A comprehensive analysis of the law regulating equal pay in South Africa

by

SHAMIER EBRAHIM

Student no: 50819151

submitted in accordance with the requirements for the degree of

DOCTOR OF LAWS

at the

UNIVERSITY OF SOUTH AFRICA

SUPERVISOR: DR. AH DEKKER

NOVEMBER 2022

DECLARATIONS

I, **Shamier Ebrahim** (student no: 50819151), hereby make the following declarations:

(a) The thesis titled, **A comprehensive analysis of the law regulating equal pay in South Africa,** is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references;

(b) I have submitted the thesis to originality checking software (turn-it-in) and it falls within the accepted requirements for originality; and

(c) I have not previously submitted this work, or part of it, for examination at UNISA for another qualification or at any other higher education institution.

10 / 11 / 2022

________________________ ________________________

SHAMIER EBRAHIM **DATE**

I, **Dr. Adriette Dekker**, hereby declare that I have considered the originality checking software report (turn-it-in report) submitted to me by Shamier Ebrahim in relation to this thesis and confirm that the thesis meets an acceptable standard of originality.

14 / 11 / 2022

________________________ ________________________

DR. AH DEKKER **DATE**

NOTES

- The best efforts have been made to reflect the law as at October 2022.

ACKNOWLEDGEMENTS

I would like to first and foremost give thanks and praise to Allah (God, the All-Knowing) for granting me the intellect and ability to complete this study.

I would also like to thank my supervisor, Dr. Adriette Dekker, who provided me with invaluable guidance throughout the writing of this thesis and who provided me with much needed direction at times when I was about to hit the rocks and ensured that I remained steady on course.

It will be remiss of me, if I do not thank my previous supervisor, Prof. Marie McGregor, under whose supervision I completed my LLD research proposal and who sparked my interest in equal pay law.

I also need to thank my wife, Firdous Abdul Rahman, for her support throughout the writing of this thesis and her patience when I would spend many weekends working on my thesis. Firdous, I can now answer the question which you constantly asked me, “Shamier how far are you?”. To our children, Ammarah and Hamzah Ebrahim, thank you for being as patient as you could be when I was working, and I can now spend much more needed time with you.

Lastly, I need to thank the University of South Africa (UNISA), in particular, the Management of the College of Law (including the late Dean, Prof. Vinesh Basdeo, who assisted me to commence my research leave at a time when commencing same was fraught with persistent obstacles) and the Research Department for awarding me the Academic Qualification Improvement Programme (AQIP) Grant which allowed me to focus full-time on my LLD studies. A researcher could not have asked for better assistance. I also wish to thank my AQIP replacement lecturers, Ms Leana Diedericks and Mr Davy Ramilla, who at different periods, took over my workload whilst I was engaged in my studies.

SUMMARY

The purpose of this thesis is as follows. Firstly, to identify the problems associated with the causes of action in section 6(4) of the EEA; the onus in section 11 of the EEA; the right to access pay related information; the grounds of justification in section 6(2) of the EEA and the Employment Equity Regulations; the equal pay provisions in sections 198A-198C of the LRA; and section 27 of the EEA. Secondly, to discuss and analyse the South African equal pay legal framework in order to provide answers and solutions to the research problems. Thirdly, to discuss and analyse the international legal framework regulating equal pay and the United Kingdom equal pay law in order to provide answers to the research questions to the extent and breadth called for. Fourthly, to summarise the answers to the research questions as sourced from South African law, international labour law and the United Kingdom equal pay law.

KEY TERMS

Section 6(4) of the EEA; equal pay for the same work; equal pay for substantially the same work; terms and conditions of employment; comparator; hypothetical comparator; subordinate comparator; the same employer; onus in section 11 of the EEA; right to access pay-related information; grounds of justification to equal pay claims; equal pay relating to non-standard (atypical) employees in sections 198A-198C of the LRA; and section 27 of the EEA.

ABBREVIATIONS

BALR: Butterworths Arbitration Law Reports

BCLR: Butterworths Constitutional Law Reports

BLLR: Butterworths Labour Law Reports

CA: Court of Appeal

CC: Constitutional Court

CCMA: Commission for Conciliation, Mediation and Arbitration

CPD: Cape of Good Hope Provincial Division

CS: Court of Session

Ct Sess: Court of Session

EAT: Employment Appeal Tribunal

ECJ: European Court of Justice

ECR: European Court Reports

EqLR: Equality Law Reports

ET: Employment Tribunal

EU: European Union

EWCA: England and Wales Court of Appeal

GG: Government Gazette

HC: High Court

HL: House of Lords

IC: Industrial Court

ICR: Industrial Cases Reports

ILJ: Industrial Law Journal

ILO: International Labour Organisation

IRLR: Industrial Relations Law Reports

LAC: Labour Appeal Court

LC: Labour Court

LDD: Law, Democracy and Development Journal

NICA: Northern Ireland Court of Appeal

Para: Paragraph

Paras: Paragraphs

PER: 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

SC: Supreme Court

SCA: Supreme Court of Appeal

SI: Statutory Instrument

T: Transvaal Local Division

THRHR: Journal of Contemporary Roman Dutch Law

W: Witwatersrand Local Division

ZACC: South African Constitutional Court

ZALC: South African Labour Court

ZALAC: South African Labour Appeal Court

TABLE OF CONTENTS

DECLARATIONS	I
NOTES	II
ACKNOWLEDGEMENTS	III
SUMMARY	IV
KEY TERMS	IV
ABBREVIATIONS	V

CHAPTER 1: INTRODUCTION

1. BACKGROUND	1
2. THE CAUSES OF ACTION	3
3. THE ONUS	6
4. THE RIGHT TO ACCESS PAY RELATED INFORMATION	8
5. GROUNDS OF JUSTIFICATION	9
6. NON-STANDARD (ATYPICAL) EMPLOYEES	10
7. SECTION 27 OF THE EEA	13
8. PURPOSE AND LIMITATION OF THE STUDY	15
9. IMPORTANCE AND REASONS FOR THE USE OF INTERNATIONAL AND FOREIGN LABOUR LAW	17

10. RESEARCH METHODOLOGY 21

11. CONCLUSION 22

12. OUTLINE OF CHAPTERS 22

CHAPTER 2: SOUTH AFRICAN LEGAL FRAMEWORK REGULATING EQUAL PAY

1. INTRODUCTION 25

2. THE RIGHT TO EQUALITY IN TERMS OF THE CONSTITUTION 26

3. OVERVIEW OF DEVELOPMENT OF EQUAL PAY LAW IN SOUTH AFRICA 29

4. THE PEPUDA 36

5. CAUSES OF ACTION IN SECTION 6(4) OF THE EEA 37
5.1 Terms and Conditions of Employment 37
5.2 Same Employer 41
5.3 The Comparator (employees of the same employer) 43
5.4 Same work 50
5.5 Substantially the same work 52
5.6 Work of equal value 53

6. DOES SECTION 6(4) ONLY APPLY TO LISTED GROUNDS? 58

7. IS A COLLECTIVE EQUAL PAY DISPUTE JUSTICIABLE? 59

8. THE ONUS PROVISION IN SECTION 11 OF THE EEA 60

9. ACCESS TO PAY RELATED INFORMATION 71
9.1 The right to access pay related information in terms of the EEA 72
9.2 The right to access information in terms of the Constitution 74
9.2.1 The right to access information in terms of the Promotion of Access to Information Act 74
9.2.1(a) The right to access information from a public body 75
9.2.1(b) The right to access information from a private body 81
9.2.1(c) Process to follow where access to a record of a public or private body is refused 85
9.2.1(c)(i) Submitting a complaint to the Information Regulator 89
9.2.1(c)(ii) Lodging an application before a Court 91

10. GROUNDS OF JUSTIFICATION 94
10.1 The applicability of section 6(2) of the EEA to equal pay claims 94
10.2 The grounds of justification in the Employment Equity Regulations 97
10.3 Can the progressive realisation of the principle of equal pay be a ground of justification? 106

11. EQUAL PAY RELATING TO NON-STANDARD (ATYPICAL) EMPLOYEES IN TERMS OF THE LRA 108
11.1 Temporary service employees 108
11.2 Fixed-term contract employees 120
11.3 Part-time employees 124
11.4 The grounds of justification and onus 127

12. SECTION 27 OF THE EEA 128

13. CONCLUSION 138
13.1 Terms and Conditions of Employment 138
13.2 Same Employer 139
13.3 The Comparator (employees of the same employer) 140

13.4 Same work 143
13.5 Substantially the same work 143
13.6 Does section 6(4) only apply to listed grounds? 144
13.7 The onus provision in section 11 of the EEA 144
13.7.1 Section 11(1) of the EEA relating to proving unfair discrimination on a listed ground 144
13.7.2 Section 11(2) of the EEA relating to proving unfair discrimination on an arbitrary ground 147
13.8 Access to Pay Related Information 148
13.9 Grounds of Justification 151
13.10 Equal Pay Relating to Non-Standard (Atypical) Employees in terms of the LRA 154
13.10.1 Temporary service employees 154
13.10.2 Fixed-term contract employees 156
13.10.3 Part-time employees 158
13.11 Section 27 of the EEA 159

CHAPTER 3: INTERNATIONAL LEGAL FRAMEWORK REGULATING EQUAL PAY

1. INTRODUCTION 163

2. THE USE OF INTERNATIONAL LABOUR LAW 164

3. SOURCES OF INTERNATIONAL LABOUR LAW 165
3.1 The European Union Directives and Treaties relevant to equal pay 167

4. INTERPRETATION OF TERMINOLOGY: 'TERMS AND CONDITIONS OF EMPLOYMENT', 'THE SAME EMPLOYER', 'THE COMPARATOR' (EMPLOYEES OF THE SAME EMPLOYER), 'SAME WORK, SUBSTANTIALLY THE SAME WORK, WORK OF EQUAL VALUE' 172

4.1 The interpretation of “terms and conditions of employment” 172

4.1.1 Case law dealing with what falls within the ambit of “terms and conditions of employment” especially with regards to pay and working conditions 177

4.1.1(a) Overtime pay, pay supplements and sick pay 178

4.1.1(b) Bonus 181

4.1.1(c) Redundancy payment 183

4.1.1(d) Termination Payments 186

4.1.1(e) Loss of earnings due to attending training courses 188

4.1.1(f) Maternity leave pay 190

4.1.1(g) Expatriation Allowance (Relocation Allowance) 192

4.1.1(h) Travel Concessions 193

4.1.1(i) Pension 195

4.1.1(j) Nursery scheme 199

4.1.1(k) Breastfeeding leave 200

4.1.2 Further “terms and conditions of employment” (pay) 201

4.2 The Same Employer 203

4.3 The Comparator (employees of the same employer) 206

4.3.1 The issue regarding contemporaneous employment of the claimant and comparator (which relates to the use of a predecessor or successor comparator) 207

4.3.2 Hypothetical Comparator 209

4.3.3 Subordinate Comparator 210

4.3.4 Dispensing with the need for a comparator 212

4.4 Same work, substantially the same work, work of equal value 214

4.4.1 The interpretation of “same work and substantially the same work” 214

4.4.2 The interpretation of “work of equal value” 216

5. ONUS AND ACCESS TO PAY RELATED INFORMATION 218

5.1 The inter-relationship between the onus and access to pay related information 219

5.2 Discharging onus by using statistics 223

5.3 Discharging onus where there is a lack of pay transparency 225

6. GROUNDS OF JUSTIFICATION 228
6.1 Service payments/Length of service 229
6.2 Performance 231
6.3 Market forces 233
6.4 Budgetary considerations (increased costs) 236
6.5 Real business need 238
6.6 Good Industrial Relations 239
6.7 Collective agreements 239
6.8 Progressive realisation of the right to equal pay 242

7. EQUAL PAY FOR NON-STANDARD (ATYPICAL) EMPLOYEES 243
7.1 Agency employees (temporary service employees) 244
7.2 Fixed-term contract employees 247
7.3 Part-time employees 252
7.3.1 ILO Part-time Work Convention and Recommendation 253
7.3.2 European Council Directive Concerning the Framework Agreement on Part-time Work (EU Part-time Work Directive) 256

8. PROACTIVE MEASURES RELATING TO EQUAL PAY 263
8.1 The role of job evaluation systems/processes 265
8.1.1 The establishment of a Pay Equity Committee 269
8.1.2 Identifying female-dominated jobs and male-dominated jobs to be compared 270
8.1.3 Choosing a job evaluation method 271
8.1.4 Developing tools for data collection and gathering data on the jobs 272
8.1.5 Analysing the questionnaire results 273
8.1.6 Determining the value of jobs 273
8.1.7 Estimating wage gaps between jobs of equal value 273
8.1.8 Making pay adjustments so as to achieve pay equity 274

8.1.8.1 Can equal pay be achieved by reducing pay? 274
8.2 The role of collective bargaining 277

9. CONCLUSION 279
9.1 Terms and conditions of employment 280
9.2 The Same Employer 283
9.3 The Comparator (employees of the same employer) 283
9.4 Same work, substantially the same work, work of equal value 286
9.5 Onus and access to pay related information 286
9.6 Grounds of Justification 289
9.7 Equal pay for non-standard (atypical) employees 294
9.7.1 Agency employees (temporary service employees) 294
9.7.2 Fixed-term contract employees 295
9.7.3 Part-time employees 297
9.8 Proactive measures relating to equal pay 300

CHAPTER 4: UNITED KINGDOM LEGAL FRAMEWORK REGULATING EQUAL PAY

1. INTRODUCTION 304

2. THE USE OF FOREIGN LAW AND THE NEED FOR USING THE UNITED KINGDOM EQUAL PAY LAW 305

3. BRIEF OVERVIEW OF THE LAW REGULATING EQUAL PAY IN THE UNITED KINGDOM 311
3.1 The Equal Pay Act and the Sex Discrimination Act 311
3.2 The Equality Act 316
3.3 Equal Pay Relating to Non-Standard (Atypical) Employees 327
3.4 Proactive measures relating to equal pay 327

4. INTERPRETATION OF TERMINOLOGY: 'TERMS AND CONDITIONS OF EMPLOYMENT', 'EMPLOYER', 'COMPARATOR', 'SAME WORK, SUBSTANTIALLY THE SAME WORK, WORK OF EQUAL VALUE' 328

4.1 Terms and Conditions of Employment 328

4.1.1 Case law dealing with the interpretation to be accorded to "terms of work" 332

4.2 The Employer, the Establishment and the section 79 Comparators 341

4.2.1 The first and second section 79 (statutory) comparators 343

4.2.1.1 What constitutes an establishment? 344

4.2.1.2 Who or what constitutes an associate employer? 346

4.2.2 The third and fourth section 79 (statutory) comparators 349

4.3 The Other Comparators (non-statutory) 356

4.3.1 The issue regarding contemporaneous employment of the claimant and comparator (which relates to the use of a predecessor or successor comparator) 357

4.3.1.1 Predecessor Comparator 357

4.3.1.2 Successor Comparator 359

4.3.2 Hypothetical Comparator 364

4.3.3 Subordinate Comparator 369

4.3.4 The Choice of Comparator 372

4.4 Same work/substantially the same work, work rated as equivalent, work of equal value 376

4.4.1 Same work / Substantially the same work (like work) 378

4.4.2 Work rated as equivalent 397

4.4.3 Work of equal value 412

5. ONUS AND ACCESS TO PAY RELATED INFORMATION 426

5.1 Onus 427

5.2 Access to Pay Related Information 430

5.2.1 Section 77 of the Equality Act 431

5.2.2 The ACAS Guide 432

6. GROUNDS OF JUSTIFICATION 436
6.1 Material Factor Defence (Specific Factors) 437
6.1.1 Seniority 438
6.1.2 Productivity 442
6.1.3 Administrative Efficiency (existence of a shortage of relevant skill) 445
6.1.4 Market Forces 447
6.1.5 Red-Circling 453
6.1.6 Union Hostility/Intransigence 462
6.1.7 Collective Agreements 464
6.1.7.1 Single Collective Agreement 464
6.1.7.2 Separate Collective Agreements 466
6.1.8 Grading Scheme/Job Evaluation Scheme 470
6.1.9 Higher Spinal Point 473
6.1.10 Payment prescribed by law 476
6.1.11 Genuine Mistake 478
6.1.12 Factors for assessing the value of the work 480
6.1.13 Financial Constraints 482
6.1.14 High Cost 484
6.1.15 Progressive realisation of the right to equal pay 487

7. EQUAL PAY RELATING TO NON-STANDARD (ATYPICAL) EMPLOYEES 488
7.1 Agency (Temporary Service) Employees 488
7.2 Fixed-term Contract Employees 497
7.3 Part-time Employees 511

8. PROACTIVE MEASURES RELATING TO EQUAL PAY 531
8.1 Equal Pay Statutory Code of Practice - Equal Pay Audit 532
8.2 Equality Act 2010 (Equal Pay Audits) Regulations 2014 (Equal Pay Audit ordered by the Employment Tribunal) 538
8.3 Equality Act 2010 (Gender Pay Gap Information) Regulations 2017 – Gender Pay Gap Reporting 546

9. CONCLUSION 552
9.1 Terms and conditions of employment 552
9.2 The Same Employer 555
9.3 The Comparator (employees of the same employer) 555
9.4 Same work/substantially the same work, work rated as equivalent, work of equal value 559
9.5 Onus and access to pay related information 564
9.6 Grounds of Justification 566
9.7 Equal pay for non-standard (atypical) employees 582
9.7.1 Agency employees (temporary service employees) 582
9.7.2 Fixed-term contract employees 583
9.7.3 Part-time employees 588
9.8 Proactive measures relating to equal pay 592

CHAPTER 5: CONCLUSIONS AND RECOMMENDATIONS

1. INTRODUCTION 598

2. THE CAUSES OF ACTION 598
2.1 Terms and Conditions of Employment 598
2.1.1 South African law 598
2.1.2 International labour law 599
2.1.3 United Kingdom equal pay law 602
2.2 Same Employer 604
2.2.1 South African law 605
2.2.2 International labour law 605
2.2.3 United Kingdom equal pay law 606
2.3 The Comparator (employees of the same employer) 606
2.3.1 South African law 607
2.3.2 International labour law 608

2.3.3 United Kingdom equal pay law 610
2.4 Same work and substantially the same work 612
2.4.1 South African law 613
2.4.2 International labour law 613
2.4.3 United Kingdom equal pay law 614

3. DOES SECTION 6(4) ONLY APPLY TO LISTED GROUNDS? 619
3.1 South African law 619

4. ONUS 619
4.1 Research question concerning section 11(1)(a)-(b) of the EEA relating to proving unfair discrimination on a listed ground 619
4.2 Research question concerning section 11(2) of the EEA relating to proving unfair discrimination on an arbitrary ground 620
4.3 South African law 620
4.3.1 Section 11(1)(a)-(b) of the EEA relating to proving unfair discrimination on a listed ground 620
4.3.2 Section 11(2) of the EEA relating to proving unfair discrimination on an arbitrary ground 622
4.4 International labour law 623
4.5 United Kingdom equal pay law 625

5. THE RIGHT TO ACCESS PAY RELATED INFORMATION 625
5.1 South African law 625
5.2 International labour law 628
5.3 United Kingdom equal pay law 628

6. GROUNDS OF JUSTIFICATION 629
6.1 South African law 630
6.2 International labour law 631
6.3 United Kingdom equal pay law 635

7. NON-STANDARD (ATYPICAL) EMPLOYEES 650

7.1 Temporary service employees 650

7.1.1 South African law 650

7.1.2 International labour law 652

7.1.3 United Kingdom equal pay law 653

7.2 Fixed-term contract employees 654

7.2.1 South African law 655

7.2.2 International labour law 656

7.2.3 United Kingdom equal pay law 657

7.2.4 Treatment of a fixed term employee whose contract is deemed to be of an indefinite duration versus a fixed-term employee whose contract is for a fixed-term 661

7.3 Part-time employees 662

7.3.1 South African law 663

7.3.2 International labour law 664

7.3.3 United Kingdom equal pay law 666

8. SECTION 27 OF THE EEA 670

8.1 South African law 671

8.2 International labour law 673

8.3 United Kingdom equal pay law 675

9. CONCLUSION 679

BIBLIOGRAPHY 680

CHAPTER 1: INTRODUCTION

> "Unequal remuneration is a subtle chronic problem, which is difficult to overcome without a clear understanding of the concepts and the implications for the workplace and society in general, as well as the introduction of proactive measures."[*]

1. BACKGROUND

The Employment Equity Act[1] ("EEA") has undergone important amendments relating to equal pay claims in 2014,[2] which largely came about as a result of the International Labour Organisation criticising South Africa for failing to include an express provision dealing with equal pay claims in the EEA.[3] These amendments are in the form of sections 6(4)-(5) of the EEA and are accompanied by the Employment Equity Regulations[4] ("Employment Equity Regulations") and the Code of Good Practice on Equal Pay/Remuneration for Work of Equal Value[5] ("Equal Pay Code"). The amendments specifically provide for three equal pay causes of action, namely, equal pay for the same work, substantially the same work and work of equal value. Prior to these amendments, the EEA dealt with equal pay claims indirectly in terms of section 6(1) of the EEA read with the definition of an employment policy or practice in section 1 of the EEA.[6] Section 6(1) of the EEA provides that no person may unfairly discriminate against an employee in any employment policy or practice on a number of listed grounds or on arbitrary grounds.[7] Section 1 of the EEA defines an "employment policy or practice" to include,

---

[*] Preface to 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) ("Oelz, Olney and Manuel Equal Pay Guide").

[1] 55 of 1998 ("EEA").

[2] The Employment Equity Amendment Act 47 of 2013 came into effect on 1 August 2014 by presidential proclamation in terms of Proclamation No 50 on the Commencement of the Employment Equity Amendment Act, 2013 *GG* No 37871 of 21 July 2014.

[3] 10th Commission for Employment Equity 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; McGregor M "Equal Remuneration for the Same Work or Work of Equal Value" (2011) 23(3) *SA Merc LJ* 488 at 497; Benjamin P "Decent Work and Non-standard Employees: Options for Legislative Reform in South Africa: A Discussion Document" (2010) 31 *ILJ* 845 at 866.

[4] Employment Equity Regulations, *GG* No 37873 of 1 August 2014 ("Employment Equity Regulations").

[5] Code of Good Practice on Equal Pay/Remuneration for Work of Equal Value, *GG* No 38837 of 1 June 2015 ("Equal Pay Code").

[6] *Mangena & Others v Fila South Africa (Pty) Ltd & Others* [2009] 12 BLLR 1224 (LC) at para 5.

[7] Section 6(1) of the EEA provides that "No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender,

inter alia, remuneration, employment benefits, terms and conditions of employment, job classification and grading, and performance evaluation systems.[8] In *Mangena & Others v Fila South Africa (Pty) Ltd & Others*[9] ("*Mangena*"), decided prior to the amendments, the Labour Court held that section 6(1) read with the definition of "employment policy or practice" in section 1 of the EEA was wide enough to include claims of equal pay for the same work, substantially the same work and work of equal value.[10]

The express equal pay protection in the form of the amendments should be commended but it, unfortunately, leads to more questions than answers. There is uncertainty about the definitions and meanings of terms used in the equal pay causes of action established by the Act.[11] Further uncertainties related to the equal pay causes of action in section 6(4) of the EEA arise from the onus of proof in section 11 of the EEA,[12] the process to obtain

---

sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth or on any other arbitrary ground."

8 Section 1 of the EEA defines an employment policy or practice as follows: "employment policy or practice" includes, but is not limited to - (a) recruitment procedures, advertising and selection criteria; (b) appointments and the appointment process; (c) job classification and grading; (d) remuneration, employment benefits and terms and conditions of employment; (e) job assignments; (f) the working environment and facilities; (g) training and development; (h) performance evaluation systems; (i) promotion; (j) transfer; (k) demotion; (l) disciplinary measures other than dismissal; and (m) dismissal."

9 [2009] 12 BLLR 1224 (LC) ("*Mangena*").

10 At para 5. In *Mangena* the Labour Court stated the following at para 5: "The first question that arises is whether equal pay claims, and in particular claims for equal pay for work of equal value, are contemplated by the EEA. Unlike equality legislation in many other jurisdictions, the EEA does not specifically regulate equal pay claims. Section 6 of the Act prohibits unfair discrimination in any employment policy or practice, on any of the grounds listed in s 6 (1) or on any analogous ground, if an applicant is able to show that the ground is based on attributes or characteristics that have the potential to impair the fundamental human dignity of persons or to affect them in a comparably serious manner. (See *Harksen v Lane NO & others* 1998 (1) SA 300 (CC) at 325A). 'Employment policy or practice' is defined by s 1 of the EEA to include remuneration, employment benefits and terms and conditions of employment. To pay an employee less for performing the same or similar work on a listed or an analogous ground clearly constitutes less favourable treatment on a prohibited ground, and any claim for equal pay for work that is the same or similar falls to be determined in terms of the EEA. Similarly, although the EEA makes no specific mention of claims of equal pay for work of equal value, the terms of the prohibition against unfair discrimination established by s 6 are sufficiently broad to incorporate claims of this nature."

11 Para 2 hereof.

12 Para 3 hereof.

relevant information in order to institute an equal pay claim,[13] and the justification grounds to an equal pay claim.[14]

There were also amendments made in 2015 to the Labour Relations Act[15] ("LRA") in the form of equal pay provisions relating to temporary service employees, fixed-term contract employees and part-time employees who earn the threshold amount and below.[16] These equal pay provisions are unique to South African equal pay law and are likewise commended but it raises more questions (uncertainties) than answers in that there is uncertainty regarding the meaning of certain terms used in the equal pay provisions relating to all three categories of employees.[17]

Section 27 of the EEA obliges a designated employer, where disproportionate income differentials or unfair discrimination relating to terms and conditions of employment in section 6(4) is reflected in its statement on the remuneration and benefits received in each occupational level of its workforce, to take measures to progressively reduce such differentials or unfair discrimination. While section 27 of the EEA presents itself as a proactive measure to address unfair pay discrimination and disproportionate income differentials it, however, suffers from certain *lacunae* and questions which detracts from the purpose of the section which is to progressively reduce unfair pay discrimination and disproportionate income differentials.[18]

2. THE CAUSES OF ACTION

Section 6(4) of the EEA seeks to provide an explicit basis for equal pay claims. In doing so, it provides as follows:

---

13 Para 5 hereof. The process to obtain relevant information in order to institute an equal pay claim is extensively discussed in para 9, pages 71-94, in Chapter 2 of this thesis.

14 Para 4 hereof.

15 66 of 1995 ("LRA").

16 The Labour Relations Amendment Act 6 of 2014 came into effect on 1 January 2015 by presidential proclamation in terms of Proclamation No 87 on the commencement of the Labour Relations Amendment Act, 2014 *GG* No 38317 of 19 December 2014.

17 Para 6 hereof.

18 Para 7 hereof.

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

Section 6(4) refers to the following three causes of action: (a) equal terms and conditions (pay) for the same work; (b) equal terms and conditions (pay) for substantially the same work; and (c) equal terms and conditions (pay) for work of equal value.

There is uncertainty about the terminology used in this section. Firstly, there is no definition in the EEA or the Employment Equity Regulations and the Equal Pay Code of what would fall within the ambit of "terms and conditions of employment", and it is assumed for purposes of this thesis that remuneration (pay) falls within its ambit. It is important to know what would fall within the ambit of terms and conditions of employment as one of the elements an equal pay claimant has to prove is that there is "a difference in the terms and conditions of employment."[19]

Secondly, section 6(4) of the EEA requires a claimant to prove that there is a difference in the terms and conditions of employment between "employees of the same employer". This phrase raises two interrelated issues, namely, the choosing of a comparator and whether he/she is an employee of the same employer. It is important to note that the one issue cannot be proved without proving the other. Section 6(4) requires the claimant to compare his/her terms and conditions of employment with that of a comparator.[20] This is clear from the phrase "[a] difference in terms and conditions of employment *between employees* of the same employer."[21] The choosing of a suitable comparator is closely linked to proving the same work, substantially the same work or work of equal value. It is also intrinsically linked with proving "employees of the *same employer*". There are no parameters provided for in the EEA, the Employment Equity Regulations or the Equal Pay Code relating to the choosing and attendant suitability of the comparator. A few questions arise in this regard. Whether the comparator must be employed at the same time as the

---

[19] Section 6(4) of the EEA.

[20] This was also a requirement prior to the amendment of section 6(4). See *Mangena* at para 6 in this regard.

[21] Emphasis added.

claimant (must their employment be contemporaneous)? Put differently, is it possible for a claimant to compare herself/himself with a comparator who is a successor or predecessor? Is it possible for a claimant to compare himself/herself with a hypothetical comparator? Is it possible for a claimant to choose a comparator who is a job applicant and who was offered a higher salary than that offered to her but who refused employment? Is it possible for a claimant to choose a comparator who is her subordinate (engaged in work of lesser value) but who is paid more than the claimant? It is important to know the parameters of choosing a comparator as this is an important element for a claimant to satisfy and it has been listed as the first requirement in an equal pay claim in *Mangena*.[22]

There is no definition in the EEA or the Employment Equity Regulations and the Equal Pay Code of what or who would constitute "the same employer". This phrase raises a number of questions. Does it mean the same company owned by the same employer at the same location? Does it cover the same company owned by the same employer at a different location? With regard to the State, is the State the same employer or is the State different employers depending on for example the different Departments and the different geographical locations? It is important to know what would fall within the meaning of "the same employer" as this too is one of the elements of the three causes of action that has to be proved by a claimant.

Section 6(4), thirdly, requires that the work performed must be the same, substantially the same or of equal value. Work is the same if it is identical or interchangeable.[23] Work is substantially the same if the work performed by the employees, that is the claimant and the comparator, is sufficiently similar so that they can reasonably be considered to be performing the same work even if it is not identical or interchangeable.[24] The work of the claimant is of equal value to the work of the comparator of the same employer in a different job if their occupations have been accorded equal value in accordance with

[22] See para 6 of *Mangena*.
[23] Regulation 4(1) of the Employment Equity Regulations.
[24] Regulation 4(2) of the Employment Equity Regulations.

regulations 5 to 7 of the Employment Equity Regulations.[25] Work of equal value is extensively dealt with in the Employment Equity Regulations and the Equal Pay Code. There is, however, no definition given in the EEA, the Employment Equity Regulations or the Equal Pay Code as to what would constitute "work that is interchangeable" and "work that is sufficiently similar". It is important to know what would fall within the meaning of "work that is interchangeable" and "work that is sufficiently similar" as these are elements that will have to be proved by a claimant in respect of the two causes of action.

Fourthly, section 6(4) requires that the difference must be based on one or more of the "grounds listed" in section 6(1) of the EEA. This raises the question as to whether an equal pay claim in terms of section 6(4) can be based on an arbitrary (unlisted) ground of discrimination or not.

3. THE ONUS

Section 11 of the EEA, which deals with the onus in discrimination claims, has been amended.[26] The old section reads as follows:

---

[25] Regulation 4(3) of the Employment Equity Regulations. Regulation 5 of the Employment Equity Regulations provides as follows: "When, applying section 6(4) of the Act - (1) it must first be established (a) whether the work concerned is of equal value in accordance with regulation 6; and (b) whether there is a difference in terms and conditions of employment, including remuneration. (2) it must then be established whether any difference in terms of sub-regulation (1)(b) constitutes unfair discrimination, applying the provisions of section 11 of the Act." Regulation 6 of the Employment Equity Regulations provides that "(1) In considering whether work is of equal value, the relevant jobs must be objectively assessed taking into account the following criteria: (a) the responsibility demanded of the work, including responsibility for people, finances and material; (b) the skills, qualifications, including prior learning and experience required to perform the work, whether formal or informal; (c) physical, mental and emotional effort required to perform the work; and (d) to the extent that it is relevant, the conditions under which work is performed, including physical environment, psychological conditions, time when and geographic location where the work is performed. (2) In addition to the criteria specified in sub-regulation (1) any other factor indicating the value of the work may be taken into account in evaluating work, provided the employer shows that the factor is relevant to assessing the value of the work. (3) The assessment undertaken in terms of sub-regulations (1) and (2) must be conducted in a manner that is free from bias on grounds of race, gender or disability, any other listed ground or any arbitrary ground that is prohibited in terms of section 6(1) of the Act. (4) Despite sub-regulations (1) and (2), an employer may justify the value assigned to an employee's work by reference to the classification of a relevant job in terms of a sectoral determination made by the Minister of Labour in terms of section 55 of the Basic Conditions of Employment Act, 1997 (Act No. 75 of 1997) which applies to the employer."

[26] Section 11 of the EEA has been amended by section 6 of the Employment Equity Amendment Act 47 of 2013.

> "… [w]henever unfair discrimination is alleged in terms of this Act [EEA], the employer against whom the *allegation* is made must establish that it is fair."[27]

The amended section 11 of the EEA dealing with the onus in discrimination claims has been drafted in line with the onus provisions of the Promotion of Equality and Prevention of Unfair Discrimination Act although not exactly the same.[28] The amended section 11 of the EEA 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.
> (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."

Section 11 of the EEA sets out a number of separate burdens of proof relating to listed grounds and arbitrary grounds.

With regard to the listed grounds, it, firstly, states that upon an *allegation* of unfair discrimination on a listed ground, the employer must prove on a balance of probabilities that the discrimination did not take place or is rational and not unfair, or is otherwise justifiable.[29] It is uncertain whether *allegation* would mean that a *mere allegation* of unfair discrimination will suffice to shift the onus to the employer.

Section 11(1)(b) of the EEA, secondly, states that the employer can justify his/her conduct by showing that it is "rational and not unfair, or is otherwise justifiable." It is uncertain whether this phrase adds to the grounds of justification in section 6(2) of the EEA or whether "rational and not unfair" means something different from the grounds of

---

27 Emphasis added. The repealed section 11 of the EEA.

28 4 of 2000. Clause 3.6 of the Memorandum on Objects of Employment Equity Amendment Bill, 2012 as found in the Employment Equity Amendment Bill, B31B-2012, https://www.gov.za/sites/default/files/gcis_document/201409/b31b-201217oct2013.pdf (last accessed on 25/10/2022).

29 Section 11(1)(a)-(b) of the EEA.

justification in section 6(2) of the EEA. It can further be asked whether the phrase "or is otherwise justifiable" creates an open-ended ground of justification.

With regard to arbitrary grounds the onus is on the complainant to prove on a balance of probabilities that the conduct is not rational, that it amounts to discrimination, and that the discrimination is unfair. The onus provision in section 11(2) of the EEA presents many uncertainties, which has to be addressed as it affects the equal pay causes of action in section 6(4). The following uncertainties arise from section 11(2) of the EEA: (a) Is the adding of the phrase "arbitrary ground" in section 6(1) as read with section 11(2) of the EEA a third ground on which an unfair discrimination claim can be brought or is it the same as an unlisted ground?; (b) Where does the *Harksen* test[30] fit in with regard to proving unfair discrimination on an unlisted ground?; and (c) Is the proving of "irrationality" something different to proving unfair discrimination?

4. THE RIGHT TO ACCESS PAY RELATED INFORMATION

Pay related information is important as this will place a claimant in a position to decide on which cause of action to launch, to choose an appropriate comparator and to prove the unfair discrimination relating to pay whether on a listed or arbitrary ground. In other words, without proper information relating to pay an equal pay claim will be a non-starter in the sense that the claimant will not be able prove her equal pay claim.

There is no provision in the EEA, the Employment Equity Regulations or the Equal Pay Code, which affords a claimant the right to obtain information from his/her employer which is relevant to a claim for equal pay. Section 27(6) of the EEA allows parties to the collective bargaining process to request information contained in the statement on the remuneration and benefits received in each occupational level of that employer's workforce for purposes of collective bargaining and subject to section 16(4)-(5) of the

[30] In *Harksen v Lane NO & Others* 1997 (11) BCLR 1489 (CC) at para 53 the Constitutional Court held that the employee must prove that the ground is based on attributes and characteristics that have the ability to impair the fundamental human dignity of people in a comparably serious manner.

LRA, which deals with the disclosure of legally privileged information, information that would contravene a law or court order, confidential information and private personal information. The information requested in terms of section 27(6) of the EEA will thus not be admissible as evidence in an equal pay claim as the section limits its application to collective bargaining. An individual employee is thus left stranded as far as access to pay related information is concerned. The right to access pay related information needs to be addressed because it is the hidden element of an equal pay claim, which results in the claim being a non-starter.

5. GROUNDS OF JUSTIFICATION

The grounds of justification to alleged unfair discrimination in terms of the EEA are set out in section 6(2) of the EEA. Section 6(2) of the EEA provides as follows:

> "(2) It is not unfair discrimination to—
> (*a*) take affirmative action measures consistent with the purpose of this Act; or
> (*b*) distinguish, exclude or prefer any person on the basis of an inherent requirement of a job."

The grounds of justification are affirmative action and the inherent requirements of the job. There is a difference of opinion among academics regarding the applicability/suitability of these grounds of justification to equal pay claims.[31] The

---

[31] Meintjes-Van Der Walt L "Levelling the 'Paying' Fields" (1998) 19 *ILJ* 22 at 30, has 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, has stated that both the defences of affirmative action and the inherent requirements of the job do not apply directly to pay discrimination; Pieterse M "Towards Comparable Worth? *Louw v Golden Arrow Bus Services"* (2001) 118(11) *SALJ* 9 at 17, has suggested that pay equity legislation should include specific defences to pay equity claims; Hlongwane N "Commentary on South Africa's Position regarding Equal Pay for Work of Equal Value" (2007) 11(1) *LDD* 69 at 78, has 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. Ebrahim S "Reviewing the Suitability of Affirmative Action and the Inherent Requirements of the Job as Grounds of Justification to Equal Pay Claims in Terms Of the *Employment Equity Act* 55 of 1998" *PER* 2018(21) at 28-33 has argued that affirmative action and the inherent requirements of the job are not suitable grounds of justification to equal pay claims because paying a designated employee more than their non-designated counterparts does not fall within the ambit of an affirmative action measure. He further argues, with regard to the inherent requirements of the job, that an employer will not be able to successfully rely on it as a ground of justification in an equal pay claim for the same work because both the employees would comply with the inherent requirements of the job and in a claim for work of equal value different job requirements are envisaged by the concept equal value and the two jobs under comparison would

Employment Equity Regulations refers to numerous factors which could justify a differentiation in terms and conditions of employment such as: (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; and (f) skills scarcity. These grounds do not include affirmative action and the inherent requirements of the job. These grounds do not, however, form a closed list as the Regulations leaves the grounds open by adding at the end thereof "any other relevant factor that is not unfairly discriminatory in section 6(1) of the EEA" as a ground of justification.[32] The following two uncertainties arise. The first uncertainty is whether the grounds of justification in section 6(2) of the EEA can apply to equal pay claims in terms of section 6(4) of the EEA. The second uncertainty is whether the grounds of affirmative action and/or the inherent requirements of the job are capable of falling within the ambit of regulation 7(1)(g) of the Employment Equity Regulations which refers to "any other relevant factor that is not unfairly discriminatory in section 6(1) of the EEA" and in this way operate as grounds of justification to equal pay claims.

6. NON-STANDARD (ATYPICAL) EMPLOYEES

The EEA does not distinguish between permanent employees and non-standard (atypical) employees and does not exclude non-standard employees from its application. The only persons excluded from the application of the EEA are members of the National Defence Force, the National Intelligence Agency, the South African Secret Service, the South African National Academy of Intelligence and the directors and staff of Comsec.[33]

---

of necessity be different. Landman A "The Anatomy of Disputes about Equal Pay for Equal Work" (2002) 14 *SA Merc LJ* 341 at 353, has, however, 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.

[32] Regulation 7(1)(a)-(g) of the Employment Equity Regulations.

[33] Section 4(3) of the EEA. Comsec stands for Electronic Communications Security (Pty) Ltd.

Non-standard employees include temporary service employees,[34] fixed-term employees[35] and part-time employees.[36] These non-standard employees will thus be able to use the equal pay causes of action as set out in section 6(4) of the EEA as they are not excluded from the application of the EEA. The Labour Relations Amendment Act[37] has, however, amended the LRA to also provide equal pay protection to non-standard employees (temporary service employees, fixed-term contract employees and part-time employees) who earn the threshold amount of R224 080.48 and below and subject to certain other conditions. It should be noted from the outset that the equal pay protection for these non-standard employees does not follow the normal equal pay route as set out in the EEA and operates under its own unique equal pay regime which is limited.

Section 198A(5) of the LRA provides as follows:

> An *employee* deemed to be an *employee* of the client in terms of subsection (3)(b) must be treated on the whole not less favourably than an *employee* of the client performing the same or similar work, unless there is a justifiable reason for different treatment.

Section 198A(5) provides specific protection for those temporary service employees who are deemed to be employees of the client employed on an indefinite basis subject to section 198B of the LRA and states that such employees *must be treated on the whole not less favourably* than employees of the client who perform the *same or similar work*. The LRA does not define or explain what is meant by the phrase "must be treated on the

---

[34] A temporary service employee is not directly defined in the LRA but section 198A(1)(a)-(c) of the LRA does state who a temporary service employee is under the definition of a "temporary service" as follows: "(1) In this section, a "temporary service" means work for a client *by an employee*— (a) for a period not exceeding three months; (b) as a substitute for an employee of the client who is temporarily absent; or (c) in a category of work and for any period of time which is determined to be a temporary service by a collective agreement concluded in a bargaining council, a sectoral determination or a notice published by the Minister, in accordance with the provisions of subsections (6) to (8)" (emphasis added).

[35] A fixed-term employee is not directly defined in the LRA but section 198B(1)(a)-(c) of the LRA does provide guidance as to who a fixed-term employee is under the definition of a "fixed term contract" as follows: "(1) For the purpose of this section, a "fixed term contract" means a contract of employment that terminates on— (a) the occurrence of a specified event; (b) the completion of a specified task or project; or (c) a fixed date, other than an employee's normal or agreed retirement age, subject to subsection (3)." It is self-evident that the description of a fixed term contract of employment relates to a fixed-term employee.

[36] Section 198C(1)(a) of the LRA defines a part-time employee as follows: "a part time employee is an employee who is remunerated wholly or partly by reference to the time that the employee works and who works less hours than a comparable fulltime employee."

[37] 6 of 2014.

whole not less favourably". The Constitutional Court has complicated the meaning to be attached to this phrase in *Assign Services (Pty) Limited v NUMSA & Others*[38] ("*Assign Services*"). The Constitutional Court while dealing extensively with the issue of whether section 198A(3)(b) gives rise to a sole employer or dual employer interpretation made certain remarks concerning the section's equal pay provision in section 198A(5). It incorrectly referred to the section as reading "be treated not less favourably" instead of "be treated on the whole not less favourably" and from this incorrect reference to the section it remarked that once the employee is deemed to be the employee of the client then he must be given the *same* terms and conditions of employment and the *same* benefits as given to similar employees.[39] There is furthermore no guidance provided regarding what would constitute the *same* or *similar work* as referred to in section 198A(5).

Section 198B(8)(a) of the LRA states as follows:

> "An *employee* employed in terms of a fixed term contract for longer than three months must not be treated less favourably than an *employee* employed on a permanent basis performing the same or similar work, unless there is a justifiable reason for different treatment."

Section 198B(8)(a) provides specific protection for employees employed in terms of a fixed-term contract for longer than three months and states that such employees "must not be treated less favourably" as compared to a permanent employee of the employer performing the same or similar work. The LRA does not define or explain what is meant by the phrase "must not be treated less favourably" neither does it provide guidance regarding what constitutes the *same* or *similar work* as referred to in section 198B(8)(a).

Section 198C(3)(a) of the LRA states as follows:

> "(3) Taking into account the working hours of a part-time *employee,* irrespective of when the part-time *employee* was employed, an employer must—
> (a) treat a part-time *employee* on the whole not less favourably than a comparable fulltime *employee* doing the same or similar work, unless there is a justifiable reason for different treatment."

---

38 [2018] ZACC 22 ("*Assign Services*").
39 At paras 53 and 69.

Section 198C(3)(a) applies to part-time employees, subject to certain exceptions, and states that an employer "must treat a part-time employee on the whole not less favourably" as compared with a comparable full-time employee performing the same or similar work by taking the working hours of a part-time employee into account. The LRA does not define or explain what is meant by the phrase "must treat a part-time employee on the whole not less favourably" and neither does it explain how the working hours of the part-time employee should be taken into account when providing her with treatment that is *on the whole not less favourably*. The LRA, furthermore, does not explain what constitutes the *same* or *similar work* as referred to in section 198C(3)(a).

Except for the remarks regarding the equal pay provision in section 198A(5) of the LRA made by the Constitutional Court in *Assign Services*, the equal pay provisions in sections 198A(5), 198B(8)(a) and 198C(3)(a) of the LRA have not had occasion to be analysed and interpreted by the Labour Courts. They are, in addition, different to the equal pay provisions in the EEA and as such are in need of proper analysis and interpretation.

7. SECTION 27 OF THE EEA

Section 27(1) of the EEA states that every designated employer must submit a statement to the Employment Conditions Commission on the remuneration and benefits received in each occupational level of that employer's workforce.[40] Section 27(2) of the EEA provides as follows:

> "Where disproportionate income differentials, or unfair discrimination by virtue of a difference in terms and conditions of employment contemplated in section 6(4), are reflected in the statement contemplated in subsection (1), a designated employer must take measures to progressively reduce such differentials subject to such guidance as may be given by the Minister as contemplated in subsection (4)."

Section 27(2) of the EEA, which is a proactive approach to achieving equal pay, states that if disproportionate income differentials or unfair discrimination by reason of a

[40] This statement must be submitted when the employer submits the report in terms of section 21 of the EEA which is submitted once a year.

difference in terms and conditions of employment in section 6(4) of the EEA are reflected in the statement then the designated employer *must take measures* to *progressively reduce such differentials*. Section 27(3) of the EEA states that the measures which the employer may take to progressively reduce the differentials *may* include (a) Collective bargaining; (b) Compliance with sectoral determinations; (c) Applying the norms and benchmarks set by the Employment Conditions Commission; and (d) Relevant measures contained in skills development legislation.[41] This list of measures is not a closed list. This means that an employer may take other measures not listed in section 27(3) of the EEA and the issue then arises as to what these measures could be. Besides listing some of the measures that may be taken to progressively reduce disproportionate income differentials or unfair discrimination in terms of section 6(4) of the EEA, section 27 of the EEA does not provide guidance on how to go about doing so nor does it mention where such guidance can be sought. The issue which arises is where can a designated employer find guidance relating to measures that must be taken to progressively reduce disproportionate income differentials or unfair discrimination in terms of section 6(4) of the EEA.

A further issue which arises is whether an employer is allowed to progressively reduce pay differentials as contemplated in section 27(2) of the EEA by reducing the pay of the higher paid employees in question in order to bring it in line with that of the lower paid employees in question (downward equalisation) or whether the employer is confined to progressively reduce the pay differentials by increasing the pay of the lower paid employers to the rate of pay enjoyed by the higher paid employees (upward equalisation). Section 27 of the EEA does not provide any guidance in this regard.

Another issue which arises is what is the position where an employer takes measures in terms of section 27(2) read with section 27(3) of the EEA to progressively reduce disproportionate income differentials or unfair discrimination in terms of section 6(4) of the EEA and is subsequently faced with an equal pay claim. Neither the EEA including the Employment Equity Regulations and the Equal Pay Code deals with this issue. The

[41] Section 27(3)(a)-(d) of the EEA.

question is whether an employer can rely on measures taken in terms of section 27(2) read with section 27(3) of the EEA to progressively reduce disproportionate income differentials or unfair discrimination in section 6(4) as a ground of justification to resist an equal pay claim.

An indirectly related issue is what is the position where an employer is found to have committed unfair pay discrimination in terms of section 6(4) of the EEA but is unable to immediately correct the unfair pay discrimination. Can a court order that the employer correct the unfair discrimination over a certain period of time which will amount to the progressive realisation of the right to equal pay by order of court or will it not be competent for a court to do so.

These *lacunae* and questions relating to the causes of action; the onus; the right to access pay related information; the justification grounds; non-standard (atypical) employees and section 27 of the EEA will further be unpacked in Chapter 2 and will be analysed in order to ascertain whether South African law can provide answers in this regard. International labour law will be discussed and analysed in Chapter 3 and foreign law (United Kingdom law) will likewise be discussed and analysed in Chapter 4 in order to ascertain how they approach these matters and whether their approach can assist towards addressing the *lacunae* and questions as well as provide further lessons which can be learnt from it for the South African equal pay law.

8. PURPOSE AND LIMITATION OF THE STUDY

The purpose of the study is to analyse the problems identified above relating to the following and to propose solutions where possible:

(a) the causes of action in section 6(4) of the EEA;
(b) the onus in section 11 of the EEA;
(c) the right to access pay related information;

(d) the grounds of justification in section 6(2) of the EEA and the Employment Equity Regulations;

(e) the equal pay provisions in sections 198A-198C of the LRA; and

(f) the *lacunae* and questions arising directly and indirectly from section 27 of the EEA.

It is submitted that the study is worthy of being undertaken as the problems identified in both the EEA and the LRA leads to an inappropriate equal pay legal framework as a result of legal uncertainty.

The International Labour Organisation has stated that:

> "…the absence of cases addressing equal pay does not necessarily imply a lack of unequal pay in practice. Rather, it may imply a lack of an appropriate legal framework for bringing complaints, a lack of awareness of rights and procedures or poor accessibility to complaints procedures."[42]

It will be important to make use of international labour law and foreign labour law in order to learn lessons regarding how best to address the problems that have been identified. To this end, a study of international labour law relating to equal pay as well as the equal pay laws of the United Kingdom is necessary. The study of international labour law and foreign labour law will be limited to the areas relevant to assist with the problems highlighted in both the EEA and the LRA above. A general and open-ended study of international and foreign labour law relating to equal pay falls outside the ambit of this study which seeks to address certain specifics that are relevant for the equal pay laws in South Africa.

The analysis undertaken in this study and the comments made herein are made in the context of equal pay discrimination and should not be read to apply elsewhere. This *caveat* is important, as comments made with regard to equal pay might not find application in other areas of discrimination law. The comments made with regard to associated sections in the EEA and the LRA which are connected to the equal pay provisions therein

---

[42] Oelz, Olney and Manuel Equal Pay Guide at 94.

should thus not be taken to comprise an analysis of the associated sections *simpliciter* but should rather be read to apply to the associated sections as it applies to the equal pay provisions.

9. IMPORTANCE AND REASONS FOR THE USE OF INTERNATIONAL AND FOREIGN LABOUR LAW

The EEA and the LRA contain specific sections which set out how the respective Acts should be interpreted. Section 3 of the EEA states that the Act must be interpreted as follows (a) in compliance with the Constitution; (b) to give effect to the purpose of the Act; (c) considering any code of good practice issued in terms of the Act or any other employment law; and (d) in compliance with the international law obligations of the Republic, in particular those contained in the International Labour Organisation Convention (No. 111) concerning Discrimination in Respect of Employment and Occupation.[43] It is clear that the section mandates that the Act be interpreted to comply with international labour law. Section 3 of the LRA, in similar vein, requires the Act to be interpreted in order to give effect to its primary objects, and in compliance with the Constitution as well as the public international law obligations of the Republic.[44] The LRA likewise requires the Act to be interpreted in order to comply with international labour law. Section 233 of the Constitution also requires that legislation must be interpreted in accordance with international law. Section 233 of the Constitution provides that the courts must prefer any reasonable interpretation of *any* legislation that is consistent with international law over any alternative interpretation that is inconsistent with same. Applying section 233 of the Constitution in the context of the EEA and the LRA means that the courts must prefer any reasonable interpretation of both Acts that is consistent with *international labour law* over any alternative interpretation that is inconsistent with same.

[43] Section 3(a)-(d) of the EEA.
[44] Section 3(a)-(c) of the LRA.

In *NEHAWU v UCT*[45] the Constitutional Court held the following with regard to interpreting the right to fair labour practices in section 23 of the Constitution:

> "In giving content to this concept the courts and tribunals will have to seek guidance from domestic and international experience. Domestic experience is reflected both in the equity based jurisprudence generated by the unfair labour practice provision of the 1956 LRA as well as the codification of unfair labour practice in the LRA. International experience is reflected in the Conventions and Recommendations of the International Labour Organisation. Of course other comparable foreign instruments such as the European Social Charter 1961 as revised may provide guidance."

In *NUMSA & Others v Baderpop (Pty) Ltd & Another*[46] the Constitutional Court held that it has been accepted by the Constitutional Court that the Conventions and Recommendations of the International Labour Organisation are important sources of international labour law.[47] Regional instruments such as instruments of the European Union also constitute a source of international labour law.[48]

Reference to the use of foreign law is made in section 39(2) of the Constitution which states that a court or tribunal must consider international law when interpreting the Bill of Rights and may consider foreign law when doing so. In *S v Makwanyane*[49] the Constitutional Court pronounced on the importance of referring to international law and foreign law by stating that the international and foreign authorities relating to the death penalty were useful and required attention because they analysed arguments for and against the death penalty and showed how other courts have dealt with the issue.[50] Blanpain states that comparative law (foreign law) is an excellent tool of education. He eloquently states that by analysing foreign systems one often discovers that:

---

45 2003 (2) BLLR 156 (CC) at para 34.

46 2003 (3) SA 513 (CC).

47 At para 28. See also *SANDU v Minister of Defence* 1999 (6) BLLR 615 (CC) at para 25 where the Constitutional Court held the following: "Section 39 of the Constitution provides that when a court is interpreting chapter 2 of the Constitution, it must consider international law. In my view, the conventions and recommendations of the International Labour Organisation (the ILO), one of the oldest existing international organisations, are important resources for considering the meaning and scope of "worker" as used in section 23 of our Constitution."

48 Valticos N and Potobsky G *International Labour Law* 2nd ed (Kluwer Law and Taxation Publishers Deventer-Boston 1995) at 49, 71-74.

49 1995 (3) SA 391 (CC).

50 At para 34.

> "… 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."[51]

The Equal Remuneration Recommendation[52] which accompanies the Equal Remuneration Convention[53] states that member countries should, in applying the principles of the Convention and Recommendation, have regard to the methods of application that have been found to be satisfactory in other countries.[54] International labour law thus encourages countries to make use of foreign law which they can learn from. This is understandable because international labour law sets norms and standards in general and leaves the specifics of achieving this to the member countries. It would then also be important for the foreign country chosen to have ratified the Equal Remuneration Convention. The United Kingdom has ratified the Equal Remuneration Convention on 15 June 1971.[55] South Africa has ratified the Equal Remuneration Convention on 30 March 2000.[56] It is clear from this that the United Kingdom has far more experience with the implementation of the Convention than South Africa as they have bound themselves to it approximately 29 years earlier than South Africa.

The United Kingdom's Equality Act of 2010 ("Equality Act") has specific provisions relating to equal pay. It provides for three causes of action relating to equal pay, namely, equal pay for like work, equal pay for work rated as equivalent, and equal pay for work of equal value.[57] The Equality Act furthermore contains a section dealing with the material factor defence to an equal pay claim and a section dealing with comparators.[58] There is, in addition to the Act, a large body of case law dealing with equal pay discrimination that

---

[51] 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.

[52] No 90 of 1951.

[53] No 100 of 1951.

[54] Preamble to the Equal Remuneration Recommendation.

[55] https://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:102651 (last accessed on 25/10/2022).

[56] https://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:102888 (last accessed on 25/10/2022).

[57] Section 65 of the Equality Act of 2010.

[58] Sections 69 and 79 of the Equality Act of 2010.

have come before the tribunals and the courts.[59] The United Kingdom has furthermore, enacted specific regulations to deal with equal pay for non-standard employees in the form of the: (a) Agency Workers Regulations Statutory Instrument No 93 of 2010; (b) Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations Statutory Instrument No 2034 of 2002; and (c) Part-time Workers (Prevention of Less Favourable Treament) Regulations Statutory Instrument No 1551 of 2000. It is thus clear that there is much to learn for the South African equal pay legal framework (as set out in the EEA and the LRA) from the United Kingdom's equal pay laws.

The United Kingdom equal pay regime also contains the following proactive measures: (a) the Equality Act 2010 (Equal Pay Audits) Regulations 2014[60] which gives the Employment Tribunal the power, where it finds that an equal pay breach has been committed, to order an employer to carry out an equal pay audit. The Employment Tribunal is also given the power to order the employer to pay a penalty where the employer fails to submit an equal pay audit and where the tribunal is of the view that the employer does not have a reasonable excuse for failing to do so. If the equal pay audit complies with the equal pay audit requirements, then the employer must publish the equal pay audit on its website for at least three years;[61] (b) the Equality Act 2010 (Gender Pay Gap Information) Regulations 2017[62] which places an obligation on an employer with 250 or more employees to publish annual information relating to pay. This information must then be published on the employer's website in such a manner that is accessible to the

---

59 See for example, *Albion Shipping Agency v Arnold* [1981] IRLR 525 EAT; *Benveniste v University of Southampton* [1989] IRLR 123 CA; *British Coal Corporation v Smith; North Yorkshire County Council v Rattcliffe* [1994] IRLR 342 CA; *Bromley v H & J Quick Ltd* [1988] IRLR 249 CA; *Bury Metropolitan Council v Hamilton* [2011] IRLR 358 EAT; *Council of the City of Sunderland v Brennan* [2012] IRLR 507 EWCA; *Coventry City Council v Nicholls* [2009] IRLR 345 EAT; *Cumbria County Council v Dow* (No. 1) [2008] IRLR 91 EAT; *Davies v McCartneys* [1989] IRLR 43 EAT; *Dibro Ltd v Hore* [1989] IRLR 129 EAT; *Glasgow City Council v Marshall* [2000] IRLR 272 HL; *Hovell v Ashford & St Peter's Hospital NHS Trust* [2009] IRLR 734 CA; *Leverton v Clwyd County Council* [1989] IRLR 28 HL; *National Coal Board v Sherwin* [1978] IRLR 122 EAT; *Potter v North Cumbria Acute Hospitals NHS Trust* [2009] IRLR 22 EAT; *Rainey v Greater Glasgow Health Board* [1987] IRLR 26 HL; *Ratcliffe v North Yorkshire County Council* [1995] IRLR 439 HL; *Redcar & Cleveland Borough Council v Bainbridge* (No. 2) [2008] IRLR 776 EWCA; *Secretary of State for Justice v Bowling* [2012] IRLR 382 EAT; *Skills Development Scotland v Buchanan* [2011] EqLR 955 EAT; *Snoxell v Vauxhall Motors Ltd* [1977] IRLR 123 EAT; *United Biscuits Ltd v Young* [1978] IRLR 15 EAT; and *Wilson v Health & Safety Executive* [2010] IRLR 59 EWCA.

60 SI 2014/2559.

61 Regulations 2, 9, 11 of the Equality Act 2010 (Equal Pay Audits) Regulations SI 2014/2559.

62 SI 2017/172.

public and its employees and must be so available for at least three years;[63] and (c) the Equal Pay Statutory Code of Practice to the Equality Act of 2010[64] which provides non-binding guidance to employers on how to go about eliminating gender pay inequalities (including pay inequalities on other grounds) through conducting equal pay audits.[65] Unlike the EEA, which only contains one section in the form of section 27 in order to achieve equal pay in a proactive manner, the United Kingdom equal pay regime contains three proactive measures to achieve equal pay, and to this end, there is much to learn from the United Kingdom equal pay regime in order to strengthen the proactive measure relating to equal pay as set out in section 27 of the EEA.

It is important to state here that the author is aware of the move to decolonise / Africanise domestic law and has not ignored this. The author could, however, not find an African country or African regional law which could properly assist with the research questions raised in this Chapter and this is the reason for not using an African country in the study.[66]

10. RESEARCH METHODOLOGY

The research methodology is in the form of a qualitative study. The study deals with South African law in the form of the Constitution, legislation, case law, articles, books as well as international law and foreign law in the form of legislation, case law, articles, books and related materials.

---

63 Regulations 2, 15 of the Equality Act 2010 (Gender Pay Gap Information) Regulations SI 2017/172.

64 Equal Pay Statutory Code of Practice to the Equality Act of 2010 (Equality and Human Rights Commission 2011).

65 Equal Pay Statutory Code of Practice to the Equality Act of 2010 (Equality and Human Rights Commission 2011) at para 163.

66 The author has made reference to the African Charter on Human Peoples' Rights of 1986 and the SADC Protocol on Gender and Development of 2008 in para 2, page 167 of Chapter 3 below, and stated that these instruments will not be discussed further because they do not assist with the answering of the research questions raised in this thesis.

11. CONCLUSION

It is clear from the above discussion that there are problems with the equal pay legal frameworks in both the EEA and the LRA and these problems have to be addressed in order for both equal pay legal frameworks to provide legal certainty to the courts, claimants and employers. It is submitted that the current legal uncertainty presented by both equal pay legal frameworks in the EEA and LRA is the antithesis of an appropriate equal pay legal framework. With this in mind, it is then prudent to deal more fully with the South African equal pay legal framework including the problems relating thereto as highlighted above, in Chapter 2 of this thesis, with the purpose of seeking to provide answers/solutions to the highlighted problems.

12. OUTLINE OF CHAPTERS

Chapter 1 – Introduction

This Chapter sets out the background to the study and proceeds to highlight the various research questions relating to: (a) the causes of action in section 6(4) of the EEA; (b) the onus in section 11 of the EEA; (c) the right to access pay related information; (d) the grounds of justification in section 6(2) of the EEA and the Employment Equity Regulations; (e) the equal pay provisions in sections 198A-198C of the LRA; and (f) the proactive measures relating to equal pay in section 27 of the EEA. The Chapter then deals with the purpose and limitation of the study as well as the importance and reasons for the use of international and foreign labour law. It then sets out the research methodolody and provides a conclusion.

Chapter 2 – South African Legal Framework Regulating Equal Pay

This Chapter deals exclusively with the equal pay legal framework in South Africa by discussing and analysing the South African equal pay legal framework in order to explore answers and solutions to the problems highlighted in Chapter 1. This Chapter accordingly

deals with the following: the right to equality in terms of the Constitution; the development of equal pay law in South Africa; equal pay in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act; the equal pay causes of action in section 6(4) of the Employment Equity Act; the onus provision in section 11 of the EEA; the grounds of justification to equal pay claims; access to pay related information; equal pay relating to non-standard (atypical) employees in terms of the Labour Relations Act; and the proactive measures relating to equal pay in terms of section 27 of the EEA. The Chapter concludes by stating the extent to which South African law can provide answers/solutions to the problems highlighted in Chapter 1.

Chapter 3 – International Legal Framework Regulating Equal Pay

This Chapter deals exclusively with the international legal framework regulating equal pay by discussing and analysing international law relating to equal pay with the focus being on seeking to assist with answering the research questions to the extent and breadth called for in Chapter 2 of this thesis. The rest of the discussion places the international legal framework relating to equal pay in context. This Chapter accordingly deals with the following: the use of international labour law in domestic labour law; the sources of international labour law; the various aspects falling under terms and conditions of employment (including “pay”); who is the employer for the purpose of bringing an equal pay claim against; the need for a suitable comparator for the purpose of an equal pay claim; a discussion of equal pay for the same work, substantially the same work and work of equal value; the onus in equal pay claims and the problems associated with accessing pay related information; the grounds of justification; the progressive realisation of the right to equal pay; equal pay for non-standard (atypical) employees and the proactive measures relating to equal pay. The Chapter concludes by summarising the guidance extracted from international law relating to equal pay as sought for in relation to the research questions.

Chapter 4 – United Kingdom Legal Framework Regulating Equal Pay

This Chapter deals exclusively with the United Kingdom legal framework relating to equal pay by discussing and analysing the United Kingdom legal framework relating to equal pay with the focus being on seeking to assist with answering the research questions to the extent and breadth called for in Chapter 2 of this thesis. The rest of the discussion places the United Kingdom legal framework relating to equal pay in context. This Chapter accordingly deals with the following: the use of foreign law and the need for using the United Kingdom equal pay law; a brief overview of the law regulating equal pay in the United Kingdom; the various aspects falling under terms and conditions of employment (including "pay"); who is the employer for the purpose of bringing an equal pay claim against; the need for a comparator and who is a suitable comparator for the purpose of an equal pay claim; a discussion of equal pay for like work (same work, substantially the same work), equal pay for work rated as equivalent and equal pay for work of equal value; the onus in equal pay claims and accessing pay related information; grounds of justification (specific grounds of justification); equal pay relating to non-standard (atypical) employees (agency (temporary service) employees, fixed-term contract employees, part-time employees); and proactive measures relating to equal pay (Equal Pay Code (Equal Pay Audit), Equality Act 2010 (Equal Pay Audits) Regulations 2014, and Equality Act 2010 (Gender Pay Gap Information) Regulations 2017). The Chapter concludes by summarising the guidance extracted from the United Kingdom legal framework relating to equal pay as sought for in relation to the research questions.

Chapter 5 – Conclusions and Recommendations

This Chapter summarises the conclusions and recommendations reached in Chapters 2-4 of this thesis by setting out the research questions followed by the conclusions and recommendations thereto.

CHAPTER 2: SOUTH AFRICAN LEGAL FRAMEWORK REGULATING EQUAL PAY

> "The principle of equal pay for work of equal value, especially between men and women, has still not been realised in many parts of the world, calling into question our collective commitment to gender equality and justice. Whether it is an underpaid worker in a garment factory, … or a female football player of a national team demanding the same pay and benefits as her male counterpart, there is a common experience."[*]

1. INTRODUCTION

This Chapter deals exclusively with the equal pay legal framework in South Africa while the study of international labour law and United Kingdom law relating to equal pay will be undertaken in Chapters 3 and 4. The purpose of this Chapter is to discuss and analyse the South African equal pay legal framework and to explore answers/solutions to the problems highlighted in Chapter 1. The Chapter will conclude by stating whether South African law can provide answers/solutions to the problems highlighted in Chapter 1 and, if so, to what extent it can do so.

This Chapter accordingly deals with the following: the right to equality in terms of the Constitution;[1] the development of equal pay law in South Africa; equal pay in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act;[2] the equal pay causes of action in section 6(4) of the Employment Equity Act ("EEA");[3] the onus provision in section 11 of the EEA; the grounds of justification to equal pay claims; access to pay related information; equal pay relating to non-standard (atypical) employees in terms of the Labour Relations Act ("LRA");[4] and the proactive measures relating to equal pay in terms of section 27 of the EEA.

---

[*] Excerpt from the Address by President Cyril Ramaphosa at the 108th session of the International Labour Conference, Palais Des Nations, Geneva, Switzerland (10 June 2019) https://www.gov.za/speeches/address-president-cyril-ramaphosa-108th-session-international-labour-conference-palais-des (last accessed on 25/10/2022).

[1] Constitution of the Republic of South Africa, 1996.

[2] 4 of 2000.

[3] 55 of 1998 ("EEA").

[4] 66 of 1995 ("LRA").

2. THE RIGHT TO EQUALITY IN TERMS OF THE CONSTITUTION

Section 9(1) of the Constitution[5] states that everyone is equal before the law and has the right to equal protection and benefit of the law. Section 9(2) of the Constitution recognises that equality includes measures designed to protect or advance persons or categories of persons who were disadvantaged by unfair discrimination. The Constitution encompasses both formal and substantive equality. Formal equality requires the same treatment, in other words, the law must treat individuals in like circumstances alike. Substantive equality, on the other hand, requires the law to ensure equality of outcome and to this end it allows for a disparity of treatment in order to achieve this goal.[6] Section 9(3) states that the State may not unfairly discriminate against anyone on a number of listed grounds.[7]

In the seminal case of *Harksen v Lane NO & Others*[8] the Constitutional Court laid down the test for unfair discrimination 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

---

5 Constitution of the Republic of South Africa, 1996 ("Constitution").

6 Currie I and de Waal J *The Bill of Rights Handbook* 5th ed (Juta 2010) 232-233. See Mubangizi JC *The Protection of Human Rights in South Africa: A Legal and Practical Guide* 2nd ed (Juta Claremont 2013) at 83 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* 6th 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.

7 Section 9(3) of the Constitution provides as follows: "The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth."

8 1997 (11) BCLR 1489 (CC). 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").

purpose then there is a violation of section 8(1).[9] If the differentiation does bear a rational connection to a legitimate government purpose it might nevertheless still amount to discrimination.[10]

b) A two stage analysis 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) 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 of the Constitution.[11]

Section 9(4) of the Constitution, in addition to providing that no person may discriminate unfairly on the listed grounds in section 9(3), requires national legislation to be enacted to prevent unfair discrimination. To this end, the EEA has been enacted. The preamble of the EEA recognises, *inter alia*, the following:

[9] 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).

[10] 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 in an arbitrary manner 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 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.

[11] At para 53.

> "that as a result of apartheid and other discriminatory laws and practices, there are disparities in employment, occupation and income within the national labour market".

The EEA which gives effect to section 9 of the Constitution, likewise encompasses both formal and substantive equality. It prohibits unfair discrimination on a number of grounds and in a number of circumstances and it seeks to achieve redress for those persons (categories of persons) who were unfairly discriminated against by providing for the taking of affirmative action measures in their favour.

The *Harksen* test is not directly applicable to a claim of equal pay for the same work, substantially the same work or work of equal value brought in terms of section 6(4) of the EEA but remains instructive.[12] A claimant[13] may not launch an equal pay claim in terms of section 9 of the Constitution because the EEA and the LRA regulates equal pay claims. This has been made clear in *SANDU v Minister of Defence & Others*[14] wherein the Constitutional Court held that if 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.[15] This is known as the principle of subsidiarity. This, however, does not mean that the Constitution has no role to play as the EEA states that the Act must be interpreted in accordance with the Constitution.[16] The EEA must thus be interpreted in accordance with section 9 of the Constitution.

---

12 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* 1st 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).

13 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.

14 (CCT 65/06) [2007] ZACC 10.

15 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.

16 Section 3(1)(a) of the EEA.

3. OVERVIEW OF DEVELOPMENT OF EQUAL PAY LAW IN SOUTH AFRICA

The law relating to equal pay has largely developed through the case law which grappled with issues of equal pay for the same/similar work and work of equal value as well as the grounds of justification to equal pay claims. The case law also set out the elements of the equal pay claims that a claimant needed to satisfy and analysed the onus relevant thereto. Prior to section 6(4) of the EEA there was no section in the EEA or previous legislation which expressly referred to equal pay claims.

It is clear from the case law that unequal pay was dealt with as an unfair labour practice under section 46(9) of the Labour Relations Act 28 of 1956 ("1956 LRA"). Section 46(9)(c) of the 1956 LRA provided that the Industrial Court had to determine an unfair labour practice dispute on terms that it deemed reasonable. Equal pay cases were brought in terms of this section and the most notable cases in this regard are *SA Chemical Workers Union & Others v Sentrachem* ("*Sentrachem 1*"),[17] *Sentrachem Ltd v John NO & Others* ("*Sentrachem 2*"),[18] *National Union of Mineworkers v Henry Gould (Pty) Ltd*[19] ("*Henry Gould*") *and Mthembu v Claude Neon Lights* ("*Mthembu*").[20]

In *Sentrachem 1* the applicants alleged that the respondent committed an unfair labour practice against them under section 46(9) of the 1956 LRA in that it discriminated between employees on the ground of race by paying black employees less than white employees who were on the same grade and/or who were engaged in work that was the same.[21] The applicants also alleged two further unfair labour practices which fall outside the ambit of equal pay.[22] The applicants sought an order that the wage discrimination be eliminated by the respondent. The Court noted that the respondent took the view that a definition of the wage gap (wage discrimination) needed to be established before the wage

[17] (1988) 9 *ILJ* 410 (IC) ("*Sentrachem 1*").
[18] (1989) 10 *ILJ* 249 (WLD) ("*Sentrachem 2*").
[19] (1988) 9 *ILJ* 1149 (IC) ("*Henry Gould*").
[20] (1992) 13 *ILJ* 422 (IC) ("*Mthembu*").
[21] At 412F.
[22] These claims of unfair labour practices related to the respondent failing to disclose financial information and dismissing its striking employees and failing to re-employ them (at 412G).

discrimination could be properly addressed whilst the applicants took the view that there was no need for such definition. The Court stated that there was no need for such a definition of the wage gap (wage discrimination) because the respondent had already agreed that there was wage discrimination between its employees and it proposed to remove it without there being a formal definition. It noted that the respondent was also of the view that the issue of wage discrimination must be investigated and dealt with at each of its plants whereas the applicants took the view that as wages were negotiated at a central level it was the responsibility of the respondent through AMICMA[23] to inform its various plants to remove the wage discrimination. The Court stated that the applicants' approach was reasonable in that the various plants' management should have information relating to the wages paid to each and every employee and would as a result be able to remove wage discrimination between black and white employees who were engaged in the same work.[24]

The Court then held that wage discrimination based on race or any other difference other than skills and experience was an unfair labour practice and stated that the respondent should have taken greater efforts to remove the wage discrimination, which it acknowledged. It ordered that the wage discrimination which affected black employees be removed by a certain date.[25]

In *Sentrachem 2* the employer launched an application to the High Court to review and set aside the judgment of the Industrial Court in *Sentrachem 1*. One of the contentions was that the Industrial Court failed to apply its mind to the question of wage discrimination in that it came to a conclusion which was grossly unreasonable. The employer argued that the Industrial Court made a finding of wage discrimination that was not justified by the evidence before it. The High Court found that the Industrial Court came to the conclusion that the employer expressly acknowledged/conceded that it practiced wage

---

[23] AMICMA stands for the Agricultural, Mining & Industrial Chemical Manufacturers' Association and is a registered employers' organisation (at 412H-I).

[24] At 428E, 429A-B and 429C-E.

[25] At 429F, 430D-E and 439G-H. Cohen T "Justifiable Discrimination – Time to Set the Parameters" (2000) 12 *SA Merc LJ* 255 at 260 states that the principle of equal pay for equal (same/similar) work was established in this case.

discrimination based on race but this express acknowledgement/concession was nowhere to be found in the record of the proceedings before the Industrial Court and SACAWU could neither point out any portion of the evidence where this appeared. The High Court found that the employer merely stated that if SACAWU could point out the wage discrimination then it would eliminate it. SACAWU acknowledged that there was no express acknowledgement/concession made by the employer but argued that there was enough evidence to justify an inference that such an acknowledgement/concession was made. The High Court rejected this argument and finally set aside the wage discrimination finding made by the Industrial Court for lack of an evidential basis to make the finding.[26]

The High Court noted that it was common cause between both parties that a practice in terms of which a black employee is paid a lesser salary than his white counterpart in circumstances where they both are engaged in the same work and have the same length of service, qualifications and skills constitutes an unfair labour practice based on unfair pay discrimination. It remarked that this was the correct exposition of the law.[27]

In *Henry Gould* the union launched an unfair labour practice claim against the employer in terms of section 46(9) of the 1956 LRA claiming that the employer committed an unfair labour practice by refusing to implement wage increases to union members in circumstances where it implemented it to non-union members. The union claimed that the employer committed this unfair labour practice after the conclusion of the collective bargaining process by refusing to retrospectively implement the wage increase to union members. It was common cause that the employer had retrospectively implemented the wage increase to non-union employees and the outcome (fruits) of the collective bargaining process were also extended to the non-union employees. The union argued that the employer's refusal to retrospectively implement the wage increase to union-members amounted to the victimisation of these members in that it unfairly discriminated between them and non-union members. The union further argued that the employer

[26] At 250I, 250J-251A, 255J, 258A-B, 258I-J, 259A-259D and 263J.
[27] Campanella J "Some Light on Equal Pay" (1991) 12 *ILJ* 26 at 29 has stated that the principle of equal remuneration for equal work was cemented in this case.

penalised the union members for engaging in the collective bargaining process. The Industrial Court then stated that as an abstract principle it is axiomatic that equals should be treated equally. It remarked that employees in the same job category with the same seniority should receive the same terms and conditions of employment unless there are good and compelling reasons to differentiate between them.[28]

The Industrial Court stated that where there is plural representation of employees in the workplace then the employees have elected to go their separate ways with the possibility that the principle of equality will be sacrificed. It further stated that the result of this is that it is legitimate for the employer to bargain separately with the two or more groups of employees, which may then lead to employees who perform the same work being subjected to different terms and conditions of employment. The Court remarked that employees who find themselves in this situation cannot complain about the inequality in their terms and conditions of employment as regards to the other group/s as this inequality and unfairness is inherent in the plural representation arrangement. It stated that where an employer wants to treat the different groups as a single unit then he must do so completely and not partially as this will be unfair. The Court noted that it would then be unfair to make a distinction between members of this single unit who are union members and those who are non-union members.[29]

The Industrial Court held that despite the employer agreeing to the division of the labour unit into two subgroups they subsequently decided to remove this distinction by affording the non-union members the fruits of the collective bargaining process instead of allowing this group of non-union members to go their own way thereby creating a single labour unit. It found that the employer then decided to treat some members of the single labour unit differently to others. It did this by affording the non-union members the fruits of the collective bargaining process but it did not extend the fruits of the individual bargaining of the non-union members to the union-members. The benefit of the individualised bargaining of the non-union members was the retrospective implementation of the wage

[28] At 1150D-E, 1157E, 1157G-H and 1158A-B.
[29] At 1158G-I and 1159A-B.

increase. The Court held that the purpose of the differentiation was to discourage union members from participating in the collective bargaining process which was unfair. It ordered the employer to pay the union members the wage increase during the period which it unfairly held it from them.[30]

In *Mthembu*, the applicant launched an application in terms of section 46(9) of the 1956 LRA before the Industrial Court claiming that their employer committed an unfair labour practice against them by unfairly discriminating against them on the basis of not granting them a merit increase. The employer gave annual increased wages based on the Industrial Council increases but had resolved in March 1989 to also grant an increase based on merit. The granting of the merit increase was negotiated with the representative union and it was agreed to between the employer and the union. The employer then instructed its local management to evaluate every employee with the purpose of informing it as to which employees were deserving of the merit increase. After this process was completed, management decided that the applicants were not deserving of a merit increase. The Industrial Court stated that differentiation does not necessarily (automatically) amount to discrimination. It further stated that it goes against the interest of both the employer and employees to rule that an employer is not allowed to differentiate between its employees based on their productivity. The Industrial Court remarked that if this were the case then all the productivity schemes in operation in the various workplaces would amount to an unfair labour practice. It further remarked that this could not be the case as an employer is allowed to reward an employee for outstanding service as that increases productivity. The Industrial Court then held that the applicants had failed to prove that the employer committed an unfair labour practice by unfairly discriminating against them in not awarding them a merit increase.[31]

After the repeal of the 1956 LRA, equal pay claims were brought in terms of item 2(1)(a) of Schedule 7 to the LRA. Item 2(1)(a) of Schedule 7 provided as follows:

---

[30] At 1160D-G, 1160J and 1161H-I.
[31] At 422I, 423A-C, 423F-G and 424G.

> "For the purposes of this item, an unfair labour practice means any unfair act or omission that arises between an employer and an employee involving-
>
> (a) the unfair discrimination, either directly or indirectly, against an employee on an arbitrary ground, including but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility".

The important equal pay cases that were decided under item 2(1)(a) of Schedule 7 to the LRA are *TGWU & Another v Bayete Security Holdings*[32] ("*TGWU*") and *Ntai & Others v SA Breweries Ltd* ("*Ntai*").[33] In *TGWU* the Labour Court 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 held that the employee failed to prove that the employer discriminated against him on the ground of race.[34] In *Ntai* the Labour Court noted that the use of neutral requirements such as *seniority* and *experience* in the computation of pay could adversely affect some employees as a group disproportionately when compared to another group, for example black employees as compared to their white counterparts who perform the same work.[35] These cases will further be discussed in paragraph 10.2 below.

Item 2(1)(a) of Schedule 7 to the LRA was repealed and replaced with the EEA. Section 6(1) of the EEA provides that no person may directly or indirectly unfairly discriminate against an employee in any employment policy or practice on a number of grounds. Section 1 of the EEA defines "employment policy or practice" to include, *inter alia*, remuneration, employment benefits and terms and conditions of employment. An equal pay claim could thus be brought in terms of section 6(1) read with section 1 of the EEA. In *Mangena v Fila*[36] the Labour Court held that even though the EEA does not specifically regulate equal pay claims, section 6 read with section 1 of the EEA was broad enough to

---

32 [1999] 4 BLLR 401 (LC) ("*TGWU*").
33 (2001) 22 *ILJ* 214 (LC) ("*Ntai*").
34 At paras 7-8.
35 At paras 79-80.
36 (JS 343/05) [2009] ZALC 81 ("*Mangena*").

incorporate both claims of equal pay for the same work and equal pay for work of equal value.[37] This case will be discussed in more detail in paragraphs 5.6 and 8 below.

The International Labour Organisation criticised South Africa for failing to include a specific provision in the EEA to deal with equal pay claims,[38] although case law played an important role in the development of equal pay law in circumstances where there was no specific provisions dealing with equal pay in the EEA or its predecessors.

This shortcoming was addressed by the legislator with the amendment of section 6 of the EEA by inserting sections 6(4) and 6(5), which deals specifically with equal pay. Section 6(4) of the EEA prohibits unfair discrimination caused by a difference in terms and conditions of employment between employees performing the same or substantially the same work or work of equal value that is directly or indirectly based on the grounds listed in section 6(1) of the EEA. There are, in addition, the Employment Equity Regulations[39] ("Employment Equity Regulations") and a Code of Good Practice on Equal Pay/Remuneration for Work of Equal Value ("Equal Pay Code")[40] which, *inter alia*, sets out the criteria for assessing work of equal value as well as the grounds of justification thereto. Section 27(2) of the EEA obliges designated employers to take measures to reduce disproportionate income differentials or unfair discrimination relating to equal pay in terms of section 6(4) of the EEA. The Labour Relations Amendment Act[41] has amended the LRA by inserting sections 198A-198D in the LRA to provide protection to non-standard employees. These sections contain equal pay provisions which are different to how equal pay is regulated in terms of the EEA. This will be discussed in more detail in paragraphs 5, 5.1-5.6, 6, 10.2-10.3, 11, 11.1-11.4, and 12 below.

---

37 At para 5.

38 10th Commission for Employment Equity 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; McGregor M "Equal Remuneration for the Same Work or Work of Equal Value" (2011) 23(3) *SA Merc LJ* 488 at 497; Benjamin P "Decent Work and Non-standard Employees: Options for Legislative Reform in South Africa: A Discussion Document" (2010) 31 *ILJ* 845 at 866.

39 Employment Equity Regulations, *GG* No 37873 of 1 August 2014 ("Employment Equity Regulations")

40 Code of Good Practice on Equal Pay/Remuneration for Work of Equal Value, *GG* No 38837 of 1 June 2015 ("Equal Pay Code").

41 6 of 2014.

4. THE PEPUDA

Similar to the EEA, the Promotion of Equality and Prevention of Unfair Discrimination Act[42] ("PEPUDA") gives effect to section 9 of the Constitution.[43] The Act does not apply to employees in the employment context but has wider application and would for example apply to members of the National Defence Force, the National Intelligence Agency, the South African Secret Service as these members are altogether excluded from the scope of the EEA.[44] The Act seeks to promote equality and eliminate unfair discrimination against people on certain prohibited grounds which are: race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.[45] The Act also seeks to eliminate unfair discrimination on unlisted analogous grounds, and to this end, section 1 sets out the requirements for analogous grounds as any other ground that: (a) causes or perpetuates systemic disadvantage, or (b) undermines human dignity; or (c) adversely affects the equal enjoyment of a person's rights and freedoms in a serious manner that is comparable to discrimination on a listed ground. The PEPUDA furthermore contains specific sections aimed at the elimination of unfair discrimination on the grounds of race, gender and disability and which sets out specific instances of discrimination on these grounds.[46] The PEPUDA states that a failure to respect the principle of equal pay for equal work and perpetuating disproportionate income differentials deriving from past unfair discrimination

---

[42] 4 of 2000 ("PEPUDA").

[43] 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).

[44] Section 5(3) of the PEPUDA; 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 12; 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 O & Garbers C "Employment Discrimination" in Thompson C & Benjamin P *South African Labour Law* (Juta Claremont loose-leaf 2002) Vol 2 at CC 1-20 have submitted that the PEPUDA will not play a major interpretative role with regards to the EEA.

[45] Sections 2(b), 6, 1 of the PEPUDA.

[46] Sections 7, 8 and 9 of the PEPUDA. 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 12.

are widespread practices that need to be addressed.[47] The Act obliges the State to ensure that legislative and other measures are taken to address these practices.[48] The Act, however, does not specifically regulate equal pay claims and makes reference thereto for illustrative purposes only and to prompt the State to deal with these issues.[49] This is the high-water mark for equal pay in the PEPUDA.

5. CAUSES OF ACTION IN SECTION 6(4) OF THE EEA

Section 6(4) of the EEA sets out three causes of action to equal pay namely: (a) equal terms and conditions of employment for the same work; (b) equal terms and conditions of employment for substantially the same work; and (c) equal terms and conditions of employment for work of equal value. Section 6(4) of the EEA does this by providing as follows:

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

5.1 Terms and Conditions of Employment

Whilst it is self-evident that pay/remuneration readily falls within the ambit of "terms and conditions of employment" there is no definition relating to this phrase in the EEA or the Employment Equity Regulations and the Equal Pay Code.[50] It is important to know what

---

47 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.

48 Section 29(2) of the PEPUDA.

49 McGregor M "Equal Remuneration for the Same Work or Work of Equal Value" (2011) 23(3) *SA Merc LJ* 488 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. 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) state at 12 that the value of the illustrative list of practices is educative rather than determinative.

50 Basson AC *et al The New Essential Labour Law Handbook* 6th edition (Labour Law Publications 2017) states at 250 that the phrase "terms and conditions of employment" in section 6(4) of the EEA "… goes

would fall within the ambit of "terms and conditions of employment" as the claimant has to prove that there is a difference in "terms and conditions of employment" between himself/herself and another employee.

Landman has stated in the context of equal pay (prior to the introduction of section 6(4) of the EEA) that the courts will have the task of deciding whether pay should include indirect benefits, future benefits as well as non-contractual benefits.[51] He refers to examples such as pension fund contributions and benefits and states that they may be regarded as pay but aspects which are problematic is overtime pay where the claimant is a part-time worker and the comparator is a full-time worker.[52]

The Labour Courts (including the Industrial Court) have thus far only heard equal pay claims relating to remuneration.[53] It thus provides limited guidance as to what would be justiciable as an equal terms and conditions claim (besides remuneration) in terms of section 6(4) of the EEA.

Item 2.1.2 of the Equal Pay Code states that it must be read in conjunction with the Code of Good Practice on the Integration of Employment Equity into Human Resources Policies, Practices and Procedures[54] ("Integration of Employment Equity Code") and, in particular, the part that deals with terms and conditions of employment. The Integration

---

wider than pay or remuneration – it is about differences in terms and conditions of employment (which includes pay or remuneration)".

[51] Landman A "Equal Pay for Equal Work or Work of Equal Value" in Dupper O *et al Essential Employment Discrimination Law* (Juta Claremont 2010) at 141-142.

[52] Landman A "Equal Pay for Equal Work or Work of Equal Value" in Dupper O *et al Essential Employment Discrimination Law* (Juta Claremont 2010) at 141-142.

[53] See *SA Chemical Workers Union & Others v Sentrachem* (1988) 9 *ILJ* 410 (IC); *National Union of Mineworkers v Henry Gould* (Pty) Ltd (1988) 9 *ILJ* 1149 (IC); *Mthembu v Claude Neon Lights* (1992) 13 *ILJ* 422 (IC); *TGWU & Another v Bayete Security Holdings* [1999] 4 BLLR 401 (LC); *Louw v Golden Arrows Bus Services (Pty) Ltd* (2000) 21 *ILJ* 188 (LC); *Heynsen v Armstrong Hydraulics (Pty) Ltd* [2000] 12 BLLR 1444 (LC); *Ntai & Others v SA Breweries Ltd* (2001) 22 *ILJ* 214 (LC); *Co-operative Worker Association & Another v Petroleum Oil and Gas Co-operative of SA* [2007] 1 BLLR 55 (LC); *Mutale v Lorcom Twenty Two CC* [2009] 3 BLLR 217 (LC); *Mangena v Fila* (JS 343/05) [2009] ZALC 81; *Duma v Minister of Correctional Services & Others* [2016] ZALCCT 6; *Pioneer Foods (Pty) Ltd v Workers Against Regression* 2016 ZALCCT 14; *DM Sethole & 18 Others v Dr Kenneth Kaunda District Municipality* [2017] ZALCJHB 484.

[54] Code of Good Practice on the Integration of Employment Equity into Human Resources Policies, Practices and Procedures *GG* No 27866 of 4 August 2005 ("Integration of Employment Equity Code").

of Employment Equity Code includes the following under terms and conditions of employment: (a) working time and rest periods; (b) annual leave; (c) sick leave; (d) maternity leave; (e) family responsibility leave; (f) any other types of leave; (g) rates of pay; (h) overtime rates; (i) allowances; (j) retirement schemes; (k) medical aid; and (l) other benefits.[55] This list does not present a *numerus clausus*[56] of what would fall under terms and conditions of employment. It is submitted that the terms and conditions listed above falls within the ambit of the phrase *terms and conditions of employment* as referred to in section 6(4) of the EEA because the Equal Pay Code states in item 2.6 that it provides guidance when interpreting the EEA which means that in this case, the Equal Pay Code as read with that part of the Integration of Employment Equity Code that deals with terms and conditions of employment provides guidance to the phrase *terms and conditions of employment* referred to in section 6(4) of the EEA. It is further submitted that this list of terms and conditions of employment should specifically be set out in the Equal Pay Code in order to promote legal certainty regarding what can fall within the ambit of terms and conditions of employment in section 6(4) of the EEA.

The Equal Pay Code makes reference to the BCEA Schedule on the Calculation of Employee's Remuneration in terms of section 35(5) of the BCEA[57] ("BCEA Schedule") in a footnote while referring to the definition of remuneration in the BCEA.[58] The BCEA Schedule lists the following payments that are included in an employee's remuneration for the purposes of calculating pay for annual leave, payment instead of notice and severance pay:

> "(a) Housing or accommodation allowance or subsidy or housing or accommodation received as a benefit in kind:
> (b) Car allowance of[or] provision of a car, except to the extent that the car is provided to enable the employee to work:
> (c) Any cash payments made to an employee, except those listed as exclusions in terms of this schedule:
> (d) Any other payment in kind received by an employee, except those listed as exclusions in terms of this schedule:
> (e) Employer's contributions to medical aid, pension, provident fund or similar schemes:

---

[55] Item 11.1 of the Integration of Employment Equity Code.
[56] *Numerus clausus* means restricted number.
[57] Basic Conditions of Employment Act 75 of 1997 ("BCEA").
[58] Footnote 3 under item 2.4 of the Equal Pay Code.

(f) Employer's contributions to funeral or death benefit schemes."[59]

The BCEA Schedule also lists the following payments that do not form part of remuneration for the purposes of the above calculations, which are:

> "(a) Any cash payment or payment in kind provided to enable the employee to work (for example, an equipment, tool or similar allowance or the provision of transport or the payment of a transport allowance to enable the employee to travel to and from work);
> (b) A relocation allowance;
> (c) Gratuities (for example, tips received from customers) and gifts from the employer;
> (d) Share incentive schemes;
> (e) Discretionary payments not related to an employee's hours of work or performance (for example, a discretionary profit-sharing scheme);
> (f) An entertainment allowance;
> (g) An education or schooling allowance."[60]

It is not clear from the Equal Pay Code as to what the purpose of the BCEA Schedule is in relation to the Equal Pay Code and more particularly the phrase "terms and conditions of employment". The purpose of the BCEA Schedule on its own is to provide a list of payments that should be included in an employee's remuneration for the purpose of calculating pay for annual leave, pay instead of notice and severance pay as well as a list of payments that do not form part of an employee's remuneration for the purpose of these calculations. It would be inappropriate to suggest, without more, that the phrase "terms and conditions of employment" under section 6(4) of the EEA should be interpreted in accordance with the BCEA Schedule. The Schedule does not have as its purpose the listing of payments that fall within and out of an employee's remuneration for the purpose of elucidating the phrase "terms and conditions of employment" under section 6(4) of the EEA. As a result thereof, no submission can be made at this stage regarding the inclusion of some or all of the payments falling under both lists, in the Equal Pay Code under terms and conditions of employment contemplated in section 6(4) of the EEA. Such submission can, however, be made later in this thesis if international labour law and/or United Kingdom law provides guidance which can assist in this regard.

---

59 Item 1(a)-(f) of the BCEA Schedule.
60 Item 2(a)-(g) of the BCEA Schedule.

5.2 Same Employer

There is no definition in the EEA, the Employment Equity Regulations or the Equal Pay Code as to who or what would constitute the "same employer". For instance, does it mean the same company at the same location? Does it cover the same company owned by the same employer at a different location? With regard to the State, is the State the same employer? Or is the State different employers depending on for example the different departments and the different geographical locations? This has not been an issue in the equal pay cases thus far that have come before the South African Labour Courts but it is an issue that has to be addressed because it is one of the elements that a claimant has to satisfy.

In *Minister of Correctional Services & Others v Duma*[61] the respondent was employed as a legal Manager at the Department of Correctional Services in the Western Cape and she compared herself with other legal managers of the Department of Correctional Services in Limpopo, Mpumulanga, North West and Kwazulu-Natal in her claim of equal pay for the same work. She succeeded with her claim in the Labour Court but on appeal the Labour Appeal Court overturned the Labour Court's decision finding that the respondent had failed to satisfy the onus of proving unfair discrimination on the arbitrary ground of geographical location.[62] Neither the Labour Court nor the Labour Appeal Court took issue with the respondent comparing her position which was in the Department's Western Cape facilities with the same positions of the Department that were in the other provinces as mentioned. It is submitted based on this case that the same Department in different provinces falls under the "same employer" which is the State. Put differently, the State is the same employer in different provinces and throughout the country.

In *MEC for Transport: KwaZulu-Natal and Others v Jele*[63] the issue on appeal related to the identity of the employer and whether the State is the employer of an employee in the

61 [2017] ZALAC 78.
62 At paras 2, 22 and 27.
63 [2004] 12 BLLR 1238 (LAC).

public service. The respondent applied for the position of Chief Director: Corporate Services at the Department of Transport in the Province of KwaZulu-Natal. At the time of applying for this position, he was employed as Deputy Director in the Department of Health, KwaZulu-Natal Provincial Government. His application was unsuccessful. He then referred an unfair labour practice dispute to the General Public Service Bargaining Council ("GPSBC") in terms of item 2(1)(b) of Schedule 7 to the LRA claiming that the State has committed an unfair labour practice against him in that its conduct relating to the refusal of his appointment (promotion) was unfair. The appellants argued in the GPSBC that item 2(1)(b) of Schedule 7 was not applicable in this case because it only referred to conduct concerning the promotion of a candidate to a higher post and not conduct relating to the non-appointment of a candidate to a post. They also argued that a candidate can only be promoted by its employer and not by someone who is not its employer. They argued that the respondent's employer was the Department of Health, KwaZulu-Natal Provincial Government and not the State. The respondent argued that he was employed in the public service by the State and if he had been appointed to the post in the Department of Transport, KwaZulu Natal then he would still have been employed by the State even though it would be a different department and this appointment would have been a promotion. The GPSBC agreed with the argument made by the appellants that item 2(1)(b) of Schedule 7 to the LRA was not applicable to the respondent's claim and as a result thereof it fell outside its jurisdiction but within the jurisdiction of the Labour Court. The GPSBC thus dismissed the claim for lack of jurisdiction.[64]

The respondent then launched an application to the Labour Court to review and set aside the arbitrator's decision in the GPSBC. The Labour Court in granting the application held that the respondent's employer was the State and if he was appointed to the post of Chief: Director in the Department of Transport then this would have been a promotion and not a mere appointment. It further held that item 2(1)(b) of Schedule 7 was thus available to the respondent. The matter then came before the Labour Appeal Court which stated that item 2(1)(b) of Schedule 7 only applies to an employee who is in the employ of the employer as there cannot be a dispute relating to promotion in the absence of an

[64] At paras 1, 2, 4-5, 7 and 26.

employment relationship. The Labour Appeal Court held that according to the Public Service Act 103 of 1994 the State is the employer of everyone employed in the public service. In dismissing the appeal, it held that the respondent's employer was the State as it would have continued to be the respondent's employer if he had been appointed to the post of Chief: Director in the Department of Transport and the appellants were simply representatives of the State and not employers in their own right.[65] It is submitted based on this case that an employee's employer remains the State even where he/she applies to be appointed in another Department of the same province in circumstances where he/she is employed in a different Department. It is further submitted that the same would apply to different Departments in different provinces because they would still fall under the "same employer" which is the State due to the State being the employer of everyone employed in the public service as stated above.

The Labour Appeal Court also made *obiter* remarks regarding the employer of different branches of the same company. It remarked that in the private sector each branch of the same company will not be an employer as the company would still remain the employer of all the employees in the various branches including those based at the headquarters of the company.[66] It is submitted based on these *obiter* remarks that an employer who owns different branches of the same company will be regarded as the employer of all the employees employed in the various branches including those based at its head office.

5.3 The Comparator (employees of the same employer)

Section 6(4) also requires a claimant to compare his/her terms and conditions of employment with that of a comparator. This is clear from the phrase "a difference in terms and conditions of employment between *employees of the same employer*."[67] There is no definition or parameters set out in the EEA, the Employment Equity Regulations or the Equal Pay Code relating to who qualifies as a comparator. The comparator has to be an

[65] At paras 6, 8, 26, and 39-40.
[66] At para 19.
[67] Emphasis added.

employee employed by the *same employer*. The Labour Court has made it clear that the comparator chosen must be suitable to the claim, in other words, if a claimant launches an equal pay claim for the same work then the comparator chosen has to do the same work as the claimant. If a claimant launches an equal pay claim for substantially the same work then the comparator has to do work that is substantially the same. If a claimant launches an equal pay claim for work of equal value then the comparator has to do different work to that of the claimant but the work must be of such a nature that it can be accorded equal value to the work of the claimant.[68] The claim is thus proved through the comparator. The choosing of an unsuitable comparator will lead to a meritless claim. Besides this, there are a few questions that arise. Must the comparator be employed at the same time as the claimant (must their employment be contemporaneous)? Put differently, is it possible for a claimant to compare herself/himself with a comparator who is a successor or predecessor? Is it possible for a claimant to compare himself/herself with a hypothetical comparator? Is it possible for a claimant to choose a comparator who is a job applicant who was offered a higher salary than that offered to her but who refused employment? Is it possible for a claimant to choose a comparator who is her subordinate (engaged in work of lesser value) but who is paid more than the claimant? It is important to know the parameters of who qualifies as a suitable comparator as this is an important element for a claimant to satisfy.

In *Louw v Golden Arrows Bus Services (Pty) Ltd*[69] the Labour Court asked whether it is permissible in our law for a claimant to compare herself with the hypothetical peromnes man in an equal pay for work of equal value claim. The hypothetical peromnes man would self-evidently only be applicable in the case of the peromnes job evaluation method. The Court did not answer this question as it was not pleaded by the applicant.[70] The Court did, however, give an indication that this could be possible when it stated:

> "I am precluded from deciding whether there is any merit in this line of attack. First because it was not the applicant's case *although it could possibly have been put forward*."[71]

---

[68] *Mangena* at para 6.
[69] (2000) 21 *ILJ* 188 (LC).
[70] *Louw* at paras 71 and 124.
[71] *Louw* at para 125.

It is submitted that an argument can be made based on the remarks above by the Court that where an equal pay claim is based on a job evaluation system then it is possible for the claimant to launch an equal pay claim and compare herself/himself with the system based hypothetical comparator. Landman J who heard this case, however, later wrote in an academic writing that a comparator must actually exist and a comparison with a hypothetical comparator is not possible.[72]

In *Mutale v Lorcom Twenty Two CC*,[73] 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 only offer between R1 000 – R3 000 to black candidates but to accept the amount requested by white candidates. This gave rise to the applicant querying the basis for the computation of her own 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. It 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. It found that the respondent had used race as a benchmark to determine the salary to be offered to job applicants.[74] It noted that the applicant asked for a starting salary of R5 000 per month as was clear from her *curriculum vitae*. The Labour Court then stated that had the applicant been white then she would have received her asking salary of R5 000 in terms of the respondent's employment practice. Based on this, it accordingly held that the difference between the amounts of R5 000 and R3 000 per month for the first year of employment constituted the compensation to which the applicant was entitled. The applicant was thus awarded an amount of R24 000 for the racial discrimination in the computation of her salary.[75]

---

72 Landman A "Equal Pay for Equal Work or Work of Equal Value" in Dupper O *et al Essential Employment Discrimination Law* (Juta Claremont) 2010 143; Landman A "The Anatomy of Disputes about Equal Pay for Equal Work" (2002) 14 *SA Merc LJ* 341 at 346.

73 [2009] 3 BLLR 217 (LC).

74 At paras 1, 4, 40, 2, 39.

75 At paras 21, 40-41.

This case is unique in the sense that the applicant succeeded in her claim despite choosing an unsuitable comparator. It is apposite to note that the known or proven racist employment practice of the respondent was the deciding factor in the case. It thus means that this case is authority for the view that where the employer has a racist employment practice (that can be proven) in place regarding the computation of salary, then the claimant will not need to choose a suitable comparator and will consequently not have to show that the work performed is the same, substantially the same or of equal value to that of the comparator. All the claimant has to do is to prove that his/her salary has been computed based on unfair discrimination relating to race (and will include the prohibited grounds of discrimination both listed and arbitrary) and in this computation a hypothetical comparator can arise, for example, in this case Mutale succeeded in proving that had she been white then she would have received the salary that she asked for and as such she compared her position to that of a white hypothetical comparator.

Item 6.5 of the Equal Pay Code provides as follows:

> "An employee may base a claim on the ground that they would have received higher pay /remuneration if they were not female. To succeed in such a claim, the employee would have to show that a male employee hired to perform the work would have been employed on different terms and conditions of employment."

In terms of this item, the employee has to prove that if a male employee was hired to perform her work then the male employee would have been employed on better terms and conditions of employment/higher pay. There is no actual comparator needed as it deals with a hypothetical comparator. It would seem from a reading of the phrase "a male employee hired to perform the work" in item 6.5 of the Equal Pay Code that it restricts the use of a hypothetical comparator to instances of equal pay for the same work and equal pay for substantially the same work as it requires that the claimant shows that a male hired to perform *the work*, which can only refer to the work that she is performing, would have been employed on different terms and conditions of employment. This then means that item 6.5 of the Equal Pay Code does not include equal pay for work of equal value because the claimant has to prove that if a male was hired to perform her work then the male employee would have been employed on better terms and conditions of

employment/higher pay and this is not wide enough to include work of equal value but is rather restricted to equal pay for the same work and equal pay for substantially the same work. Item 6.5 of the Equal Pay Code is closely related to the Labour Court's findings in *Mutale's* case with only two differences which are: (a) *Mutale* dealt with a hypothetical comparator based on the ground of race and item 6.5 of the Equal Pay Code deals with a hypothetical comparator based on the ground of sex/gender; and (b) the use of the hypothetical comparator in *Mutale* is not dependent on showing that the work which would be performed by the hypothetical comparator would be the same, substantially the same or of equal value but the use of the hypothetical comparator in item 6.5 of the Equal Pay Code is dependent on the claimant showing that the work which would be performed by the hypothetical comparator would be the same or substantially the same. It is submitted that if a hypothetical comparator can be used on the grounds of race and sex then there is no reason why its use should not be extended to the other listed grounds of discrimination in section 6(1) as well as arbitrary (unlisted) grounds.[76]

In *Mdunjeni-Ncula v MEC, Department of Health & Another*[77] the appellant applied for a position of Senior Legal Administrative Officer at the Department of Health, Eastern Cape. She was shortlisted, interviewed and offered the position. She was offered R340 716 per annum but accepted the offer on condition that she be remunerated in the amount of R658 998.50. Her counter-offer was rejected but the appellant commenced employment on 1 December 2014 and requested that her salary be reviewed. In an attempt to settle the matter internally a revised offer was made to the appellant in the sum of R361 623.[78] The appellant dissatisfied with the revised offer, launched an equal pay claim in terms of section 6(4) read with section 6(1) of the Employment Equity Act claiming that she suffered unfair pay discrimination based on gender in that she was paid less than three male comparators for performing the same work or substantially the same work. The first

[76] Unlisted grounds that have come before the courts include the following: (a) citizenship; (b) qualifications, tertiary teaching and research experience; (c) temporary status of employment; (d) professional ethics; (e) mental health; (f) political or cultural affiliation; (g) pregnancy or parenthood; and (h) geographical location – see van Niekerk A *et al Law@work* 5th ed (LexisNexis 2019) at page 136.

[77] (PA10/2019) [2021] ZALAC 29.

[78] At paras 2-4.

comparator was offered a remuneration package in the sum of R532 278 but refused the offer and was consequently not employed. The second comparator was initially offered the position with the amount of R340 716 but this was revised to R610 716 per annum which was later found to be unlawful. The third comparator who was a subordinate to the appellant employed in the post of legal administrative officer unsuccessfully applied for the post, but received a higher salary in his post of legal administrative officer as compared to the appellant and this was due to his longer length of service.[79]

The Labour Court held that the appellant was required to prove that sex or gender was the reason for the different treatment which formed the basis of her unfair pay discrimination claim. It found that the comparators chosen by the appellant were inappropriate because the first comparator was never employed by the respondent and the higher salary offered to the second comparator was found to be an unlawful salary offer. The Labour Court consequently dismissed the appellant's equal pay claims.[80]

Dissatisfied with the Labour Court judgment, she launched an appeal before the Labour Appeal Court. The Labour Appeal Court held that the appellant failed to prove that she suffered unfair pay discrimination based on gender in relation to any of the three comparators whom she based her claim on. It held the following in dismissing the claim: (a) the first comparator was never employed by the respondent; (b) the second comparator was not appropriate because the revised salary offered to him was unlawful; and (c) the third comparator received a higher salary than the appellant which was directly as a result of his longer length of service and which was a rational ground.[81]

The following arguments can be made based on this case. It is argued that the rejection by the Labour Appeal Court of the use of the first male comparator who was offered a higher salary than that offered to the appellant was not correct because this type of comparator is squarely envisaged in item 6.5 of the Equal Pay Code. Item 6.5 of the Equal

[79] At paras 1, 5-7.
[80] At para 9.
[81] At paras 16-19.

Pay Code clearly allows a claimant to base an equal pay for the same work or substantially the same work claim on the ground that she would have received higher pay if she were not female and to succeed with such a claim she would have to prove that if a male employee were hired to perform the work that she is performing then he would have been employed on better terms and conditions of employment. It is clear from this case that if the first comparator was employed to perform the work performed by the appellant then he would have received a salary of R532 278 per annum which is higher than the salary received by the appellant which was R340 716 per annum. It is submitted that there may have been other reasons to find that the appellant's equal pay claim for the same work or substantially the same work could not succeed but it was incorrect to find that the first comparator was inappropriate because he was not subsequently employed as this is contrary to item 6.5 of the Equal Pay Code (and *Mutale's* case). It is argued that the appellant should have been allowed to compare her equal pay situation to that of the first comparator as he was a valid comparator. It would seem that the Courts had difficulty in accepting the first comparator as suitable due to the hypothetical nature of the comparison in the sense that the first comparator was not subsequently employed.

It is further argued, based on the rejection of the third comparator as inappropriate, that the comparator employee was not found to be inappropriate based on him being subordinate to the equal pay claimant (engaged in work of lesser value) as the Labour Appeal Court did not deal with this at all but rather proceeded to find that the comparator's higher salary as compared to that of the equal pay claimant was due to his longer length of service and it can thus be argued that a comparator employee who is a subordinate to an equal pay claimant (engaged in work of a lesser value) and who earns higher pay than the claimant is an appropriate comparator in an equal pay claim.

Based on the above, it will be difficult to reject the use of a hypothetical comparator as the case law and the Equal Pay Code make reference to this. It will also be difficult to argue that a comparator who performs work of lesser value than the claimant but who receives more pay is not an appropriate comparator. Despite the explicit finding by the Labour Appeal Court in *Mdunjeni-Ncula* that a job applicant who is offered a higher salary

than the claimant is not a valid comparator if he does not subsequently become an employee, it is argued that this finding is incorrect and such a comparator is a valid comparator and falls under the umbrella of a hypothetical comparator. The requirement of contemporaneous employment of the claimant and comparator as well as the use of a comparator who is a successor or predecessor has not come before the South African Labour Courts and no guidance can be extracted from South African equal pay law in this regard.

5.4 Same work

The first cause of action in terms of section 6(4) of the EEA is equal terms and conditions for the same work. The Employment Equity Regulations defines this cause of action as follows:

> "the work performed by an employee - (1) is the same as the work of another employee of the same employer, if their work is *identical or interchangeable*".[82]

The word "interchangeable" is not defined in the Employment Equity Regulations or elsewhere and as a result it is not clear what would amount to work that is interchangeable. The meaning of the word "interchangeable" will be important for an equal pay claim for the same work because if a claimant cannot prove that his/her work is identical to that of the comparator then his/her claim on that basis will be dismissed if he/she cannot prove that their work is interchangeable. How does a claimant go about this if there is no indication in the EEA, the Equal Pay Code or the Employment Equity Regulations as to what this entails? It is therefore important to ascertain the meaning of the word "interchangeable" for the sake of clarity. In *Transvaal Consolidated Land and Exploration Co Ltd v Johannesburg City Council*[83] the High Court held the following regarding the use of dictionaries when interpreting legislation:

[82] Regulation 4(1) of the Employment Equity Regulations. The word "identical" is straightforward and it is defined as "exactly the same, or very similar" in the Cambridge dictionary https://dictionary.cambridge.org/dictionary/english/identical (last accessed on 25/10/2022).

[83] 1972 (1) SA 88 (W).

> "Dictionary definitions serve to mark out the scope of the meanings available for a word, but the task remains of ascertaining the particular meaning and sense of the language intended in the context of the statute under consideration."[84]

In *De Beers Industrial Diamond Division (Pty) Ltd v Ishizuka*[85] the High Court held that the dictionary meaning of a word is merely a guide and cannot govern the interpretation. The Court further held that where a word has more than one meaning, then the dictionary does not prescribe the priorities of the meanings because the applicable meaning should be ascertained by the context in which the word is located and used.[86] In *S v Makhubela*[87] the Court held that the word "drive" as contained in the Road Traffic Act 7 of 1973 must as a starting point be given its ordinary meaning but the decisive factor is the context in which the word appears. The Court found that the word driving did not include a person who steers the car whilst it is being pushed as it is limited to the scenario where the vehicle is being controlled whilst being propelled by its own mechanical power.[88] It is clear from these cases that the dictionary meaning of a word contained in legislation is a useful guideline which can be used in arriving at a meaning to be given to the word but the dictionary meaning is not decisive in this regard as the word still has to be interpreted in the particular context. Turning to the phrase, "interchangeable", which is in need of interpretation, the dictionary defines *interchangeable* to mean "able to be exchanged with each other without making any difference or without being noticed".[89] Before a submission can be made regarding the suitability of using the dictionary meaning of *interchangeable* for the word *interchangeable* as it appears in regulation 4(1) of the Employment Equity Regulations one has to ascertain the context within which the word is used and to this end it is important to refer to case law which has dealt with equal pay claims for the same work in order to better understand the context of this claim.

In *Henry Gould* the Industrial Court held that employees having the same seniority and in the same job category should receive the same terms and conditions of employment

---

84 At 94G.
85 1980 (2) SA 191 (T).
86 At 196E-F.
87 1981 (4) SA 210 (B).
88 At 210G and 211D-E.
89 https://dictionary.cambridge.org/dictionary/english/interchangeable (last accessed on 25/10/2022).

unless there are good and compelling reasons to differentiate between them.[90] In *Sentrachem 2* the High Court noted that both parties accepted that a practice in terms of which a black employee is paid a lesser salary than his white counterpart in circumstances where they both are engaged in the same work and have the same length of service, qualifications and skills constitutes an unfair labour practice based on unfair pay discrimination. It remarked that this was the correct exposition of the law.[91] These cases aptly set out the context of an equal terms and conditions (pay) claim for the same work.

Having ascertained the context of an equal pay for the same work claim wherein the word *interchangeable* would be located, it is submitted that the above dictionary meaning of the word *interchangeable* "able to be exchanged with each other without making any difference or without being noticed" should be followed for the word *interchangeable* as it appears in regulation 4(1) of the Employment Equity Regulations because it fits contextually within the equal terms and conditions for the same work cause of action and thus passes the test of "contextual fit" as expressed in the case law above which deals with the interpretation of statutes.

5.5 Substantially the same work

The second cause of action in terms of section 6(4) of the EEA is equal terms and conditions for substantially the same work. The Employment Equity Regulations defines this cause of action as follows:

> "the work performed by an employee - … (2) 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."[92]

The phrase "sufficiently similar" is not defined in the Employment Equity Regulations and it is thus not clear what would constitute work that is *sufficiently similar*. It is important for

---

[90] At 1158A-B.

[91] Campanella J "Some Light on Equal Pay" (1991) 12 *ILJ* 26 at 29 has stated that the principle of equal remuneration for equal work was cemented in this case.

[92] Regulation 4(2) of the Employment Equity Regulations.

a claimant to know what would constitute work that is *sufficiently similar* because he/she will have to prove this, failing which, the claim will be dismissed. *Sufficiently* is defined in the dictionary as "enough for a particular purpose"[93] and *similar* is defined as "looking or being almost the same, although not exactly".[94] Landman states that assessing work of a similar nature calls for an accurate comparison of the work done by both the complainant and the comparator. The comparison must not be overly fastidious (overly demanding).[95] The case law does not explain the phrase "sufficiently similar". It is submitted that the dictionary meanings of the words *sufficiently* and *similar* "enough for a particular purpose" and "looking or being almost the same, although not exactly" should be followed for the words *sufficiently* and *similar* as it appears in regulation 4(2) of the Employment Equity Regulations because it fits contextually within the equal terms and conditions for substantially the same cause of action and thus passes the test of "contextual fit" as required by the case law discussed under paragraph 5.4 above.

5.6 Work of equal value

The third cause of action in terms of section 6(4) of the EEA is equal terms and conditions for work of equal value. The Employment Equity Regulations defines this cause of action as follows:

> "the work performed by an employee - … (3) is of the same value as the work of another employee of the same employer in a different job, if their respective occupations are accorded the same value in accordance with regulations 5 to 7."

Proving an equal pay for work of equal value claim has proved to be difficult in South Africa.[96] Before the introduction of section 6(4) to the EEA and the Employment Equity Regulations which sets out the factors for assessing work of equal value, the factors to

---

93 https://www.oxfordlearnersdictionaries.com/definition/english/sufficiently (last accessed on 25/10/2022).

94 https://dictionary.cambridge.org/dictionary/english/similar (last accessed on 25/10/2022).

95 Landman A "The Anatomy of Disputes about Equal Pay for Equal Work" (2002) 14 *SA Merc LJ* 341 at 344. See also *Mangena* at para 6.

96 The ILO has acknowledged the complexity of equal pay for work of equal value by stating that an understanding of what it entails and how it should be applied has proved difficult to grasp (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 iii).

assess work of equal value were developed through the case law. The Labour Court has also stated that it is not an expert in job grading and in the allocation of value to particular occupations in the context of an equal pay for work of equal value claim.[97] It is suggested that this statement by the Labour Court has to date not been addressed by the legislator. It is prudent to deal first with the development of the factors for assessing work of equal value through the case law, whereafter the Employment Equity Regulations (including the Equal Pay Code) relating to work of equal value will be discussed as well as the argument that the legislator has not addressed the concerns of the Labour Court to the effect that it is not an expert in job grading and evaluation.

In *Louw v Golden Arrow Bus Services (Pty) Ltd*[98] the applicant (a black male) employed as a buyer alleged that the respondent committed direct unfair discrimination against him on the ground of race because it paid his comparator, a white male, employed as a warehouse supervisor a higher salary for work of equal value,[99] alternatively, the respondent committed indirect discrimination against him in that the difference in salaries was based on race as a result of the respondent applying 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. 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 it was attributable to non-discriminatory considerations.[100] 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. There was at least one peromnes grade difference between the size of the applicant's work (buyer) and that of the comparator (warehouse supervisor) based on the peromnes system, which was used to determine the rate of remuneration. The

97 *Mangena* at para 15.
98 (2000) 21 *ILJ* 188 (LC).
99 Pieterse M "Towards Comparable Worth? *Louw v Golden Arrow Bus Services*" (2001) 118(11) *SALJ* 9 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.
100 At paras 4-7, 59.

Labour Court 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.[101]

In *Mangena* the applicant (a black male) alleged that the respondent discriminated against him on the ground of race because it paid his comparator (a white female) a higher salary notwithstanding that the work performed by both of them was the same or alternatively of equal value.[102] The Labour Court remarked that the EEA does not specifically regulate equal pay claims as is the position with equality legislation in many other jurisdictions. It further remarked that a claim of equal pay for equal work falls to be determined in terms of the EEA as the Act is broad enough to incorporate a claim of equal pay for work of equal value even though the principle is not mentioned in the EEA.[103] The Labour Court noting that the Equal Remuneration Convention only refers to the prohibited ground of sex, held that the principle of equal pay 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 thus entertain a claim of equal pay for work of equal value under the EEA. The Labour Court noted that it was required 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.[104] The Labour Court found that the applicant failed to adduce evidence regarding the precise functions performed by the comparator and he had an exaggerated view of the nature of the work performed by him. It then rejected the applicant's evidence as to the nature of the work performed by both

---

[101] At paras 26, 105-106, 130, 133. Pieterse M "Towards Comparable Worth? *Louw v Golden Arrow Bus Services*" (2001) 118(11) *SALJ* 9 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.

[102] 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.

[103] McGregor M "Equal Remuneration for the Same Work or Work of Equal Value" (2011) 23(3) *SA Merc LJ* 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.

[104] At para 5.

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 an equal pay for equal work claim was non-existent as the applicant had failed to establish that the work performed by him and the comparator was the same/similar.[105]

The Labour Court then noted that the applicant had not pleaded a claim of equal pay for work of equal value. It remarked that 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 Labour Court remarked that to the extent that the issue of relative value was self-evident, as argued by the applicant, the work which the applicant was engaged in was of considerably less value than that performed by the comparator taking into account, the demands made, levels of responsibility and skills in relation to both jobs. The Labour Court acknowledged that it had no expertise in job grading or in the allocation of relative value to different functions or occupations. It went further and stated that an applicant claiming equal pay 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 the value to be accorded to the respective work. This factual foundation might include evidence of skill, effort, responsibility and the like[106] in relation to the work of both the claimant and the comparator.[107] It concluded that the basis for the applicant's claim of equal pay for work of equal value was non-existent. Both claims of equal pay for equal work and work of equal value were consequently dismissed.[108] The Court correctly stated that it had to interpret the EEA in accordance with international labour law. The claimant in this case, as in other cases, failed to prove that he was doing the same work as his comparator or that the work was of equal value. The Court acknowledged that it did not have expertise in job grading but provided guidance to

[105] At para 14.
[106] This would mean that one could adduce evidence regarding like factors in relation to the work performed.
[107] At para 15.
[108] At paras 15, 17; McGregor M "Equal Remuneration for the Same Work or Work of Equal Value" (2011) 23(3) *SA Merc LJ* 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. Meintjes-Van Der Walt L "Levelling the 'Paying' Fields" (1998) 19 *ILJ* 22 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.

claimants in equal value claims that they must lay a proper factual foundation of their work and that of their comparator which includes evidence of skill, effort, responsibility and the like in order to place the court in a proper position to decide on the value to be accorded to the work in question.

Regulation 6 of the Employment Equity Regulations deals with the assessment of the value of the respective occupations in relation to considering whether work is of equal value. Regulation 6 provides as follows:

> "(1) In considering whether work is of equal value, the relevant jobs must be objectively assessed taking into account the following criteria:
> (a) the responsibility demanded of the work, including responsibility for people, finances and material;
> (b) the skills, qualifications, including prior learning and experience required to perform the work, whether formal or informal;
> (c) physical, mental and emotional effort required to perform the work; and
> (d) to the extent that it is relevant, the conditions under which work is performed, including physical environment, psychological conditions, time when and geographic location where the work is performed.
> (2) In addition to the criteria specified in sub-regulation (1) any other factor indicating the value of the work may be taken into account in evaluating work, provided the employer shows that the factor is relevant to assessing the value of the work.
> (3) The assessment undertaken in terms of sub-regulations (1) and (2) must be conducted in a manner that is free from bias on grounds of race, gender or disability, any other listed ground or any arbitrary ground that is prohibited in terms of section 6(1) of the Act.
> (4) Despite sub-regulations (1) and (2), an employer may justify the value assigned to an employee's work by reference to the classification of a relevant job in terms of a sectoral determination made by the Minister of Labour in terms of section 55 of the Basic Conditions of Employment Act, 1997 (Act No. 75 of 1997) which applies to the employer."

The factors for assessing work of equal value as set out in regulation 6 is a definite improvement of the equal pay legal framework relating to equal pay for work of equal value but the Employment Equity Regulations does not address the Labour Court's concerns in *Mangena* to the effect that it does not have expertise in job grading and evaluation. How is the Commission for Conciliation, Mediation and Arbitration ("CCMA") and the Labour Court expected to evaluate different jobs which are claimed to be of equal value if they do not have the expertise to do so? This problem will obviously not arise in a case where either one or both of the parties present expert job evaluation evidence which the CCMA and Labour Court is then able to analyse and to make a finding thereon. This problem becomes real when there is no expert job evaluation evidence and the Court

is not in a proper position to accord values to the jobs. It has been argued by the author elsewhere that the EEA should be amended to include a provision which will allow the Courts (including the CCMA), like the Employment Tribunal in the United Kingdom, to request a report from an independent expert (job evaluation specialist) on the question of the values of the jobs. It has further been argued that the legal framework for determining an equal pay for work of equal value claim in terms of the EEA will remain inadequate until such a provision is introduced.[109]

6. DOES SECTION 6(4) ONLY APPLY TO LISTED GROUNDS?

This question is posed because section 6(4) in setting out the causes of action states "… based on any one or more of the *grounds listed* in subsection (1), is unfair discrimination". This gives the impression that the three equal pay causes of action can only be brought on the listed grounds. This issue received mention in *Pioneer Foods v Workers Against Regression*[110] wherein the Labour Court commented as follows:

> "Mr Freund argued that s 6(4) appears to apply only in respect of the various grounds listed in section 6(1); i.e. it does not specifically apply to unfair discrimination on "any other arbitrary ground" as referred to at the end of section 6(1). But whether this is correct or not, he accepted, is of little importance, since section 6(1) itself would seem to imply that an employer may not unfairly discriminate in respect of terms and conditions of employment on an unlisted, arbitrary ground."[111]

It is submitted that this comment made by the Labour Court in *Pioneer Foods* is the correct interpretation of the phrase as it accords with the purpose of the Act which is to eliminate unfair discrimination. To hold that the phrase should be interpreted to only refer to the listed grounds would be to adopt the literal method of interpretation and ignore the purposive method of interpretation and the unfair discrimination regime in terms of section 6(1) of the EEA, which permits the proving of unfair discrimination on an arbitrary ground. Adopting the literal method of interpretation to the phrase would mean that an employee would not be able to bring an equal pay claim if he/she relies on an unlisted ground of

---

[109] Ebrahim S "Equal Pay for Work of Equal Value in Terms of the Employment Equity Act 55 of 1998: Lessons from the International Labour Organisation and the United Kingdom" *PER* 2016(19) at 22-23.

[110] 2016 ZALCCT 14.

[111] At para 10.

discrimination in section 6(1). This would render section 6(4) of the EEA internally incoherent with section 6(1) and has to be rejected.

7. IS A COLLECTIVE EQUAL PAY DISPUTE JUSTICIABLE?

In *Famous Brands Management Company v CCMA & Others*[112] the Labour Court had before it an application to review and set aside a ruling by a commissioner of the CCMA that dismissed the employer's (applicant's) point *in limine* on the issue of jurisdiction. The applicant's point *in limine* was that the CCMA did not have jurisdiction to entertain a collective dispute of equal pay for equal work in terms of section 10(6)(aA) of the EEA. It argued that section 10(6)(aA) of the EEA only allows individual disputes to be arbitrated before the CCMA and collective disputes had to be referred to the Labour Court for adjudication and that the reference to "employee" in the section refers to the singular and not the plural.[113]

The Labour Court accepted that the applicant was entitled to pursue a review on a jurisdictional point despite the existence of the recently added section 10(8) of the EEA. It further noted that the Labour Court may not review any ruling made during arbitration proceedings before the issue in dispute has been finally determined but the Labour Court does have the power to deal with a review before the final outcome of arbitration where it is of the opinion that it is just and equitable to do so. The question before the Labour Court was whether the CCMA has jurisdiction to arbitrate a dispute involving unfair discrimination in the form of unequal pay for equal work where more than one complaining employee is involved. The Labour Court assumed that the dispute referred to the CCMA was one contemplated in section 6(4) read together with section 6(1) of the EEA and that the persons involved earned less than the prescribed threshold. The applicant argued that section 10(6)(aA) must be read as it stands, that is, in the singular and not the plural. The Labour Court held that it is not convinced that the EEA requires an interpretation of the singular in section 10(6)(aA) which excludes the plural. It referred to section 6(b) of

[112] [2016] ZALCJHB 290.
[113] At paras 1-2, 4-5.

the Interpretation Act of 1957 which states that in every law, words in the singular number include the plural unless the contrary intention appears. It held that it is not unusual for more than one person to be applicants in an unfair dismissal or unfair labour practice arbitration before the CCMA. The Labour Court held that it was not convinced that more than one person earning below the threshold could not pursue an unfair discrimination claim based on unequal pay for equal work in an arbitration before the CCMA. It dismissed the review application with no order as to costs.[114] The Labour Court correctly rejected the argument that only one employee can refer a dispute relating to unequal pay and correctly interpreted section 10(6)(aA) of the EEA to include more than one employee.

8. THE ONUS PROVISION IN SECTION 11 OF THE EEA

It is prudent to set out the elements of the three equal pay causes of action in order to place the onus provision in context. This will also assist with the headings below which deals with access to pay related information and the grounds of justification. The three causes of action and their elements, having regard to section 6(4) of the EEA and regulation 4(3) of the Employment Equity Regulations, are as follows:

1. In an equal pay claim for the same work a claimant has to prove the following: (a) that the work performed by her is the same (identical or interchangeable); as (b) the work performed by another employee (comparator); of (c) the same employer; (d) but she is paid less because the employer has unfairly discriminated against her within the meaning of section 6(1) of the EEA read with section 11.

2. In an equal pay claim for substantially the same work a claimant has to prove the following: (a) that the work performed by her is substantially the same (the work performed by the employees are sufficiently similar that they can reasonably be considered to be performing the same job even though the work is not identical or interchangeable); as (b) the work performed by another employee (comparator); of (c) the same employer; (d) but she is paid less because the employer has

[114] At paras 7-8, 10-12, 16-17, 20-21 and 25-26.

unfairly discriminated against her within the meaning of section 6(1) of the EEA read with section 11.

3. In an equal pay for work of equal value claim a claimant has to prove the following: (a) that the work performed by her is of equal value (their respective occupations have to be accorded equal value in accordance with the factors for assessing equal value in regulations 5-7); (b) to the work of another employee (comparator); (c) in a different job of the same employer; (d) but she is paid less because the employer has unfairly discriminated against her within the meaning of section 6(1) of the EEA read with section 11. Regulation 5 then goes on to set out the methodology for assessing a claim for equal value as follows: it must be established whether the work concerned is of equal value and whether there is a difference in the terms and conditions of employment, whereafter it must be established whether the difference constitutes unfair discrimination.[115]

Section 11 of the EEA dealing with the onus in discrimination claims has been amended.[116] The old section read as follows:

> "… [w]henever unfair discrimination is alleged in terms of this Act [EEA], the employer against whom the *allegation* is made must establish that it is fair."[117]

The amended section 11 of the EEA 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.

---

[115] Regulation 5(1)-(2) of the Employment Equity Regulations. Regulation 5(1)-(2) of the Employment Equity Regulations states as follows: "When, applying section 6(4) of the Act - (1) it must first be established (a) whether the work concerned is of equal value in accordance with regulation 6; and (b) whether there is a difference in terms and conditions of employment, including remuneration. (2) it must then be established whether any difference in terms of sub-regulation (1)(b) constitutes unfair discrimination, applying the provisions of section 11 of the Act."

[116] Section 11 of the EEA has been amended by section 6 of the Employment Equity Amendment Act 47 of 2013.

[117] Emphasis added. The repealed section 11 of the EEA.

> (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."

Section 11 of the EEA sets out separate onuses relating to listed grounds and arbitrary grounds. With regard to the listed grounds, it states that upon an allegation of unfair discrimination on a listed ground, the employer must prove on a balance of probabilities that the discrimination did not take place or is rational and not unfair, or is otherwise justifiable.[118] Does this mean that a "mere allegation" of unfair discrimination will suffice to shift the onus to the employer?

In *Mangena* the Labour Court held that the Court has made it clear on numerous occasions that it is not sufficient for a claimant to baldly claim that the difference in pay may be ascribed to race. It found that the applicants had failed to prove on a *prima facie* level that the comparators chosen performed the same or similar work and this was needed in to establish a factual foundation to sustain an equal pay for the same/similar work claim.[119] In *Louw* the Labour Court accepted that a mere allegation of (pay) discrimination does not constitute proof of discrimination.[120] It referred to the case of *Ex Parte Minister of Justice: re R v Jacobson & Levy*[121] where the Appellate Division held that *prima facie* evidence means *prima facie* proof of an issue which a party has the onus of proving and if there is no evidence from the other side regarding this issue then the *prima facie* proof becomes conclusive proof and the party who establishes a *prima facie* case would have discharged his/her onus.[122] In *TGWU* the Labour Court held that a bald allegation of (pay) discrimination is not sufficient to shift the onus to the employer.[123] In *Ntai* the Labour Court held that a mere allegation of (pay) discrimination will not be sufficient to establish a *prima facie* case.[124] It is clear from these cases that a *mere allegation* of pay discrimination will not take an equal pay claim anywhere as a claimant

118 Section 11(1)(a)-(b) of the EEA.
119 At paras 6, 14.
120 At para 48.
121 1931 AD 466 at 478.
122 At para 56.
123 At para 4.
124 At para 13.

is at least required to establish a *prima facie* case of pay discrimination which would require an answer from the employer.

Du Toit, however, argues that the word "alleged" in section 11(1) of the EEA must be presumed to mean something less than making out a *prima facie* case as this would be required in the normal course where the burden of proof is not reversed.[125] He further argues, relying on *Kroukam v SA Airlink*,[126] that the employee should produce evidence which is sufficient to raise a credible possibility that unfair discrimination has taken place and this will then call for the employer to prove the contrary.[127] It is submitted that Du Toit's argument will definitely assist an equal pay claimant where the claim is based on a listed ground where such claimant does not have enough information to lay a basis for the claim at a *prima facie* level. It is further submitted that the claimant will then merely have to do more than making a bald allegation and less than establishing a *prima facie* case which according to Du Toit will be the test used in automatically unfair dismissals which is that a claimant must produce sufficient evidence in order to raise a credible possibility that unfair discrimination has taken place. While adopting this approach is at odds with the equal pay cases cited above which at least requires the establishment of a *prima facie* case of discrimination, it is submitted that the approach argued for by Du Toit fits more contextually within section 11(1) of the EEA for the following two reasons: (a) it does not follow the literal meaning to be attached to the phrase *mere allegation* which if followed would lead to employers being required to answer meritless equal pay claims in the absence of the claimant adducing an iota of evidence; and (b) if a *prima facie* case was required by section 11(1) then it could have simply been stated that the claimant must establish a *prima facie* case in order to put the employer on its defence. Based on these arguments, it is submitted that Du Toit's approach should be followed and to this

---

[125] Du Toit D *et al Labour Relations Law: A Comprehensive Guide* 6th ed (LexisNexis 2015) 696.

[126] [2005] 12 BLLR 1172 (LAC).

[127] Du Toit D *et al Labour Relations Law: A Comprehensive Guide* 6th ed (LexisNexis 2015) 696. Basson AC *et al The New Essential Labour Law Handbook* 6th ed (Labour Law Publications CC 2017) state the following at 234 "Put differently, this section [section 11(1) of the EEA] states that whenever unfair discrimination is alleged and established on a listed ground, the employer must prove that it is fair or justified. In other words, the person alleging the discrimination does not have to prove the unfairness. Rather, once discrimination is established the onus is on the employer to prove that the discrimination if fair."

end, section 11(1) only requires an equal pay claimant to produce sufficient evidence in order to raise a credible possibility that unfair pay discrimination has taken place and if she succeeds in doing so then the onus is on the employer to prove its defence on a balance of probabilities as required by section 11(1). It is further submitted that the *sufficient evidence* should be more than the making of a bald allegation and less than establishing a *prima facie* case.

Section 11(1)(b) of the EEA refers to a justification that can be proffered by the employer which is "rational and not unfair, or is otherwise justifiable." Does this phrase add to the grounds of justification in section 6(2) of the EEA? Does rational and not unfair mean something different from the grounds of justification in section 6(2) of the EEA and does "or is otherwise justifiable" create an open-ended ground of justification? Du Toit suggests that an employer can possibly rely on one of the two grounds of justification in section 6(2) of the EEA in terms of section 11(1)(a) and 11(1)(b) of the EEA.[128] It is submitted that Du Toit is correct and it is further submitted based on Du Toit's view that "rational" and "not unfair" and "is otherwise justifiable" referred to in section 11(1)(b) of the EEA does not add to the grounds of justification in section 6(2) of the EEA, neither does the phrase "or is otherwise justifiable" create an open-ended ground of justification as the phrase "rational and not unfair, or is otherwise justifiable" refers to the two grounds of justification in section 6(2) of the EEA. It is, however, argued below under para 10.1 that the grounds of justification in section 6(2) of the EEA are not applicable to equal pay claims. This being the argument, it is then submitted that in equal pay cases section 11(1)(b) of the EEA should be read to refer to the specific grounds of justification to equal pay claims that are listed in regulation 7(1)(a)-(g) of the Employment Equity Regulations. It is not necessary to set out here the grounds of justification contained in regulation 7(1)(a)-(g) of the Employment Equity Regulations as it is dealt with in detail under paragraph 10.2 below.

The submission made that in equal pay cases, section 11(1)(b) of the EEA should be read to refer to the grounds of justification to equal pay claims in regulation 7(1)(a)-(g) of

[128] Du Toit D *et al Labour Relations Law: A Comprehensive Guide* 6th ed (LexisNexis 2015) 697.

the Employment Equity Regulations is buttressed by regulation 7(2)(a)-(b) of the Employment Equity Regulations which provides guidance relating to when a pay difference based on the specific grounds listed therein will be *fair* and *rational* when established *in accordance with the onus provision in section 11 of the EEA*. Regulation 7(2)(a)-(b) of the Employment Equity Regulations states that a difference in pay based on the specific grounds listed in regulation 7(1)(a)-(g) will be fair and rational where it is shown that the application of the specific ground of justification is not biased against an employee or group of employees based on any of the prohibited grounds in section 6(1) and it is applied in a proportionate manner. Regulation 7(2)(a)-(b) of the Employment Equity Regulations resembles proving an absence of indirect discrimination as the proving of indirect discrimination occurs where it is shown that an ostensibly neutral factor adversely affects a disproportionate number of people from a protected group as referred to in *Co-operative Worker Association & Another*.[129] Based on this, it is submitted that an employer who attracts the onus under section 11(1)(b) of the EEA read with regulation 7 of the Employment Equity Regulations also has to prove that the factor which it relies on for the pay differential does not amount to indirect discrimination as referred to in regulation 7(2)(a)-(b) of the Employment Equity Regulations. This then means that insofar as equal pay claims are concerned, section 11 of the EEA must be read with regulation 7(1)(a)-(g) and regulation 7(2)(a)-(b) of the Employment Equity Regulations.

With regard to proving unfair discrimination on an arbitrary ground,[130] section 11(2) of the EEA places the onus on the complainant to prove on a balance of probabilities that the conduct is not rational, it amounts to discrimination, and the discrimination is unfair. The following questions arise from this section: (a) Is the adding of the phrase "arbitrary ground" in section 6(1) as read with section 11(2) of the EEA a third ground on which an unfair discrimination claim can be brought or is it the same as an unlisted ground? (b) Where does the *Harksen* test fit in with regard to proving unfair discrimination on an

---

129 *Co-operative Worker Association & Another v Petroleum Oil and Gas Co-operative of SA* [2007] 1 BLLR 55 (LC).

130 In *Ndudula v Metrorail PRASA* (C1012/2015) [2017] ZALCCT 12 the Labour Court held that the term "arbitrary ground" in section 6(1) of the EEA refers to an unlisted ground and is not a new ground that was added to section 6(1) of the EEA (at para 102).

unlisted ground?[131] and (c) Is the proving of "irrationality" different to proving unfair discrimination?

The issue regarding whether the adding of the phrase "arbitrary ground" in section 6(1) as read with section 11(2) of the EEA is a third ground on which an unfair discrimination can be brought was raised in *Ndudula & 17 Others v Metrorail-Prasa (Western Cape)*[132] wherein the applicants argued that after the amendment to section 6(1) in the form of the addition of "any other arbitrary ground" there are three categories of grounds constituting discrimination and no longer two categories. The grounds are as follows: (a) on a listed ground, (b) on a ground analogous to a listed ground, and (c) on any other arbitrary ground. They further relied on the part of the judgment in *Pioneer Foods* which makes reference to a discussion by Du Toit wherein he states that the reintroduction of arbitrary grounds cannot be understood as merely reiterating the existence of unlisted grounds, which would render it redundant. The respondent argued that section 6(1) only refers to listed and analogous grounds and any other arbitrary ground is not itself a ground but refers to any unlisted grounds analogous to the listed grounds. The respondent further argued that once the applicants rely upon an arbitrary ground which is not a listed ground but an analogous one then they must plead this arbitrary ground. The respondent argued that an arbitrary ground is nothing more than a ground analogous to a listed ground.[133]

After referring to authorities on the approach to interpretation, the Labour Court remarked that the phrase "any other arbitrary ground" when read in isolation lends itself to the possible interpretations as argued for by the applicants and the respondent. It noted that the amended section 11 of the EEA distinguishes between listed and arbitrary grounds in respect of the burden of proof and does not distinguish between listed grounds, analogous grounds and arbitrary grounds. The Labour Court held that this distinction pointed to the legislature dealing with only two categories of grounds. The first category

---

[131] In *Harksen v Lane NO & Others* 1997 (11) BCLR 1489 (CC) at para 53 the Constitutional Court held that the employee must prove that the ground is based on attributes and characteristics that has the ability to impair the fundamental human dignity of people in a comparably serious manner.

[132] [2017] ZALCCT 12.

[133] At paras 28, 32, 37, 40 and 42.

is the listed grounds and all other grounds are arbitrary in nature. It held that if this was not the position then one would have expected the legislature to make provision for the burden of proof in respect of the three categories of grounds. The Labour Court then undertook an extensive analysis of section 9 of the Constitution and the test for unfair discrimination as laid down in *Harksen v Lane*. At the end of this analysis it held that unfair discrimination may occur on a listed or unlisted ground and the common factor is that the differentiation must affect human dignity or must have a similar serious consequence. It further held that when section 6(1) of the EEA is interpreted contextually with the amended section 11(2), "arbitrary ground" refers to an unlisted ground. The Labour Court made reference to *New Way Motor & Diesel Engineering (Pty) Ltd v Marsland*[134] wherein the Labour Appeal Court held that "arbitrary ground" in section 187(1)(f) of the LRA must be considered to have the same meaning as an unlisted ground in section 9(3) of the Constitution and in section 6(1) of the EEA.[135]

The Labour Court held that the conclusion is that the purpose of adding "any other arbitrary ground" to section 6(1) of the EEA was not to create a third category of unfair discrimination and serves no other purpose than being synonymous with "unlisted grounds". It found that the applicants had not relied on a listed or any other arbitrary ground as they had not pleaded any ground upon which the employer allegedly discriminated against them. The Labour Court thus dismissed the application with no order as to costs.[136]

It is submitted that the meaning of "arbitrary ground" has now been settled in *Ndudula's* case. It is further submitted that the Court has correctly found that the reference to arbitrary ground is a reference to an unlisted ground and does not create a third ground on which an unfair discrimination claim can be brought. This answers the first question raised under section 11(2) of the EEA above which reads, is the adding of the phrase "arbitrary ground" in section 6(1) as read with section 11(2) of the EEA a third ground on

[134] [2009] 12 BLLR 1181 (LAC).
[135] At paras 52-73, 76 and 87.
[136] At paras 101-102 and 109-110.

which an unfair discrimination claim can be brought or is it the same as an unlisted ground. The Labour Appeal Court has, however, in *Mdunjeni-Ncula v MEC, Department of Health & Another*[137] remarked *obiter*, that it is arguable that the phrase "any other arbitrary grounds" in section 6(1) of the EEA goes beyond the listed and unlisted (analogous) grounds but the Labour Appeal Court stated that it was not necessary to decide this as the issue was not before it.[138]

It is further submitted based on *Ndudula's* case that a claimant who relies on an arbitrary ground will first have to prove that the ground is objectively 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. This is in accordance with the test for unlisted grounds as laid down in *Harken's* case.[139] Section 11(2) of the EEA must thus be read to require a claimant to prove that the arbitrary ground is based on attributes or characteristics which has the potential to impair his/her dignity or affect him/her in a comparably serious manner. This is the starting pointing, failing which, the claim will be dismissed. This answers the second question raised above under 11(2) of the EEA above which queries where the *Harksen* test fits in with regard to proving unfair discrimination on an unlisted ground.

In *DM Sethole & 18 Others v Dr Kenneth Kaunda District Municipality*[140] the applicants, Environmental Health Practitioners, complained of a remuneration differentiation between them and Pollution Control Officers. At the commencement of the trial the legal representative for the applicants abandoned an earlier legality attack on the posts of Pollution Control Officer and remarked that the applicants were saying that the creation of the posts of Pollution Control Officer and then differentiating between them, constitutes discrimination against the applicants as Environmental Health Practitioners. The Labour Court then informed the legal representative that the discrimination case of the applicants was not properly pleaded and requested him to identify what the unlisted arbitrary ground

137 (PA10/2019) [2021] ZALAC 29.
138 At para 15.
139 *Harksen* at para 43.
140 [2017] ZALCJHB 484.

was that the applicants would rely on in establishing their claim. The legal representative informed the court that he could not provide a definitive answer but the ground would become apparent during evidence. The Labour Court found this to be unsatisfactory but allowed the applicants to proceed in order to see whether this arbitrary ground could eventually emerge. After the applicants testified it was still not clear to the court what the unlisted arbitrary ground was that the applicants were relying on. The respondent applied to the Court for absolution from the instance at the close of the applicant's case on the basis that the applicants had failed to make out a *prima facie* case. The Labour Court then dealt at length with the principles applicable to the consideration of an application for absolution from the instance and the incidence of onus.[141]

The Labour Court then stated that, as the applicants bore the onus in respect of their discrimination claim, it was therefore competent to proceed to decide the absolution from the instance application and more specifically whether the applicants have at least made out a *prima facie* case and whether their evidence can at least lead to a reasonable inference that they had been discriminated against in the context of remuneration disparity. It held that on the evidence as it stood the positions of Pollution Control Officers and Environmental Health Practitioners were not the same, their level, specialty and qualification requirements for the positions were also not the same. It remarked that the difficulty in establishing discrimination was exacerbated by the fact that the applicants failed to, with sufficient particularity, identify and plead what the ground was that they relied upon. It further remarked that the nub of the complaint of the applicants was that they were not happy with the grading of their Environmental Health Practitioner positions as considered against the grading of the Pollution Control Officer positions. It held that the complaint did not make out a case on an arbitrary ground and the case of the applicants was quintessentially a grading dispute which may be an unfair labour practice but certainly not a case of discrimination. The Labour Court granted the application for absolution from the instance and ordered the applicants to pay the respondent's costs.[142] This case assists with the question raised in (a) above under section 11(2) of the EEA in

---

[141] At paras 3, 7-9 and 13-25.

[142] At paras 26, 35, 87, 90 and 96.

that a claimant who relies on an arbitrary ground is obliged to specifically state what that ground is and cannot baldly claim unfair pay discrimination on an arbitrary ground.

In *Leonard Dingler Employee Representative Council v Leonard Dingler (Pty) Ltd*[143] the Labour Court gave important guidance as to when discrimination will be unfair. It held that discrimination will be unfair when it is found to be unacceptable in terms of society's prevailing norms. It further stated that whether society will tolerate the discrimination will depend on what the object of the discrimination is and the means used to achieve it. It remarked that the object of the discrimination must be legitimate and the means used to achieve the object must be *proportional* and *rational*.[144] In *Hoffman v SA Airways*[145] the Constitutional Court held that the decisive factor relating to the unfairness of discrimination is its impact on the person discriminated against. The Constitutional Court mentioned that relevant considerations to take into account to determine the unfairness of the discrimination are: (a) the position of the victim discriminated against in society; (b) the intended purpose sought to be achieved by the discrimination; (c) the extent to which the rights of the victim have been affected; and (d) whether the discrimination has resulted in the impairment of the victims' human dignity.[146] In *Minister of Correctional Services and Others v Duma*[147] the Labour Appeal Court upheld an appeal from the Labour Court which found that the respondent had been unfairly discriminated against in her pay based on the ground of geographical location. It commented on section 11(2) of the EEA and held that the respondent *in casu* was required in terms of the section to show that the conduct amounted to a differentiation on geographical grounds and that this was unfair as read with the principles set out in *Hoffman's* case and that this discrimination was *not rational* and impaired her dignity. Here again the court includes *rationality* under the test for unfair discrimination and does not regard it as the test for unfair discrimination *simpliciter*.[148] It is thus clear that the proving of "irrationality" in section 11(2)(a) of the EEA is not a

143 (1998) *ILJ* 285 (LC).
144 At 295H.
145 2001 (1) SA 1 (CC).
146 At para 27.
147 [2017] ZALAC 78.
148 At paras 11 and 14.

different (new) test to proving unfair discrimination but forms part of the test for unfair discrimination.

It is clear from the above three cases that rationality forms part of the enquiry regarding whether or not the discrimination is unfair and does not constitute a test on its own. In other words, the test for unfair discrimination includes the sub-test of rationality but rationality is not the test for unfair discrimination in and of itself. This answers the third question raised above under 11(2) of the EEA namely whether the proving of "irrationality" is something different to proving unfair discrimination.

The Labour Appeal Court in *Duma's* case also made the following important comment regarding the laying of a proper factual foundation in an equal pay claim:

> "The question with which the court grappled in *Mangena*, *supra*, comes back to haunt this case, namely was there an adequate factual foundation to sustain the claim that the respondent was on a salary notch which was unjustified because of her geographical location. It is this factual foundation which permits a court to examine whether the complainant suffered an assault to her dignity and whether her rights or interests have been unfairly affected."[149]

This case serves as a reminder that a claimant for equal pay has to lay a proper factual foundation for her claim. This is no easy task especially where access to pay related information is limited in terms of the EEA. A claimant will thus have to satisfy the elements of the different claims in line with the onus provision in section 11 of the EEA. In other words, the elements of the equal pay claims must be read together with the onus provision in section 11 of the EEA. This is the route that must be followed.

9. ACCESS TO PAY RELATED INFORMATION

It should be clear based on the above that pay related information is important as this will place a claimant in a position to decide on which cause of action to launch, to choose an appropriate comparator and prove the unfair discrimination relating to pay whether on a listed or arbitrary ground. In other words, without proper information relating to pay an

---

[149] At para 23.

equal pay claim will be a non-starter in the sense that a claimant will not be able prove her equal pay claim.

9.1 The right to access pay related information in terms of the EEA

There is no provision in the EEA, the Employment Equity Regulations or the Equal Pay Code, which affords a claimant the right to obtain information from her employer which is relevant to her claim for equal pay. An individual employee or group of employees will not be able to access the income statement which the employer is obliged to submit in terms of section 27 of the EEA in order to found a claim for equal pay as the Employment Conditions Commission is not allowed to disclose any information pertaining to individual employees or employers.[150] Section 27(6) of the EEA, however, allows parties to the collective bargaining process to request information contained in the statement for purposes of collective bargaining and subject to section 16(4)-(5) of the LRA, which deals with the disclosure of legally privileged information, information that would contravene a law or court order, confidential information and private personal information. It is submitted that this would mean that the information requested in terms of section 27(6) of the EEA will not be admissible as evidence in an equal pay claim as the section limits its application to collective bargaining and this is further buttressed by the purpose of section 27 which is the progressive reduction of pay differentials arising from disproportionate income differentials and/or unfair pay discrimination as contemplated in section 6(4) of the EEA.

Section 78(1)(b) of the BCEA, however, affords employees *the right to discuss* their terms and conditions of employment with each other, their employer or any other person. Section 79(2) of the BCEA guards against the interference of this right by any person, which includes the employer, as follows: (a) an employee who exercises the right to discuss his/her terms and conditions of employment cannot be discriminated against; (b) an employee cannot be required (or threatened) to not exercise the right to discuss his/her terms and conditions of employment; (c) an employee cannot be prevented from

[150] Section 27(5) of the EEA.

exercising the right to discuss his/her terms and conditions of employment (or threatened in that regard); (d) an employee cannot be prejudiced (or threatened in this regard) because of a past, present or anticipated failure to abide by an employer's unlawful requirement that she should not discuss her terms and conditions; and (e) an employee cannot be prejudiced (or threatened in this regard) because of a past, present or anticipated disclosure of information (pay related information) which he/she is lawfully entitled to give to another.[151]

While section 79(2) protects the right to discuss terms and conditions in section 78(1)(b) of the BCEA the discussion depends on whether or not the fellow-employee, employer, or any other person wishes to discuss this as there is no obligation on them to do so. There is also the danger that the discussion can reveal incorrect information which will not assist an employee (equal pay claimant). Furthermore, if, for example a discussion with a fellow employee reveals correct information which is useful for an equal pay claim then this information will only assist the claimant if the fellow employee decides to provide testimony in the arbitration or at court to this effect. Should the fellow employee decide not to testify then the information will merely amount to hearsay evidence which is, as a general rule, inadmissible.[152] The fellow employee could also, if forced to testify, recant the information, in which case, the claimant is no better off than not having used the information provided by the fellow employee. The claimant could use the option of applying for the fellow employee to be declared a hostile witness which, if successful, would allow the claimant to cross examine its own witness (the fellow employee) but this is not an ideal solution as it is volatile and might not yield the intended result.[153]

---

[151] Section 79(2)(a)-(c)(i)-(ii) of the BCEA.

[152] Schmidt CWH & Rademeyer H *Law of Evidence* (loose-leaf) state the following at 18-4: "Hearsay evidence, as has been shown, is excluded in principle because it is normally unreliable and may therefore mislead the court. It is unreliable because the person who witnessed the facts does not, himself, tell the court what he observed. He is not under oath, his demeanour cannot be observed by the court and the truth or accuracy of his allegations cannot be tested by means of cross-examination."

[153] Schmidt CWH & Rademeyer H *Law of Evidence* (loose-leaf) state the following at 9-56: "It has already been mentioned that the questioner confronted by a witness who in court tells a story different from the one he has told previously, can discredit that witness by putting his previous statement to him and if necessary proving it. This procedure does not, however, confer on the questioner the right to cross examine. He acquires this right only if the court declares the witness to be hostile. The mere fact that the witness gives adverse evidence or contradicts his previous statements does not mean that he is a hostile witness. Those factors may certainly contribute to an inference of hostility, but it is important

Notwithstanding the limited application and constraints of section 78(1)(b) of the BCEA it is submitted that the section has the potential to provide an equal pay claimant with some pay related information which she would otherwise not have knowledge of and because of this, reference to the right of employees to discuss their terms and conditions of employment together with the protection of this right should specifically be mentioned in the EEA.

9.2 The right to access information in terms of the Constitution

Section 32 of the Constitution states that everyone has the right to information that is held by the State and information held by another person if such information is required for the exercise or protection of any rights.[154] The section goes on to state that national legislation must be enacted to give effect to this right.[155] To this end, the Promotion of Access to Information Act[156] ("PAIA") was enacted. The constitutional right of access to information is thus not of direct application but forms part of the interpretative method with which to interpret the provisions of PAIA.[157]

9.2.1 The right to access information in terms of the Promotion of Access to Information Act

The long title of PAIA makes it clear that the Act gives effect to the constitutional right to access information as contained in section 32 of the Constitution. The Act regulates access to information held by both public and private bodies. The objects of PAIA are, *inter alia*, to give effect to section 32 of the Constitution which provides for the right of access to any information held by the State and any information that is held by another

also to note the demeanour of the witness and his or her relationship with any of the parties, as well as the circumstances of the case in general. Of course hostility implies an animus against the questioner's side and for that reason the demeanour of the witness and the way in which he answers questions (for example, whether reluctantly or not) play an important role."

154 Section 32(1)(a)-(b) of the Constitution.

155 Section 32(2) of the Constitution.

156 Act 2 of 2000 ("PAIA").

157 Currie I & de Waal J *The Bill of Rights Handbook* 5th ed (Juta 2010) 689.

person provided that it is required for the exercise or protection of a right.[158] The right to access information will be dealt with from the viewpoints of both public and private bodies.[159] It should be noted from the outset that there is nothing in the Protection of Personal Information Act[160] ("POPIA") which restricts access to information in terms of PAIA relating to a record of a public body in terms of section 34(1) read with section 34(2)(f)(iii) of PAIA which relates to information about an individual who is or was an employee of a public body concerning his/her "… classification, salary scale, remuneration and responsibilities of the position held or services performed…" as well as access relating to a record of a private body in terms of section 63(1) read with section 63(2)(f)(iii) of PAIA which relates to information about an individual who is or was an employee of such private body relating to his/her (job) classification, salary scale or remuneration and responsibilities of the position held or services performed by him/her. These sections will further be discussed below. It should also be noted that section 5(a)-(b) of PAIA makes it clear that it applies notwithstanding that there is a provision in other legislation which prohibits or restricts the disclosure of a record of a public or private body and such provision is materially inconsistent with a specific provision or object of PAIA.

9.2.1(a) The right to access information from a public body

A person requesting information from a public body, known as a requester, must be given access to a record of a public body provided that: (a) he/she complies with all the procedural requirements relating to a request for access to that record; and (b) access is not prohibited in terms of any ground of refusal.[161] The procedural requirements that have to be met in order to access a record of a public body is contained in sections 18 and 22

[158] Section 9(a)(i)-(ii) of PAIA.

[159] Section 1 of PAIA defines a "private body" as "… (a) a natural person who carries or has carried on any trade, business or profession, but only in such capacity; (b) a partnership which carries or has carried on any trade, business or profession; or (c) any former or existing juristic person, but excludes a public body". Section 1 of PAIA defines a "public body" as "… (a) any department of state or administration in the national or provincial sphere of government or any municipality in the local sphere of government; or (b) any other functionary or institution when- (i) exercising a power or performing a duty in terms of the Constitution or a provincial constitution; or (ii) exercising a public power or performing a public function in terms of any legislation".

[160] 4 of 2013.

[161] Section 11(1)(a)-(b) of PAIA.

of PAIA and relates to the form of the request and the fees payable, respectively. The mandatory grounds for refusal of access to records of a public body are dealt with in Chapter 4 of Part 2 of PAIA.[162] A requester in relation to a public body is defined to mean *any person* making a request for access to a record of that public body or a person acting on his/her behalf.[163] This definition of a requester is wide, and it is submitted that an employee of the public body from whom access to a record is sought easily falls within the ambit of the definition.[164] It should, however, be noted that a public body as contemplated in paragraphs (a) and (b)(i) of the definition of "public body" in section 1 of PAIA or its official are excluded from the definition of requester in section 1 of PAIA and as such cannot request access to a record of another public body.[165] A record is defined as any information which is recorded irrespective of the form or medium in which it has been recorded and which is in the possession or under the control of the public body regardless of whether or not it was created by the public body.[166]

This means that once a requester meets the procedural requirements in terms of the Act then he/she is entitled to access the record provided that it is not prohibited in terms of the Act. Section 34(1) of PAIA states that the information officer[167] of a public body must

---

162 The mandatory grounds for refusal of access to records of a public body in Chapter 4 of Part 2 of PAIA are as follows: (a) Mandatory protection of privacy of third party who is a natural person – section 34; (b) Mandatory protection of certain records of the South African Revenue Service – section 35; (c) Mandatory protection of commercial information of third party – section 36; (d) Mandatory protection of certain confidential information, and protection of certain other confidential information, of third party – section 37; (e) Mandatory protection of safety of individuals, and protection of property – section 38; (f) Mandatory protection of police dockets in bail proceedings, and protection of law enforcement and legal proceedings – section 39; (g) Mandatory protection of records privileged from production in legal proceedings – section 40; and (h) Mandatory protection of research information of third party, and protection of research information of public body – section 43.

163 Section 1 of PAIA defines a "requester" in relation to a public body as "…(i) any person (other than a public body contemplated in paragraph (a) or (b)(i) of the definition of "public body", or an official thereof) making a request for access to a record of that public body; or (ii) a person acting on behalf of the person referred to in subparagraph (i)".

164 The Guide on how to use the Promotion of Access to Information Act 2 of 2000 as updated and published by the Information Regulator in accordance with section 10(1) of PAIA states the following at 24: "Any person, whether South African or non-South African, is allowed to make a request under PAIA. …"; Robinson RM *Access to Information* (LexisNexis 2016) states the following at 41: "PAIA places no qualification requirements, such as citizenship, on a requester."

165 See the definition of "requester" in relation to a public body in section 1 of PAIA.

166 Section 1 of PAIA which provides a definition for the term "record".

167 Section 1 of PAIA defines "information officer" as "… in relation to, a public body-(a) in the case of a national department, provincial administration or organisational component-(i) mentioned in Column 1 of Schedule 1 or 3 to the Public Service Act, 1994 (Proclamation No. 103 of 1994), means the officer

refuse a request for access to a record if the disclosure of such record would amount to an unreasonable disclosure of personal information about a third party (who is a natural person).[168] Section 1 of PAIA restricts the meaning of a *third party* to any natural person other than the requester for the purpose of section 34 of PAIA. Section 34(2)(f)(iii) of PAIA states that an information officer *cannot* refuse access to a record in terms of section 34(1) insofar as it relates to information about an individual *who is or was* an *official* of a public body (the third party) relating to his/her position or functions, including but not limited to: "… classification, salary scale, remuneration and responsibilities of the position held or services performed by the individual". It is important to note that this information listed in section 34(2)(f)(iii) of PAIA does not present a *numerus clausus* as the section states the following before listing the information "… which relates to the position or functions of the individual, including, but not limited to….". Based on this, it is submitted that other pay related information of an individual not specifically listed under section 34(2)(f)(iii) will fall under the ambit of the section and may similarly not be refused provided that it relates to the position or functions of the individual concerned. An official is defined to include an employee of the public body.[169] This means that the disclosure of pay related information of an employee or former employee in terms of section 34(2)(f)(iii) of PAIA is not regarded as an unreasonable disclosure of personal information as contemplated in section 34(1) of PAIA. It is clear upon a reading of section 34(2)(f)(iii) of PAIA that it refers to the pay related information of a current employee as well as that of a former employee (predecessor comparator) as it refers to "… information about an individual *who is or was* an official of a public body…".

---

who is the incumbent of the post bearing the designation mentioned in Column 2 of the said Schedule 1 or 3 opposite the name of the relevant national department, provincial administration or organisational component or the person who is acting as such; or (ii) not so mentioned, means the Director-General, head, executive director or equivalent officer, respectively, of that national department, provincial administration or organisational component, respectively, or the person who is acting as such (b) in the case of a municipality, means the municipal manager appointed in terms of section 82 of the Local Government: Municipal Structures Act, 1998 (Act No. 117 of 1998), or the person who is acting as such; or (c) in the case of any other public body, means the chief executive officer, or equivalent officer, of that public body or the person who is acting as such".

[168] Section 34(1) of PAIA read with the heading of section 34 of PAIA which reads: "Mandatory protection of privacy of third party who is natural person".

[169] Section 1 defines an "official" as follows: "… (a) any person in the employ (permanently or temporarily and full-time or part-time) of the public or private body, as the case may be, including the head of the body, in his or her capacity as such; or (b) a member of the public or private body, in his or her capacity as such".

A public body is defined as follows: (a) any State department or administration in the national or provincial sphere of government including any municipality in the local sphere of government; or (b) any other institution or functionary when it exercises a power or performs a duty in terms of the Constitution or (c) any other institution or functionary when it performs a public function or exercises a public power in terms of any legislation.[170] Public bodies described in paragraph (a) do not give rise to any difficulty regarding their identification. Examples of public bodies which exercise power in terms of the Constitution contemplated in paragraph (b) include the Human Rights Commission, the Public Protector, the Auditor General, the Commission for Gender Equality and the Broadcasting Authority.[171]

Public bodies contemplated in paragraphs (b) and (c) are, however, not as easy to identify as those contemplated in paragraph (a). Robinson states that records of public bodies contemplated in paragraphs (a) and (b) above will always be treated as records of public bodies. She further states that this is not necessarily the case with public bodies contemplated in paragraph (c) above because this type of body only has the attributes of a public body when it produces a record in the exercise of the public power or performance of a public function and where it produces a record outside of this then it is regarded as a private body in relation to such record.[172] In *M & G Media Ltd & Others v 2010 FIFA World Cup Organising Committee South Africa Ltd & Another*[173] the High Court has provided the following guidance regarding the meaning of a *public power* and a *public function* as referred to when describing public bodies contemplated in (c) above: (i) the exercise of a *public power* means the exercise of a power which concerns all members of the community, which involves or relates to government and which belongs to the community as a whole and is administered through its representatives in government; and (ii) the exercise of a *public function* means the performance of a function which concerns all members of the community, which relates to or involves government and which belongs to the community as a whole and which is administered through its

170 Section 1 of PAIA which defines the term “public body”.
171 Robinson RM *Access to Information* (LexisNexis 2016) 25.
172 Robinson RM *Access to Information* (LexisNexis 2016) 29.
173 2011 (5) SA 163 (GSJ).

representatives in government.[174] It further held that a critical indicator of when a scenario falls within the definition of a public body contemplated in (c) above is whether or not public funds are used in the activities of that body. It held that the fact that the body receives public funds is sufficient in order to constitute its activities as public. It held that when funds are given from the public purse a *public power* is clearly exercised and a *public function* is clearly performed. It provides the following example of when an institutionary or functionary performs a *public function* or exercises a *public power* and where it does not: (i) where a private security company operates a prison and pays for the catering services to feed the prisoners then the catering contract record plainly falls within the ambit of records of a public body – it is clearly performing a public function or exercising a public power; and (ii) where the same private security company provides private security services to its private clients then the company is being paid by its private clients and these records are clearly records of a private body – it is clearly not performing a public function or exercising a public power.[175] Examples of public bodies contemplated in (c) above include the Financial Services Board, the Independent Communications Authority of South Africa, Universities, financial exchanges, Eskom, Transnet and Telkom.[176]

With regard to a public body as defined in (a)-(b) above the records of these public bodies as stated by Robinson will always be regarded as public records and this means that an equal pay claimant employed by such a public body as contemplated in (a)-(b) above will be able to access pay related information of a fellow employee (comparator) or a former employee (predecessor comparator) by complying with the procedural requirements, which in essence, relates to the form of the request and the fees payable.[177] Access to this information cannot be refused as it is not prohibited in terms of any ground of refusal and is specifically listed as one of the records to which access cannot be refused.[178]

[174] At paras 221-222.
[175] At paras 240-241, 253, 258, 260, 262.
[176] Robinson RM *Access to Information* (LexisNexis 2016) 25.
[177] See sections 18 and 22 of PAIA.
[178] Section 34(2)(f)(iii) of PAIA.

With regard to a public body as defined in (c) above the situation is not as clear as that which applies to public bodies contemplated in (a)-(b) above. If the functionary or institution contemplated in (c) above produces a record pursuant to the exercise of a public power or performance of a public function and/or which involves funds from the public purse[179] and which relates to information about an employee (including a former employee) concerning his/her " … classification, salary scale, remuneration and responsibilities of the position held or services performed by the individual" then an equal pay claimant will be able to access this information as a record of a public body[180] by complying with the procedural requirements which in essence relates to the form of the request and the fees payable.[181] Access to this information cannot be refused as it is not prohibited in terms of any ground of refusal[182] and is specifically listed as one of the records to which access cannot be refused.[183] If on the other hand, the functionary or institution contemplated in (c) above produces a record outside the exercise of a public power or performance of a public function and/or which does not involve funds from the public purse and which relates to information about an employee (including a former employee) concerning his/her "… classification, salary scale, remuneration and responsibilities of the position held or services performed by the individual" then the functionary or institution is regarded as a *private body* with regard to such record[184] and an equal pay claimant will not be able to access this record as being that of a public body – it will have to access this record as being that of a private body and will in addition to the requirements required for access to a record of a public body have to prove that the information is required for the exercise or protection of certain rights.[185] Access to this

[179] See *M & G Media Ltd & Others v 2010 FIFA World Cup Organising Committee South Africa Ltd & Another* 2011 (5) SA 163 (GSJ) at paras 240-241, 253, 258, 260, 262.
[180] Robinson RM *Access to Information* (LexisNexis 2016) 29.
[181] See sections 18 and 22 of PAIA.
[182] The grounds for refusal of access to records of a public body are dealt with in Chapter 4 of Part 2 of PAIA.
[183] See section 34(2)(f)(iii) of PAIA.
[184] Robinson RM *Access to Information* (LexisNexis 2016) 29.
[185] Section 50(1)(a)-(c) of PAIA.

information cannot be refused as it is not prohibited in terms of any ground of refusal[186] and is specifically listed as one of the records to which access cannot be refused.[187]

It should be noted that the information which will be sought will not be a direct answer as to why the claimant is being paid less than the potential comparator but it does amount to pay related information which is useful and which the claimant would otherwise not have. This is understandable because PAIA was not enacted to regulate the access to information (records) specifically relevant to equal pay claims. This limitation relating to the information has a substantial impact when it comes to the onus of proving unfair pay discrimination in terms of section 11 of the EEA. The comments made here apply *mutatis mutandis* to the right to access information from a private body discussed below.

9.2.1(b) The right to access information from a private body

A person requesting information from a private body, known as a requester, must be given access to a record of the private body provided that: (a) the record is required for the exercise or protection of any rights; (b) he/she complies with the procedural requirements relating to a request for access to the record; and (c) access to the record is not prohibited in terms of any ground of refusal.[188] A requester in relation to a private body is defined to mean *any person* making a request for access to a record of that private body or a person acting on his/her behalf.[189] This definition of a requester is wide, and it is submitted that an employee of the private body from whom access to a record is sought falls within the ambit of the definition.[190]

---

[186] The grounds for refusal of access to records of a private body are dealt with in Chapter 4 of Part 3 of PAIA.
[187] See section 63(2)(f)(iii) of PAIA.
[188] Section 50(1)(a)-(c) of PAIA.
[189] Section 1 of PAIA defines a "requester" in relation to a private body as "…(i) any person, including, but not limited to, a public body or an official thereof, making a request for access to a record of that private body; or (ii) a person acting on behalf of the person contemplated in subparagraph (i)".
[190] The Guide on how to use the Promotion of Access to Information Act 2 of 2000 as updated and published by the Information Regulator in accordance with section 10(1) of PAIA states the following at 24: "Any person, whether South African or non-South African, is allowed to make a request under **PAIA**. …"; Robinson RM *Access to Information* (LexisNexis 2016) states the following at 41: "PAIA places no qualification requirements, such as citizenship, on a requester."

A private body is defined as follows: (a) a natural person who carries on (or has carried on) any business, trade or profession; (b) a partnership which carries on (or has carried on) any business, trade or profession; or (c) any juristic person (including a former juristic person).[191] The head of a private body is defined as follows: (a) where the private body is a natural person, that natural person is the head or any person duly authorised by him/her; (b) where the private body is a partnership, the head is any partner of the partnership or any person duly authorised by the partnership; (c) where the private body is a juristic person, the head is the chief executive officer (or equivalent officer) thereof (including those acting in these positions) or any person duly authorised by such officers; or (d) where the private body is a political party, the head thereof is the leader of such party or a person duly authorised by the leader.[192] A record is defined as any information which is recorded irrespective of the form or medium in which it has been recorded and which is in the possession or under the control of the private body regardless of whether or not it was created by the private body.[193] The procedural requirements relates to the form of the request and the fees payable.[194] The mandatory grounds for refusal of access to records of a private body are dealt with in Chapter 4 of Part 3 of PAIA.[195]

Besides satisfying the procedural requirements for access to a record and provided that it is not prohibited in terms of the Act, there is an additional requirement that the requester must show that the record is required for the exercise or protection of a right.[196] It should be noted that this requirement is absent from the requirements to access information from a public body. In *Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC*[197] the Supreme Court of Appeal held that information can only be required for the

---

191 Section 1 of PAIA which defines the term "private body".
192 Section 1(a)-(d) of PAIA.
193 Section 1 of PAIA which defines the term "record".
194 See sections 53 and 54 of PAIA.
195 The mandatory grounds for refusal of access to records of a private body in Chapter 4 of Part 3 of PAIA are as follows: (a) Mandatory protection of privacy of third party who is a natural person – section 63; (b) Mandatory protection of commercial information of third party – section 64; (c) Mandatory protection of certain confidential information of third party – section 65; (d) Mandatory protection of safety of individuals, and protection of property – section 66; (e) Mandatory protection of records privileged from production in legal proceedings – section 67; (f) Mandatory protection of research information of third party, and protection of research information of private body – section 69.
196 Section 50(1)(a) of PAIA.
197 2001 (3) SA 1013 (SCA).

exercise or protection of a right if that information is sought for the furtherance of the exercise or protection of the right. It further held that a requester has to make out a case for access to information by stating the right which he/she wishes to exercise or protect as well as the information that is required and how this information will assist in the furtherance of the exercise or protection of the right.[198] In *Company Secretary, ArcelorMittal South Africa Ltd v Vaal Environmental Justice Alliance*[199] the Supreme Court of Appeal held that:

> "Information sought by parties contemplating litigation to vindicate asserted rights is conventionally sought in order for it to be useful in that litigation, or, to put it in constitutional and statutory terms, the information is 'required for the exercise or protection of any rights'."[200]

In *M & G Media Ltd & Others v 2010 FIFA World Cup Organising Committee South Africa Ltd & Another*[201] the High Court stated that the degree of connection between the information requested and the protection and enforcement of rights should not be set too high as this will defeat the purpose of PAIA.[202] Based on the above, a claimant would thus have to show that the right which he/she wishes to protect is the right to equal pay in terms of section 6(4) of the EEA and the information that would be required is the pay related information of an identified current or former employee and this information will assist him or her in the sense that depending on what the information reveals the claimant will either pursue an equal pay claim in terms of section 6(4) of the EEA or choose not to do so as its suspicions regarding possible infringement of his/her equal pay rights would have been allayed by the information provided.

It should be noted that the head of a private body must refuse access to a record if its disclosure will amount to an unreasonable disclosure of personal information about a third party (who is a natural person).[203] Section 1 of PAIA restricts the meaning of a *third party* to any natural person other than the requester for the purpose of section 63 of PAIA.

[198] At para 28.
[199] 2015 (1) SA 515 (SCA).
[200] At para 59.
[201] 2011 (5) SA 163 (GSJ).
[202] At para 354.
[203] Section 63(1) of PAIA read with the heading of section 63 of PAIA which reads: "Mandatory protection of privacy of third party who is natural person".

Section 63(2)(f)(iii) of PAIA states that a record consisting of information about an individual *who is or was* an *official* of a private body relating to his/her position or functions *including but not limited to* the classification, salary scale or remuneration and responsibilities of the position held or services performed by him/her *may not* be refused.[204] It is important to note that this information listed in section 63(2)(f)(iii) of PAIA does not present a *numerus clausus* as the section states the following before listing the information "… which relates to the position or functions of the individual, including, but not limited to….". Based on this, it is submitted that other pay related information of an individual not specifically listed under section 63(2)(f)(iii) will fall under the ambit of the section and may similarly not be refused provided that it relates to the position or functions of the individual concerned. An official is defined to include an employee.[205]

This means that the disclosure of pay related information of an employee or former employee in terms of section 63(2)(f)(iii) of PAIA is not regarded as an unreasonable disclosure of personal information as contemplated in section 63(1) of PAIA. It is clear upon a reading of section 63(2)(f)(iii) of PAIA that it refers to the pay related information of a current employee as well as that of a former employee (predecessor comparator) as it refers to "… information about an individual *who is or was* an official of a public body…". This would mean that an equal pay claimant should be able to obtain the pay related information of a potential comparator (current or predecessor) from her employer provided that she satisfies the requirements in terms of the Act.

Neither the EEA, the Equal Pay Code or the Employment Equity Regulations refers to PAIA and that it may be used to obtain pay related information of a fellow current or predecessor employee. It would thus be unreasonable to assume that a claimant would be aware of this. This impacts on the right to equal pay negatively as the equal pay legal framework in the form of the EEA, the Equal Pay Code and the Employment Equity Regulations sets out the causes of action and the defences thereto, *inter alia*, but fails to explain how claimants should go about obtaining pay related information which would

---

204 Sections 63(1) and 63(2)(f)(iii) of PAIA.
205 See the definition of "official" in section 1 of PAIA.

place them in a proper position to decide whether or not to institute an equal pay claim. If a claimant is not aware of PAIA and how to go about obtaining pay related information then he/she might institute an equal pay claim without being able to lay a proper basis for the claim and the claim will then fall to be dismissed. The equal pay legal framework is thus deficient in this material respect, and it is submitted that the right to access pay related information in terms of PAIA as analysed above should be contained and referred to in the EEA in order to address such deficiency.

9.2.1(c) Process to follow where access to a record of a public or private body is refused

The process to follow where access to a record is refused by the information officer of a public body as defined in paragraph (a), section 1 of the definition of "public body" in PAIA (which refers to any state department or administration in the national or provincial sphere of government including any municipality in the local sphere of government) *is different* to the process to follow where access to a record is refused by the information officer of a public body as defined in paragraph (b)(i)-(ii), section 1 of the definition of "public body" in PAIA (which refers to any other institution or functionary when it exercises a power or performs a duty in terms of the Constitution or any other institution or functionary when it performs a public function or exercises a public power in terms of any legislation) and where access to a record is refused by the head of a private body. It is prudent to deal first with the process to follow where access to a record is refused by the information officer of a public body as defined in paragraph (a), section 1 of the definition of a "public body" followed by the process to follow where a record is refused by the information officer of a public body defined in paragraph (b)(i)-(ii), section 1 of the definition of a "public body" and where a record is refused by the head of a private body.

A requester may lodge an *internal appeal* with the relevant authority against a decision of the information officer to refuse access to a record of a public body as defined in paragraph (a) of section 1 of the definition of "public body". Such information officer must within 10 working days after receipt of the internal appeal submit the appeal together with his/her reasons for refusing access to the record to the relevant authority. The relevant

authority is defined in section 1 of PAIA as follows: (a) the relevant authority in the case of a public body in the national sphere of government is as follows: (i) the person designated in writing by the President in relation to the Office of the Presidency; (ii) in any other case, the Minister responsible for that public body or any other person who he/she designates in writing; (b) the relevant authority in the case of a public body in the provincial sphere of government is as follows: (i) the person designated in writing by the Premier in relation to the Office of the Premier; (ii) the MEC responsible for that public body or any person who he/she designates in writing; and (c) the relevant authority in the case of a public body in relation to a municipality in the local sphere of government is as follows: (i) the mayor; (ii) the speaker; or (iii) any other person who is designated in writing by the Municipal Council of that Municipality.[206]

A relevant authority when deciding an appeal may confirm the decision appealed against or substitute a new decision for it. The relevant authority must decide an internal appeal within 30 days after it has been received by the information officer. It must immediately after the decision on an internal appeal give notice of such decision to the appellant (requester). The notice given by the relevant authority must state adequate reasons for the decision reached and it must make reference to the provision/s of the Act (PAIA) which it relied on.[207] Section 77(5)(c)(i) of PAIA states that the notice given to the appellant (requester) must inform the appellant that he/she may lodge an application with a *court* against the decision within 180 days after notice is given. It is submitted that the notice must in addition to this inform the appellant that he/she also has the option of submitting a claim to the Information Regulator against the decision, as contemplated in section 77A(1)-(2)(a) of PAIA, within 180 days of the decision. If the relevant authority decides to grant access to the record in question then access to the record must be given forthwith by the information officer. In the event that the relevant authority does not give notice of its decision on the internal appeal within 30 days after the internal appeal is

---

[206] Sections 74(1)(a), 75(4)(a) and the definition of "relevant authority" in section 1 of PAIA.
[207] Sections 77(2), 77(3)(a), 77(4)(a)(i), 77(5)(a) of PAIA.

received by the information officer then the relevant authority is regarded as having dismissed the internal appeal.[208]

An appellant who has been unsuccessful, in an internal appeal against the decision of the information officer to refuse her access to a record of a public body, before the relevant authority of a public body as defined in paragraph (a) of section 1 of the definition of "public body" has the following options: (a) She may either lodge an application with a *court* against the decision of the relevant authority for appropriate relief or may submit a complaint to the Information Regulator against the decision of the relevant authority as contemplated in section 77A(1)-(2)(a) of PAIA for appropriate relief;[209] (b) If she decides to submit a complaint to the Information Regulator against the decision of the relevant authority as contemplated in section 77A(1)-(2)(a) of PAIA and is unsuccessful before the Information Regulator then she may still challenge the decision of the Information Regulator before a court;[210] (c) If she decides not to use the option of submitting a complaint to the Information Regulator challenging the decision of the relevant authority and directly proceeds to challenge such decision before a court then she loses the option of referring the matter to the Information Regulator if the court does not find in her favour as the decision of the court cannot be challenged before the Information Regulator but the decision of the Information Regulator can be challenged before a court.[211] It is apposite to note that the requester is barred from approaching the Information Regulator and/or a court unless she has exhausted the internal appeal process and may only approach them after she has done so.[212] She may thus not bypass the internal process.

---

208 Sections 77(5)(d)(i), 77(6), 77(7) of PAIA.

209 Section 78(1)(a) read with section 78(2)(a) of PAIA; section 77A(1) read with section 77A(2)(a) of PAIA. The Guide on How to use the Promotion of Access to Information Act 2 of 2000, as amended (Information Regulator (South Africa)) states the following at para 24.1.2, page 52: "… Whilst one is not compelled to approach the [Information] Regulator before approaching the Court, it is advisable that one should consider approaching the Regulator, as the Regulator has extensive and quick dispute resolution mechanisms, as opposed to the Court."

210 Section 78(1)(b) read with section 78(2)(e) of PAIA.

211 See section 77A(2)(a)-(d) of PAIA that lists the decisions that can be challenged before the Information Regulator and which does not include challenging the decision of a court and section 78(2)(e) of PAIA which specifically allows a requester to challenge the decision of the Information Regulator before a court.

212 Sections 77A(1), 78(1)(a) of PAIA.

There is no internal appeal against a refusal of a record by the information officer of a public body as defined in paragraph (b)(i)-(ii) of section 1 of the definition of "public body" (which refers to any other institution or functionary when it exercises a power or performs a duty in terms of the Constitution or any other institution or functionary when it performs a public function or exercises a public power in terms of any legislation). There is similarly no internal appeal against a refusal of a record by the head of a private body.[213] Where access to a record is refused by the information officer of a public body as defined in paragraph (b)(i)-(ii) of section 1 of the definition of "public body" in PAIA and where access to a record is refused by the head of a private body the requester has the following options available to her: (a) She may either lodge an application with a *court* against the decision of the information officer or the decision of the head of a private body for appropriate relief or may submit a complaint to the Information Regulator against such decisions for appropriate relief;[214] (b) If she decides to submit a complaint to the Information Regulator against the decision of an information officer of a public body as defined in paragraph (b)(i)-(ii) of section 1 of the definition of "public body" or the decision of the head of a private body as contemplated in section 77A(2) of PAIA[215] and is unsuccessful before the Information Regulator then she may still challenge the decision of the Information Regulator before a court;[216] (c) If she decides not to use the option of submitting a complaint to the Information Regulator challenging the decision of the information officer or the head of a private body and directly proceeds to challenge such decision before a court then she loses the option of referring the matter to the Information Regulator if the

---

[213] See section 77A(2)(c)(i) read with section 77A(2)(d)(i) of PAIA and section 78(2)(c)(i) read with section 78(2)(d)(i) of PAIA which requires an internal appeal against a decision of the information officer of a public body as defined in para (a) of section 1 of the definition of "public body" in PAIA to be exhausted before such decision can be challenged before the Information Regulator or a Court but it allows a requester to challenge a decision by the information officer of a public body as defined in para (b)(i)-(ii) of section 1 of the definition of "public body" in PAIA as well as the decision of the head of a private body before the Information Regulator or a Court without mentioning the exhausting of internal processes because there are none.

[214] Sections 77A(2)(c)(i), 77A(2)(d)(i), 78(2)(c)(i), 78(2)(d)(i) of PAIA. The Guide on How to use the Promotion of Access to Information Act 2 of 2000, as amended (Information Regulator (South Africa)) states the following at para 24.1.2, page 52: "… Whilst one is not compelled to approach the [Information] Regulator before approaching the Court, it is advisable that one should consider approaching the Regulator, as the Regulator has extensive and quick dispute resolution mechanisms, as opposed to the Court."

[215] Section 77A(2)(c)(i), section 77A(2)(d)(i) of PAIA.

[216] Section 78(2)(e) of PAIA.

court does not find in her favour as the decision of the court cannot be challenged before the Information Regulator but the decision of the Information Regulator can be challenged before a court.[217]

9.2.1(c)(i) Submitting a complaint to the Information Regulator

A requester who is aggrieved by the following may submit a complaint before the Information Regulator for appropriate relief: (a) an unsuccessful internal appeal to the relevant authority of a public body in terms of paragraph (a) of the definition of a "public body"; (b) a refusal to grant access to a record by an information officer of a public body contemplated in paragraph (b) of the definition of a "public body"; or (c) a refusal to grant access to a record of a private body by the head of a private body.[218] The complaint to the Information Regulator must be in writing and, to this end where necessary, the Information Regulator must give a requester reasonable assistance to enable her to put such complaint in writing.[219] The Information Regulator must do either of the following after receiving a complaint: (a) investigate the complaint; (b) refer the complaint to the Enforcement Committee (established in terms of section 50 of POPIA); (c) decide to take no action with regard to the complaint as contemplated in section 77D of PAIA. The Information Regulator must within a reasonable period after receiving the complaint, advise the complainant and the information officer or head of a private body (the parties) of which action referred to above it intends to take.[220] The Information Regulator may also, without investigating the complaint, use its best endeavours to secure a settlement of the complaint if it appears from the complaint that such settlement between the parties is possible.[221]

[217] See section 77A(2)(a)-(d) of PAIA that lists the decisions that can be challenged before the Information Regulator and which does not include challenging the decision of a court and section 78(2)(e) of PAIA which specifically allows a requester to challenge the decision of the Information Regulator before a court.

[218] Sections 77A(2)(a), 77A(2)(c)(i), 77A(2)(d)(i) of PAIA.

[219] Section 77B(1)-(2) of PAIA.

[220] Sections 77C(1)(a)-(c), 77(3) read with section 77D(1) of PAIA.

[221] Section 77F of PAIA.

Before the Information Regulator proceeds to investigate a complaint, it must besides informing the parties of its intention to do so, inform the information officer of the public body or the head of the private body, whichever is applicable, of the details of the complaint and its right to submit a written response to such complaint within a reasonable period. The Information Regulator may also, without investigating the complaint, use its best endeavours to secure a settlement of the complaint if it appears from the written response to such complaint referred to above that such settlement between the parties is possible.[222] The Information Regulator may for the purpose of investigating a complaint summon persons before it and compel them to give *viva voce* or written evidence and/or compel them to produce any record/s it considers relevant (*subpoena duces tecum*).[223] The Information Regulator may for the purpose of investigation serve the information officer of a public body or head of a private body as the case might be with an information notice requesting such party to provide it with the information specified in the notice within the time period mentioned. Such information notice must be accompanied by the reasons for the issuing of the notice and the right to appeal such notice in terms of section 78(2)(e) of PAIA.[224] The Information Regulator has the following similar powers (and limitations thereof) to that of a court in terms of section 80 of PAIA when it is seized with a complaint submitted to it regarding access to a record: (a) it may examine any record of a public or private body and such record cannot be withheld from it; and (b) it may not disclose a record of a public or private body in circumstances where access to such record must be refused in terms of PAIA.[225]

Where the Information Regulator has decided to refer the complaint to the Enforcement Committee then it may, after considering the recommendation of the Enforcement Committee, serve the information officer of a public body or the head of a private body with an enforcement notice which may contain the following: (a) confirming the decision which is the subject matter of the complaint; (b) amending the decision which is the subject matter of the complaint; (c) setting aside the decision which is the subject matter

[222] Sections 77E(a)-(b), 77F of PAIA.
[223] Section 77G(2) of PAIA read with section 81 of POPIA.
[224] Section 77I(1)-(2) read with sections 78(4) and 78(2)(e) of PAIA.
[225] Section 77G(1) read with sections 80(1), 80(2)(a) of PAIA.

of the complaint; (d) requiring the relevant information officer or head of a private body to take such action as stated in the enforcement notice; or (e) requiring the relevant information officer or head of a private body to refrain from taking such action as stated in the enforcement notice. Such enforcement notice must be accompanied by the reasons for the issuing of the notice and the right to appeal such notice in terms of section 78(2)(e) of PAIA.[226] If an information officer of a public body or the head of a private body refuses to comply with an enforcement notice then he/she is guilty of an offence and is liable, upon conviction, to a fine and/or imprisonment (not exceeding three years).[227]

The Information Regulator may also decide to take no action with regard to the complaint if it is of the view that: (a) the complaint has not been submitted within the prescribed period and condonation thereof cannot succeed for lack of reasonable grounds; (b) the complaint is vexatious, frivolous or is not made in good faith; or (c) having regard to all the circumstances of the case further action is not appropriate or is unnecessary. The Information Regulator must inform the complainant of such a decision and the reasons upon which it is based.[228]

9.2.1(c)(ii) Lodging an application before a Court

A requester who is aggrieved by the following may by way of application apply to court for appropriate relief: (a) an unsuccessful internal appeal to the relevant authority of a public body in terms of paragraph (a) of the definition of a “public body”; (b) a refusal to grant access to a record by an information officer of a public body contemplated in paragraph (b) of the definition of a “public body”; (c) a refusal to grant access to a record of a private body by the head of a private body; or (d) aggrieved by any decision of the Information Regulator (which will include a refusal to grant access to a record). A court hearing an application regarding refusal of access to a record may examine any record of a public or private body and no such record may be withheld from the court. A court is

---

226 Section 77J(1)-(2) of PAIA read with section 78(2)(e) of PAIA.
227 Section 77K of PAIA.
228 Section 77D(1)-(2) of PAIA.

not allowed to disclose any record of a public or private body where such disclosure must be refused in terms of PAIA. It is important to note that the burden of establishing that the refusal of a request for access to a record complies with PAIA is on the party claiming that the refusal to grant access complies with PAIA.[229]

A court hearing an application against the refusal of access to a public or private record may make any order that is just and equitable including the following orders: (a) confirming the decision which is the subject of the application; (b) amending the decision which is the subject of the application; (c) setting aside the decision which is the subject of the application; (d) ordering the information officer or relevant authority or head of a private body, as the case might be, to take action or refrain from taking action as the court considers necessary within a specified period; (e) granting an interdict; (f) granting interim relief; (g) granting specific relief; (h) granting a declaratory order; (i) granting compensation; and (j) making an order as to costs.[230] It is important to note that any person who does the following with the intention to deny a requestor the right to access a record commits an offence and is liable on conviction of such offence to a fine or imprisonment for a period not in excess of two years: (a) destroys a record; (b) damages a record; (c) alters a record; (d) conceals a record; (e) falsifies a record; or (f) makes a false record.[231]

A court which may entertain an application against the refusal of access to a record is defined in section 1 of PAIA to refer to the following courts: (a) the Constitutional Court where it sits as a court of first instance; (b) a High Court or court of similar status; and (c) a district magistrates court and a regional magistrates court established for the purpose of adjudicating civil disputes. A High Court, court of similar status to a High Court, a civil district magistrates court and a civil regional magistrates court will have jurisdiction to entertain an application in terms of PAIA provided that any of the following is present: (a) the decision by the information officer, relevant authority or head of a private body to

[229] Sections 78(2)(a), 78(2)(c)(i), 78(2)(d)(i), 78(2)(e) of PAIA, the definition of "private body" in section 1 of PAIA, section 80(1), section 80(2)(a), section 81(3)(a) of PAIA.
[230] Section 82(a)-(d) of PAIA.
[231] Section 90(1)(a)-(c) of PAIA.

refuse access to a record was taken within the area of the relevant court's jurisdiction; or (b) the public or private body has its principal place of administration or business within the area of the relevant court's jurisdiction; or (c) the requester is domiciled or ordinarily resident within the area of the relevant court's jurisdiction.[232] It is axiomatic that the inclusion of civil district and regional magistrates courts under the definition of "court" in section 1 of PAIA allows an employee the less costly option of lodging an application in these courts against the refusal of access to a record as opposed to the more costlier option of approaching the High Court.

It is also important to know which court/s will qualify as *a court of similar status* to a High Court before which an employee may bring an application to challenge the refusal to grant him/her access to a record as discussed above. Section 151(2) of the LRA provides that the Labour Court is a superior court which has the standing, inherent powers and authority equal to that of a division of the High Court concerning matters under its jurisdiction.[233] Based on this, it is submitted that the Labour Court is a court of similar status to a High Court as contemplated in section 1 of the definition of "court" in PAIA. It is thus submitted that an equal pay claimant who wishes to challenge a decision to refuse her access to a record of a comparator in term of sections 34(2)(f)(iii) or 63(2)(f)(iii) of PAIA (access to pay related information) will be able to approach the Labour Court for appropriate relief because it is a court which has *similar status* to a High Court. It is further submitted that this should specifically be mentioned in the EEA in order to make it clear that an employee, challenging a decision to refuse her access to pay related information as regulated in terms of PAIA, may approach the Labour Court for appropriate relief.

It should be noted that an equal pay claimant does not have the option of approaching the CCMA or relevant Bargaining Councils in order to challenge a decision to refuse her

[232] The definition of "court" in section 1 of PAIA.

[233] Section 151(2) of the LRA. The Department of Justice and Constitutional Development of the Republic of South Africa website states the following: "The Labour Courts have the same status as a High Court. They adjudicate matters relating to labour disputes between an employer and employee. It is mainly guided by the Labour Relations Act which deals with matters such as unfair labour practices" (https://www.justice.gov.za/about/sa-courts.html#:~:text=Labour%20Courts%20and%20Labour%20Appeal,such%20as%20unfair%20labour%20practices (last accessed on 25/10/2022).

access to pay related information in terms of PAIA because no provision is made therefore. This is not surprising as PAIA was not enacted to provide specific pay related information in an equal pay matrix. The CCMA and Bargaining Councils can furthermore not fall under the umbrella of being a *court of similar status to a High Court*.[234]

It is submitted that the process to follow where access to a record of a public body or a private body is refused, as analysed in paragraphs 9.2.1(c), 9.2.1(c)(i) and 9.2.1(c)(ii) above, should be mentioned in the EEA as it will assist an employee who wishes to further challenge a refusal to grant her access to the pay related information of a comparator in terms of sections 34(2)(f)(iii) or 63(2)(f)(iii) of PAIA.

10. GROUNDS OF JUSTIFICATION

10.1 The applicability of section 6(2) of the EEA to equal pay claims

Section 6(2) of the EEA sets out the grounds of justification to a claim of unfair discrimination as follows:

> "(2) It is not unfair discrimination to—
>
> (a) take affirmative action measures consistent with the purpose of this Act; or
>
> (b) distinguish, exclude or prefer any person on the basis of an inherent requirement of a job."

These grounds of justification are not mentioned in the Employment Equity Regulations or the Equal Pay Code. The Employment Equity Regulations and the Equal Pay Code set out the following 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

[234] In *Fredericks and Others v MEC for Education and Training, Eastern Cape and Others* 2002 (2) BCLR 113 (CC) the Constitutional Court held the following at paras 30 and 31: " … It is quite clear from the provisions of the Labour Relations Act that the CCMA is not a court, and, in particular, not a court of equivalent jurisdiction to the High Court." (para 30); "… the CCMA is not a "court of a status similar to a High Court". (para 31).

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.[235] The question which arises is whether the grounds of justification in terms of section 6(2) of the EEA apply to claims for equal pay in terms of section 6(4) of the EEA. The issue of the applicability of the grounds of justification in section 6(2) of the EEA to equal pay claims has not properly been dealt with by the Courts, except for the *obiter* remarks in *Ntai & Others v SA Breweries Ltd*,[236] but has received attention in academic writings.

In *Ntai & Others v SA Breweries Ltd*[237] the Labour Court dealing with an equal pay claim remarked *obiter*, that the respondent did not have a legal duty to apply affirmative action measures to increase the salaries of the applicants. The Labour Court stated that the application of an affirmative action measure does not constitute a right which an employee can utilise but is a defence which can be relied upon by an employer.[238] It is clear from the *obiter* remarks made, that the Labour Court regarded affirmative action as a possible ground of justification to an equal pay claim. Meintjes-Van der Walt has suggested that a pay differential in the context of pay discrimination should not be justified on the ground of affirmative action as there are better ways in which an affirmative action plan can be used to address past inequalities without causing new differentials.[239] Landman has suggested that affirmative action is a suitable ground of justification to an equal pay claim. He has further suggested that when affirmative action is applied in the context of equal pay claims, it may be that designated employees are paid more than able-bodied white males who are the only persons who do not fall within a designated group. He states that whether an employer may fairly discriminate within the designated groups by applying affirmative action measures (paying persons from one designated group more than persons from another designated group), the so-called degrees of disadvantage, is a

---

235 Regulation 7(1)(a)-(g) of the Employment Equity Regulations. This list of factors is repeated in item 7.3.1-7.3.7 of the Equal Pay Code.
236 (2001) 22 *ILJ* 214 (LC).
237 (2001) 22 *ILJ* 214 (LC).
238 At paras 85-86.
239 Meintjes-Van Der Walt L "Levelling the 'Paying' Fields" (1998) 19 *ILJ* 22 at 30.

vexed question. Landman has suggested that the justification to equal pay claims on the ground of the inherent requirements of the job is possible in theory.[240]

Du Toit *et al* have suggested that it is difficult to imagine circumstances where affirmative action and the inherent requirements of the job could operate as grounds of justification to pay discrimination between employees performing work of equal value.[241] Cohen has stated that affirmative action and the inherent requirements of the job do not apply directly to pay discrimination.[242] Pieterse has suggested that pay equity legislation must include specific grounds of justification to pay equity claims and it will be beneficial if the legislation specifies the interface between the pay equity principles and affirmative action structures.[243] Hlongwane has stated that the EEA does not expressly provide for defences to pay discrimination and it is difficult to reconcile how either the defence of affirmative action or the inherent requirements of the job could justify pay discrimination.[244]

It has been argued by the author elsewhere that affirmative action and the inherent requirements of the job are not suitable grounds of justification to equal pay claims because paying a designated employee more than their non-designated counterpart does not fall within the ambit of an affirmative action measure. It has further been argued by the author, with regard to the inherent requirements of the job, that an employer will not be able to successfully rely on it as a ground of justification in an equal pay claim for the *same work* because both the employees would comply with the inherent requirements of

---

[240] Landman A "The Anatomy of Disputes about Equal Pay for Equal Work" (2002) 14 *SA Merc LJ* 341 at 353.

[241] Du Toit D *et al Labour Relations Law: A Comprehensive Guide* 5th ed (LexisNexis Durban 2006) 617; Du Toit D *et al Labour Relations Law: A Comprehensive Guide* 6th ed (LexisNexis Durban 2015) at 707 where the following is stated: ''Justification of alleged pay discrimination in terms of either of the two statutory defences is practically ruled out''.

[242] Cohen T "Justifiable Discrimination – Time to Set the Parameters" (2000) 12 *SA Merc LJ* 255 at 260-261.

[243] Pieterse M "Towards Comparable Worth? *Louw v Golden Arrow Bus Services*" (2001) 118(11) *SALJ* 9 at 17.

[244] Hlongwane N "Commentary on South Africa's Position regarding Equal Pay for Work of Equal Value" (2007) 11(1) *LDD* 69 at 78. Ebrahim S "Reviewing the Suitability of Affirmative Action and the Inherent Requirements of the Job as Grounds of Justification to Equal Pay Claims in Terms Of the *Employment Equity Act* 55 of 1998" *PER* 2018(21) states the following at 25 under footnote 108: "It is axiomatic that affirmative action cannot apply as a ground of justification to all the grounds referred to in s 6(1) of the EEA with reference to equal remuneration claims. Affirmative action applies as a ground of justification only where the discrimination is based on sex, gender and/or race".

the job and in a claim for *work of equal value* different job requirements are envisaged by the concept equal value and the two jobs under comparison would of necessity be different. It has lastly been argued by the author that it is important to mention by way of an amendment to section 6 of the EEA that affirmative action and the inherent requirements of the job do not apply to equal pay claims.[245]

10.2 The grounds of justification in the Employment Equity Regulations

Regulation 7 of the Employment Equity Regulations sets out the grounds of justification to a difference in terms and conditions of employment as follows:

> "(1) 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 or potential above the minimum acceptable levels required for the performance of the job;
> (c) the individuals' respective performance, quantity or quality of work, provided that employees are equally subject to the employer's performance evaluation system, that the performance evaluation system is consistently applied;
> (d) where an employee is demoted as a result of organisational restructuring or for 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) where an individual is employed temporarily in a position for purposes of gaining experience or training and as a result receives different remuneration or enjoys different terms and conditions of employment;
> (f) the existence of a shortage of relevant skill, or the market value in a particular job classification; and
> (g) any other relevant factor that is not unfairly discriminatory in terms of section 6(1) of the Act.
> (2) A differentiation in terms and conditions of employment based on one or more grounds listed in sub-regulation (1) will be fair and rational if it is established, in accordance with section 11 of the Act, that -
> (a) Its application is not biased against an employee or group of employees based on race, gender or disability or any other ground listed in section 6(1) of the Act; and
> (b) It is applied in a proportionate manner."

Regulation 7(1) of the Employment Equity Regulations states that 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 the grounds set out in the regulation. This

---

[245] Ebrahim S "Reviewing the Suitability of Affirmative Action and the Inherent Requirements of the Job as Grounds of Justification to Equal Pay Claims in Terms Of the *Employment Equity Act* 55 of 1998" *PER* 2018(21) at 28-33.

would mean that the mere fact that the difference is based on a ground listed in regulation 7(1) is not on its own a complete ground of justification because the regulation further requires that it must in addition be "fair and rational". Regulation 7(2) of the Employment Equity Regulations then states that a difference in terms and conditions of employment based on one or more of the grounds listed in regulation 7(1) will be fair and rational if it is established in accordance with section 11 of the EEA that its application is not biased against an employee or group of employees based on race, gender or disability or any other ground listed in section 6(1) and it is applied in a proportionate manner. It would thus seem that the test for fairness according to regulation 7(2)(a)-(b) is "that its application is not biased against an employee or group of employees on the grounds listed in section 6(1)" and the test for rational is "that it is applied in a proportionate manner". This is confined to the grounds of justification which could be raised by the employer.

Having mentioned the argument by the author under paragraph 10.1 above to the effect that the grounds of affirmative action and the inherent requirements of the job in section 6(2) of the EEA are not capable of operating as grounds of justification to equal pay claims in terms of section 6(4) of the EEA, the question which arises here is whether these grounds of justification are nevertheless capable of falling within the ambit of regulation 7(1)(g) of the Regulations which refers to "any other relevant factor that is not unfairly discriminatory in section 6(1) of the EEA" and operate as grounds of justification to equal pay claims in this way. It is submitted that the argument mentioned under para 10.1 above regarding the unsuitability of affirmative action and the inherent requirements of the job operating as grounds of justification to equal pay claims applies *mutatis mutandis* here. This argument is buttressed by the following: (a) the grounds of affirmative action and the inherent requirements of the job are not listed in regulation 7(1) of the Employment Equity Regulations; and (b) the grounds of justification to equal pay claims which have developed through the case law referred to below does not include affirmative action and the inherent requirements of the job save for the *obiter* remarks made in *Ntai & Others v SA Breweries Ltd*[246] where the court accepted that affirmative action could be relied on

[246] (2001) 22 *ILJ* 214 (LC) discussed under para 9.1 above.

as a ground of justification to an equal pay claim. Simply put, it is submitted that the grounds of affirmative action and the inherent requirements of the job cannot fall under the ambit of "any other relevant factor that is not unfairly discriminatory in terms of section 6(1) of the Act" as set out in regulation 7(1)(g) of the Employment Equity Regulations and in this way operate as grounds of justification to equal pay claims because of unsuitability.

It is important to refer to case law which has referred to the grounds of justification to equal pay claims in order to ascertain the grounds of justification that the courts regard as being suitable to equal pay claims. It is also important to note that many of the grounds of justification to equal pay claims as referred to in the case law below have found its way into regulation 7(1)-(2) of the Employment Equity Regulations which deals with the grounds of justification to equal pay claims.

In *Sentrachem 1* 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 the same work. The Industrial Court held that pay discrimination based on race or any other difference other than skills and experience constituted an unfair labour practice.[247] It is clear that the principle of equal remuneration for equal work was recognised in this case and that the Industrial Court considered skills and experience to be grounds of justification to pay discrimination.[248] The factor of skills finds it way under the grounds of ability and competence in regulation 7(1)(b) of the Employment Equity Regulations and the factor of experience finds it way under the grounds of seniority or length of service in regulation 7(1)(a) of the Employment Equity Regulations.

---

[247] At 412F, 429F, 430E-F, 439H. It should be noted that *Sentrachem 1* was overturned in *Sentrachem 2* based on the High Court setting aside the wage discrimination finding in *Sentrachem 1* for lack of an evidential basis to make such a finding. This, however, does not affect the statement of equal pay law as set out in *Sentrachem 1* which in essence relates to skills and experience being grounds of justification to equal pay claims – see para 3 of this chapter for a discussion of *Sentrachem 2*.

[248] Cohen T "Justifiable Discrimination – Time to Set the Parameters" (2000) 12 *SA Merc LJ* 255 at 260 has stated that the principle of equal remuneration for equal work was established in this case.

In *Mthembu* the Industrial Court held that an employer is entitled to reward an employee with a merit increase (and not others) as that increases productivity.[249] The factor of productivity finds its way under the grounds of performance and quantity or quality of work in regulation 7(1)(c) of the Employment Equity Regulations. In *TGWU* the applicant was not aware of the nature of the work performed by his comparator as well as his comparator's educational qualifications or experience. The Labour Court stated that the applicant expected it to infer that he was discriminated against on the ground of his race in that he earned R1 500 whilst his white comparator earned R4 500. The Labour Court was of the view that the applicant had not succeeded in proving that he had been discriminated against. It 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.[250] The factor of expertise can fall under the grounds of ability and competence in regulation 7(1)(b) of the Employment Equity Regulations. The factor of experience finds it way under the grounds of seniority or length of service under regulation 7(1)(a) of the Employment Equity Regulations. The factor of skills finds it way under the grounds of ability and competence in regulation 7(1)(b) of the Employment Equity Regulations. The factor of *responsibility* is not mentioned under regulation 7(1) and does not *prima facie* fall within any of the listed grounds of justification in regulation 7(1) of the Employment Equity Regulations. The question which arises in this regard is whether the factor of *responsibility* can fall under the ambit of "any other relevant factor that is not unfairly discriminatory in terms of section 6(1) of the Act" in terms of regulation 7(1)(g) of the Employment Equity Regulations. Before making a submission regarding this question, it is prudent to ascertain what the position is under international labour law and United Kingdom law. This will be done in Chapters 3-4 of this thesis.

249 At 423E-G.
250 At paras 5, 4, 7, 10.

In *Heynsen v Armstrong Hydraulics (Pty) Ltd*[251] the applicant alleged that he was discriminated against based on his race in that he earned less than his co-employees. His co-employees were part of the bargaining unit and were weekly paid whereas he did not belong to the bargaining unit and was monthly paid, but the work he performed was the same as that of his co-employees. The applicant sought an order directing the respondent to remunerate him on the basis of equal pay for equal work. The Labour Court noted that there were differences in the terms and conditions of employment between weekly paid and monthly paid employees.[252] It further noted that monthly paid employees were entitled to certain benefits which hourly paid employees were not entitled to. The Labour Court held that it would be unfair if employees who were not part of the bargaining unit were to benefit from that unit while still enjoying benefits which were not shared by the bargaining unit. The Labour Court noted that according to the International Labour Organisation, collective bargaining is not a justification for pay discrimination.[253] 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 found that insofar as there might be discrimination, it was not unfair based on the facts. The application was consequently dismissed.[254] This case provides authority for the view that where the claimant and the comparator perform the same work, but both are subjected to different wage setting structures which results in a difference in their terms and conditions of employment, then the claimant will not be successful in an equal pay claim where she seeks to be afforded a benefit which is afforded to her comparator in circumstances where she is not subject to the unfavourable terms and conditions of the comparator. In other words, a claimant will not be successful in trying to gain a windfall. The reliance on different wage setting structures as a ground

[251] [2000] 12 BLLR 1444 (LC).

[252] At paras 1, 3-4, 6, 10-11.

[253] *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.

[254] At paras 8, 12-13, 15, 17-18. See also *Larbi Odam & 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.

of justification for a difference in pay of employees engaged in the same work is not listed in regulation 7(1) of the Employment Equity Regulations. The question which arises in this regard is whether the factor of different wage setting structures resulting in a pay difference between employees engaged in the same work can fall under the ambit of "any other relevant factor that is not unfairly discriminatory in terms of section 6(1) of the Act" in terms of regulation 7(1)(g) of the Employment Equity Regulations. Before making a submission regarding this question, it is prudent to ascertain what the position is under international labour law and United Kingdom law. This will be done in Chapters 3-4 of this thesis.

In *Ntai* the applicants alleged that their employer committed unfair discrimination against them 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 it was due to race. The respondent ascribed the difference in pay to a series of performance-based pay increases, 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.[255]

The Labour Court remarked that the respondent was not under a legal duty to apply affirmative action measures to somehow increase the wages of the applicants. It further remarked that the application of an affirmative action measure was a defence which could be used by an employer and was not 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

[255] At paras 2-3, 5, 25, 21, 57, 61, 90.

also arise in the case of equal pay for work of equal value.[256] 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 employees as a group disproportionately when compared to their white counterparts who perform the same work.[257]

This case emphasises that a claimant must prove that the reason for the different pay is based on a proscribed ground. It makes an important remark to the effect that ostensibly neutral factors such as seniority and experience can lead to indirect discrimination in pay if it is proved that such factors affect, for example, black employees as a group disproportionately when compared to their white counterparts who perform the same work. It is important to note that the Court's caution regarding indirect pay discrimination finds some reference in regulation 7(2)(a)-(b) of the Employment Equity Regulations which states that a difference in terms and conditions based on any of the listed grounds in regulation 7(1) will only be fair and rational if its application is not biased against an employee or group of employees based on any of the grounds in section 6(1) of the EEA and it must be applied in a proportionate manner.

In *Co-operative Worker Association & Another v Petroleum Oil and Gas Co-operative of SA*[258] the second applicant alleged that the respondent committed unfair discrimination based on the absence of family responsibility because employees with family responsibility (dependent spouses and children) received a higher total guaranteed remuneration than employees who did not have 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 as such deserve protection. To this end, additional remuneration for these employees was endorsed and encouraged in terms of both national and international law.[259] The Labour Court agreed with the

256 At paras 85-86.
257 At paras 79-80.
258 [2007] 1 BLLR 55 (LC).
259 At paras 6, 8, 42, 51.

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.[260] A claimant will thus not be successful in launching an equal pay claim based on the absence of one of the proscribed grounds. The claimant will have to rely on the proscribed ground as being the basis for the pay discrimination.

In *Pioneer Foods (Pty) Ltd v Workers Against Regression*[261] the Labour Court heard an appeal against an arbitration award in which the Commissioner found that paying newly appointed drivers at an 80% rate for the first two years of employment as opposed to the 100% rate paid to drivers working longer than two years in terms of a collective agreement amounted to unfair discrimination in pay. The CCMA regarded the factor of seniority as a ground of discrimination as opposed to a ground justifying pay differentiation.[262] The issue before the Labour Court was the interpretation of section 6(4) of the EEA, and more specifically, the issue of the factor of seniority operating as a ground of discrimination.[263] The Labour Court found that the equal pay legal framework regards the factor of seniority as a ground which justifies pay differentiation and the Commissioner had misconceived the law by regarding it as a ground upon which *unfair* pay discrimination was committed.[264] The Labour Court found that the Commissioner's approach was that it amounts to unfair discrimination for the appellant to pay a newly appointed employee, who was previously employed by a labour broker, at a lower rate than the rate paid to existing long-service employees, irrespective of how short the period of previous employment with the labour broker was. The lower rate of pay for newly appointed employees as contained in the collective agreement between the Food and Allied Workers Union ("FAWU") and the appellant came about as a result of FAWU persuading

[260] At paras 47, 36, 60.
[261] *Pioneer Foods (Pty) Ltd v Workers Against Regression* 2016 ZALCCT 14.
[262] At paras 1, 3 and 5.
[263] At paras 2, 3 and 4.
[264] At paras 26-29, 19-25.

the appellant to reduce the extent to which it was using the services of various forms of precarious employees, including employees supplied by labour brokers. FAWU also proposed the implementation of a scale which showed the difference between employees who newly started working and long serving employees. The 80% scale/rate was applied to all new employees from outside the company and it ceased to operate after two years of service.[265]

The Labour Court found that the differentiation complained of was not irrational and not based on an arbitrary unlisted ground and was not unfair. The appeal was thus upheld.[266] It is clear from this case that seniority can be a defence to a claim of unequal pay, but it must be remembered that this ground can also lead to unfair indirect discrimination in the circumstances as highlighted in *Ntai's* case under this paragraph 10.2 above. It has been argued by the author elsewhere, based on *Pioneer Foods*, that the seniority factor is a ground which justifies pay differentiation and is a complete defence to an equal pay claim unless the factor is applied in an unfair and irrational manner as prohibited in regulation 7.[267] The factor of seniority finds it way expressly under regulation 7(1)(a) of the Employment Equity Regulations.

In *Duma v Minister of Correctional Services & Others*[268] the Labour Court noted that Duma relied upon the unlisted ground of "geographical location" for her claim of unfair discrimination relating to equal pay. The Court held that the basis for the differentiation which was the fact that Duma was employed by the Department in one province and not another appeared to be entirely arbitrary. It held that the use of the ground of geographical location as a basis for paying employees in one province less than employees in another province for the same work has the ability to impair the dignity of those employees in a manner comparable to the listed grounds and amounts to discrimination. The Labour Court found that Duma had successfully proved that she was unfairly discriminated

[265] At paras 44, 46-48.
[266] At para 76.
[267] Ebrahim S "Equal Pay in Terms of the Employment Equity Act: The Role of Seniority, Collective Agreements and Good Industrial Relations: *Pioneer Foods (Pty) Ltd v Workers against Regression* 2016 ZALCCT 14" *PER* 2017(20) at 15.
[268] [2016] ZALCCT 6.

against with regard to her pay based on the unlisted ground of geographical location and awarded her compensation.[269] This matter went on appeal to the Labour Appeal Court and it overturned the Labour Court's decision, finding that the respondent had failed to satisfy the onus of proving unfair discrimination on the arbitrary ground of geographical location. It found that the respondent had failed to establish a link between the difference in pay and her geographical location.[270] The Labour Appeal Court did not make any finding that geographical location cannot constitute an arbitrary ground for the purpose of proving unfair discrimination as all that is stated was that the respondent had failed to establish a link between the difference in pay and her geographical location.

The following question arises from this case indirectly. Assuming that an equal pay claimant succeeds in adducing proof of unfair pay discrimination to the extent that it calls for the employer to provide a justification thereto, the question which arises is, whether geographical location can constitute a ground of justification to an equal pay claim. It has been argued by the author elsewhere based on *Duma's* case that geographical location can constitute a ground of justification to an equal pay claim provided that it is relevant and not unfairly discriminatory as required in regulation 7(1)(g) of the Employment Equity Regulations.[271]

10.3 Can the progressive realisation of the principle of equal pay be a ground of justification?

Section 27(2) of the EEA states that where disproportionate income differentials or unfair discrimination as contemplated in section 6(4) (relating to equal pay) are reflected in the statement on the remuneration and benefits received in each occupational level of the employer's workforce as contemplated in section 27(1) of the EEA, then the employer is under an obligation to "take measures to progressively reduce such differentials" subject

[269] At paras 19, 21-22, 26.
[270] At paras 2, 22, 27.
[271] Ebrahim S "Equal pay in terms of the Employment Equity Act: Is geographical location a ground of discrimination or a ground justifying pay differentiation? *Duma v Minister of Correctional Services* [2016] ZALCCT 6" *THRHR* 2018(81) 134 at 141.

to guidance that may be given by the Minister of Labour. Regulation 7(1)(g) of the Employment Equity Regulations allows a difference in terms and conditions of employment to be justified on any ground not listed in the Regulations provided that it is not unfairly discriminatory in terms of section 6(1) of the EEA and that it is fair and rational. The question which arises is, can an employee succeed in an equal pay claim in terms of section 6(4) of the EEA in circumstances where the employer has implemented measures to progressively reduce disproportionate income differentials and/or unfair discrimination in terms of section 6(4) of the EEA but which has not been completed. Put differently, the question is whether an employer can rely on measures taken in terms of section 27(2) of the EEA as a ground of justification which would fall under "any other relevant factor that is not unfairly discriminatory in terms of section 6(1) of the Act" in terms of regulation 7(1)(g) of the Employment Equity Regulations. Allowing an equal pay claimant to succeed with her claim in such circumstances and not allowing an employer to rely on the measures taken in terms of section 27(2) as a ground of justification under regulation 7(1)(g) of the Employment Equity Regulations seems to be counter-productive because the employer is being punished for complying with section 27(2) of the EEA and it would interrupt measures, which if properly applied, would eventually remove the income differentials and/or unfair discrimination in section 6(4). This avenue could also, however, be open to abuse by employers and it would therefore be prudent for the courts, if faced with such ground of justification, to request credible evidence that these measures are being implemented. The court is in a good position to ascertain whether a ground of justification is genuine or a sham seeking to circumvent section 6(4) of the EEA. Based on this, it is submitted that it will be difficult to refuse to recognise the progressive realisation of the right to equal pay as a ground of justification, falling under regulation 7(1)(g) of the Employment Equity Regulations, where it is genuine and in circumstances where it gives effect to section 27(2) of the EEA. It is further submitted that in order to promote legal certainty the taking of measures in terms of section 27(2) of the EEA in order to progressively reduce disproportionate income differentials and/or unfair pay discrimination in section 6(4) of the EEA should specifically be listed as a ground of justification under regulation 7(1) of the Employment Equity Regulations.

11. EQUAL PAY RELATING TO NON-STANDARD (ATYPICAL) EMPLOYEES IN TERMS OF THE LRA

The EEA does not distinguish between permanent employees and non-standard employees. The only persons excluded from the application of the EEA are members of the National Defence Force, the National Intelligence Agency, the South African Secret Service, the South African National Academy of Intelligence and the directors and staff of Comsec.[272] Non-standard employees include temporary service employees, fixed-term contract employees and part-time employees. These non-standard employees will thus be able to use the equal pay causes of action as set out in section 6(4) of the EEA as they are not excluded from the application of the EEA. The Labour Relations Amendment Act[273] has, however, amended the LRA to also provide equal pay protection to certain (non-standard employees) temporary service employees, fixed-terms contract employees and part-time employees who do not earn in excess of the threshold of R224 080.48 and subject to other conditions. This equal pay protection is found in sections 198A-198D of the LRA. The equal pay protection for these non-standard employees does not follow the usual equal pay route as set out in the EEA and it operates under a different limited equal pay regime which is dealt with below.

11.1 Temporary service employees

Section 198A(1) defines a "temporary service" to include work for a client by an employee for a period not exceeding three months, as a substitute for an employee of the client who is temporarily absent, or in a category of work and for a period of time which is determined to be a temporary service by a collective agreement, sectoral determination or a notice published by the Minister in terms of the section.[274] Section 198A does not apply to employees who earn in excess of the threshold prescribed by the Minister in terms of section 6(3) of the BCEA.[275] This would thus mean that section 198A would apply to those

272 Section 4(3) of the EEA.
273 6 of 2014.
274 Section 198A(1)(a)-(c) of the LRA.
275 Section 198A(2) of the LRA.

employees who are earning the threshold amount and those that are earning below the threshold amount excluding only those that earn in excess of the threshold. The heading of section 198A is not a model of clarity in this regard as it reads "Application of section 198 to employees earning below earnings threshold". This gives the impression that it would exclude employees who earn the same amount as the threshold amount. It is submitted that the wording of section 198A(2) which only excludes those employees who earn in excess of the threshold amount and includes employees who earn the same amount as the threshold and those who earn below the threshold amount should be followed. Section 198A(3)(a) of the LRA then states that an employee who performs a temporary service as defined in the section for the client is the employee of the temporary employment service and not the client.

Section 198A(3)(b) of the LRA on the other hand states that an employee not performing a temporary service as defined in the section is deemed to be the employee of the client and the client is deemed to be the employer and such employee is deemed to be employed on an indefinite basis. Whether this section gives rise to a dual employment relationship where a placed employee is deemed to be employed by both the temporary employment service and the client or whether it creates a sole employment relationship between the employee and the client has extensively been debated in the Constitutional Court in *Assign Services (Pty) Limited v NUMSA & Others*[276] ("*Assign Services*").

In *Assign Services* the issue before the Constitutional Court was the interpretation to be given to section 198A(3)(b) of the LRA, in particular, whether it gives rise to a dual employment relationship where the two employers are the temporary employment service and the client or whether it gives rise to a sole employment relationship where the only employer is the client for the purposes of the LRA. On 1 April 2015 Assign Services placed 22 workers with Krost. The workers rendered services for more than three consecutive months and this triggered the provisions of section 198A(3)(b) of the LRA. Several of the workers were members of the National Union of Metalworkers of South Africa

[276] [2018] ZACC 22 ("*Assign Services*").

("NUMSA").[277] There was a dispute between Assign Services, Krost and NUMSA regarding the interpretation to be given to and the effect of section 198A(3)(b) of the LRA. Assign Services took the view that the interpretation and effect of the section gave rise to the dual employer interpretation in terms of which the placed workers remained their employees (employees of the temporary employment service) but these employees were also deemed to be Krost's employees (employees of the client) for purposes of the LRA. NUMSA took the view that the interpretation and effect of the section creates a sole employer interpretation in terms of which Krost (the client) becomes the only employer of the placed workers when section 198A(3)(b) of the LRA is triggered.[278]

Assign Services then referred the dispute in the form of a stated case for arbitration to the CCMA in terms of section 198D of the LRA. Assign Services argued before the CCMA that the deeming provision in section 198A(3)(b) of the LRA does not terminate the commercial agreement between the client and the temporary employment service neither does it terminate the contractual employment relationship between the temporary employment service and the placed workers. It further argued that the dual employer interpretation provides greater protection for the placed workers. NUMSA argued that the dual employer interpretation as sought by Assign Services creates confusion, uncertainty and prejudices vulnerable employees.[279] The Commissioner's award was that the effect of the deeming provision in section 198A(3)(b) of the LRA results in the client becoming the sole employer for the purposes of the LRA. The Commissioner was of the view that the dual employer interpretation would create many problems such as confusion relating to the disciplining of workers, which of the employers' disciplinary codes would be applicable and difficulties regarding re-instatement.[280]

Assign Services took the matter on review to the Labour Court contending that the Commissioner committed material errors of law in his interpretation of section 198A(3)(b) of the LRA. It argued that section 198A should be read together with section 198(2) of the

[277] At paras 1, 13.
[278] At para 14.
[279] At paras 15-18.
[280] At paras 19-20.

LRA which provides that a person whose services has been provided to a client by a temporary employment service is the employee of the temporary employment service and the temporary employment service is the employer for the purposes of the LRA. It argued that section 198(2) of the LRA is the controlling provision which persists despite the deeming provision in section 198A(3)(b) of the LRA.[281]

NUMSA argued that once section 198A(3)(b) of the LRA is triggered, section 198(2) of the LRA does not apply to the relevant employees. It further argued that the two provisions are mutually exclusive. The Labour Court found that the Commissioner had committed a material error of law. It held that the temporary employment service retains control notwithstanding any new statutory relationship between the employee and the client and the client is only an employer for the purposes of the LRA with the common law contract between the temporary employment service and the employee remaining firmly in place. It finally held that the dual employer interpretation best protects the rights of employees and the Commissioner's award was set aside.[282]

NUMSA then took the matter on appeal to the Labour Appeal Court. The Casual Workers Advice Office ("CWAO") and the Confederation of Associations in the Private Employment Sector ("CAPES") were admitted as *amici curiae* in the Labour Appeal Court. CWAO supported NUMSA's submissions and contended that the dual employer interpretation is not in accordance with the plain language of section 198A(3)(b) of the LRA. It further contended that the sole employer interpretation gives effect to the purpose of the amendments and to the constitutional rights of workers in section 23 of the Constitution. CAPES, on the other hand, supported Assign Services submissions and contended that the LRA should be read together and reconciled with the Basic Conditions of Employment Act in terms of which the temporary employment service remains the employer of all the placed employees and the only way in which the LRA and the BCEA can be reconciled after the deeming provision in section 198A(3)(b) takes effect is through the dual

281 At para 21.
282 At paras 22-23.

employer interpretation.[283] The Labour Appeal Court held that the sole employer interpretation better protected the rights of the placed employees as well as promoted the purpose and objects of the LRA and the 2014 amendments. It held that a placed employee who has worked for a period exceeding three months is no longer performing a temporary service as defined in section 198A and the client then becomes the sole employer in terms of section 198A(3)(b) of the LRA.[284]

Assign Services then took the matter on appeal to the Constitutional Court. It argued that the Labour Appeal Court's decision was tantamount to a ban on labour broking. It further argued that the Labour Appeal Court failed to properly consider the language of the deeming provision and focused on the purpose of the provision to the exclusion of its statutory context. It argued that the LRA still allows a temporary employment service to offer employment services after the three month cut off period in section 198A(3)(b) of the LRA and section 198(2) was not amended with the insertion of section 198A and this means that the temporary employment service must remain an employer for purposes of the LRA. It also argued that the placed employees are not better protected in terms of the sole employer interpretation as they would for example lose the protection of section 198(4) of the LRA which mandates joint and several liability for certain contraventions by a temporary employment service. It further contended that the placed employees would be forced into new employment relationships on terms to which they have not agreed to.[285]

NUMSA maintained their argument that sections 198 and 198A are mutually exclusive and create two separate deeming provisions that cannot operate at the same time. It argued that section 198A does not ban temporary employment services as it only applies to lower paid placed employees in employment for more than three months. Placed employees earning above the threshold can continue to be employed through temporary employment services without attracting the deeming provision in section 198A. It further

[283] At paras 24-27.
[284] At para 28.
[285] At paras 29-30.

argued that the deeming provision only alters the contract between the placed worker and the temporary employment service and it does not affect the contract between the temporary employment service and the client.[286] The Constitutional Court held that section 198A of the LRA must be interpreted textually, contextually and purposively and its purpose must be contextualised in accordance with the right to fair labour practices in terms of section 23 of the Constitution and the LRA as a whole.[287]

The Constitutional Court noted that there may be more than one employer for purposes of liability for example, the client is regarded as the employer for the purposes of the Occupational Health and Safety Act[288] whereas the temporary employment service is excluded from the definition of employer. On the other hand, the temporary employment service is expressly designated as the employer for the purpose of the BCEA. The Court further noted that sections 198A(3)(b) and 198(2) do not refer to each other, neither are the sections made subject to the other and there is no mention that the two sections operate simultaneously. It held that the legislature introduced sections 198A-198D of the LRA to determine the parameters of "temporary services" and to set out the protection to be afforded to placed employees and this entails that the placed employees are integrated into the workplace of the client after the expiry of the three month period. The Court remarked that while not every dual employment relationship will prejudice employees, this does not hold true for the placed employee in terms of the section. *The placed employees are offered more protection in terms of the sole employer interpretation which gives the employees certainty and job security. The Court accepted the sole employer interpretation and dismissed the appeal.*[289] This case is important as it provides clarity regarding who the employer is and this provides certainty regarding against whom an equal pay claim should be brought against. It is thus submitted that a temporary service employee who is deemed to be an employee of the client in terms of section 198A(3)(b) of the LRA should launch an equal pay claim in terms of section 198D(1) read with section

[286] At para 31.
[287] At paras 41-42.
[288] 85 of 1993.
[289] At paras 46, 47, 68, 69, 78, 80, 82, 85.

198A(5) of the LRA against the client who is deemed to be his/her employer and not the temporary employment service.

Section 198A(5) of the LRA which is the equal pay provision provides as follows:

> "An *employee* deemed to be an *employee* of the client in terms of subsection (3)(b) must be treated on the whole not less favourably than an *employee* of the client performing the same or similar work, unless there is a justifiable reason for different treatment."

Section 198A(5) only applies to a temporary service employee who is deemed to be an employee of the client and states that such employee *must be treated on the whole not less favourably* than an employee of the client performing the *same or similar work*. It is clear from a reading of this section that it does not apply to work of equal value but is limited to work that is the same or similar. The LRA does not define what is meant by the phrase "must be treated on the whole not less favourably" under section 198A(5) of the LRA and does not explain what is meant by work that is the same or similar. Section 197(3)(a) of the LRA refers to the phrase "on the whole not less favourable" in the context of dealing with the transfer of a business as a going concern by providing that the new employer complies with the LRA if it employs transferred employees on terms and conditions that are "on the whole not less favourable" to the employees than those on which they were employed by the old employer. The phrase "on the whole not less favourable" is unfortunately also not defined or explained in the LRA. Grogan states that there is no test to determine to what extent the employer may amend the terms and conditions of transferred employees which would comply with section 197(3)(a) of the LRA. He further states that the changes contemplated in the section must, however, fall short of changes to fundamental terms and conditions of an employee's contract.[290] The only relevant aspect which can be deduced from this is that the phrase under section 197(3)(a) of the LRA relating to *terms and conditions that are on the whole not less favourable* allows the new employer some latitude in that it does not oblige it to provide the transferred employees with the exact terms and conditions which they enjoyed under their old employer. Applying this to the phrase *must be treated on the whole not less*

290 Grogan *Workplace Law* 10th ed (Juta Cape Town 2009) 301-302.

favourably under section 198A(5) of the LRA would allow the deemed employer some latitude in that it would not be obliged to provide the deemed employee with the same terms and conditions enjoyed by its employees who are engaged in the same or similar work. This by no means solves the interpretation to be accorded to the phrase *must be treated on the whole not less favourably* under section 198A(5) of the LRA but merely provides some guidance which can be deduced from section 197(3)(a) of the LRA. The question regarding what is meant by the phrase "must be treated on the whole not less favourably" under section 198A(5) thus remains with some guidance being obtained from section 197(3)(a) of the LRA.

Botha states that an explanatory memorandum to a Bill may assist in determining the purpose of provisions of the Act which resulted from the Bill.[291] In *National Union of Mineworkers of SA v Driveline Technologies*[292] the Labour Appeal Court referred to an explanatory memorandum of a Labour Relations Bill in its approach to interpreting the LRA.[293] The information from explanatory memorandums is thus important as it forms part of the interpretative framework to interpreting the LRA. Clause 38 of the Memorandum of Objects of the Labour Relations Amendment Bill, 2012[294] ("Memo") provides an example of what would constitute treatment that is "on the whole not less favourably" in terms of section 198A(5) of the LRA:

> "This means, for example, that if an employee is procured by a temporary employment service for a client for three months, but is kept on after the expiry of the three-month period, then that employee must, unless there is a justifiable reason for different treatment, be paid the same wages and benefits as the client's other employees who are performing the same or similar work."

This example is important in the interpretative process as it demonstrates the intended meaning to be accorded to the phrase "on the whole not less favourably" in terms of section 198A(5) of the LRA. According to this example the phrase "on the whole not less

---

[291] Botha C *Statutory Interpretation: An Introduction for Students* 4th ed (Juta 2012) 87.
[292] 2002 (4) SA 645 (LAC). See also *Shoprite Checkers (Pty) Ltd v Ramdaw* 2001 (3) SA 68 (LC).
[293] At paras 79-80.
[294] Memorandum on Objects of Employment Equity Amendment Bill, 2012 as found in the Employment Equity Amendment Bill, B31B-2012, https://www.gov.za/sites/default/files/gcis_document/201409/b31b-201217oct2013.pdf (last accessed on 25/10/2022).

favourably" means that an employee who is deemed to be an employee of the client must be paid the *same wages* and given the *same benefits* as the client's other employees. If this was the intention and or purpose of the phrase then it is difficult to understand why the legislature included the words "on the whole" where its intended purpose was to bring about a result that is the same. The meaning of the phrase "on the whole" according to the dictionary is "taking all things into consideration, in general".[295] It is clear that the example in the memo relating to the *same wages* and *same benefits* does not take the phrase "on the whole" into account when one has regard to the dictionary meaning of the phrase.

In *Assign Services* the Constitutional Court whilst dealing extensively with the interpretation to be accorded to section 198A(3)(b) of the LRA made a few remarks relating to section 198A(5) of the LRA. It started the brief remarks by quoting section 198A(5) of the LRA, *albeit*, incorrectly as follows:

> "Then, once an employee becomes employed by the client by operation of section 198A(3)(b), the employee must, in terms of subsection (5), "be treated not less favourably than an employee of the client performing the same or similar work, unless there is a justifiable reason for different treatment". This would obviously apply only in the event that the terms and conditions of the employment applicable to the placed worker are less favourable than those applicable to the employees of the client."

It quotes subsection (5) as stating "be treated not less favourably than an employee of the client performing the same or similar work, unless there is a justifiable reason for different treatment" whereas subsection 5 reads as follows: "be treated *on the whole* not less favourably than an *employee* of the client performing the same or similar work, unless there is a justifiable reason for different treatment." The Constitutional Court thus omitted the words "on the whole". After this remark the Court went on to state that part of the protection afforded by section 198A(3)(b) is that the placed employee:

> "… automatically becomes employed on the same terms and conditions of similar employees, with the same employment benefits, the same prospects of internal growth and the same job security that follows."

295 https://www.collinsdictionary.com/dictionary/english/on-the-whole (last accessed on 25/10/2022).

This raises a question mark regarding the Court's interpretation of section 198A(5) of the LRA. Was it correctly interpreted by the Constitutional Court in circumstances where the Court has omitted words from the section which are material and then went on to make comments on the section to the effect that it means that the placed employee is employed on the *same terms and conditions*, the *same employment benefits*, the same prospects of growth and the same job security. Despite the incorrect reference to the section the Court's remarks regarding the same wage and benefits is in accordance with the example provided in the Memo. Does "on the whole not less favourable" mean the same? If so, why did the legislature include the words "on the whole" and not leave the section to read "not less favourable" as it did in relation to fixed-term workers in section 198B(8)(a) of the LRA? There is no clarity in this regard. It will be important to resolve the interpretation of this phrase because the interpretation given to it by the Constitutional Court disregards the words "on the whole" and this then means that an employer cannot provide a package to the deemed employee that is on the whole not less favourable as it has to provide him/her with terms and conditions that are equal to that of its employees who perform the same or similar work.

Based on the above there are two possible views which could be argued based on the meaning to be accorded to the phrase *must be treated on the whole not less favourably* under section 198A(5) of the LRA. The first argument based on the example in clause 38 of the Memo regarding what would constitute treatment that is "on the whole not less favourably" under section 198A(5) of the LRA read with the Constitutional Court's remarks in *Assign Services* regarding this matter is that the phrase means that the deemed employee must be given the same terms and conditions as the deemed employer's employees who are engaged in the same or similar work. The second argument based on taking the words "on the whole" under the phrase "on the whole not less favourably" in section 198A(5) of the LRA into account read with the dictionary meaning of the words "on the whole" and the limited guidance deduced from the use of the phrase *on the whole not less favourable* under section 197(3)(a) of the LRA is that the phrase *must be treated on the whole not less favourably* under section 198A(5) of the LRA does not oblige the deemed employer to provide the deemed employee with the same terms and conditions

as its employees who are engaged in the same or similar work but allows the deemed employer to provide the deemed employee with, for example, a package, on condition, that the package does not result in treatment that is on the whole not less favourable as compared to the terms and conditions of employment enjoyed by those employees of the deemed employer who are engaged in the same or similar work.

It is difficult at this stage to choose which of the arguments are correct as they both can be substantiated and argued from a proper basis, and to this end, it is important to seek guidance from international labour law and United Kingdom law in Chapters 3-4 of this thesis in order to assist in this regard.

Whilst it might seem that there is no need to explain what is meant by work that is the same or similar under section 198A(5) of the LRA because it is self-evident, it is submitted that this is not the case because an employer is not under an obligation in terms of section 198A(5) to treat a deemed employee on the whole not less favourably if it can show that his/her work is not the same or similar to the work of its other employees.[296] A deemed employee who launches a claim in terms of section 198D(1) read with section 198A(5) of the LRA in order to force the employer to treat her on the whole not less favourably will also have to point to those employees of the employer who are receiving better treatment than her and she will further have to show that those employees are performing the same or similar work. Should she fail to show that the comparator employees are performing the same or similar work then the claim will not succeed for lack of proving one of the elements in order for section 198A(5) of the LRA to be enforced. The issue which then arises is how should the meaning of the same or similar work be approached. It is submitted that regulations 4(1)-(2) of the Employment Equity Regulations which defines what is meant by work that is the same and work that is substantially the same as referred to under the causes of action in section 6(4) of the EEA, equal pay for the same work and equal pay for substantially the same work, should be followed when interpreting the same

[296] See *General Industries Workers Union of South Africa obo Mgedezi and others/Swissport SA (Pty) Ltd and Another* [2019] 9 BALR 954 (CCMA) at para 15 where the CCMA found that the work of the comparators were not same or sufficiently similar in order to trigger section 198A(5) of the LRA.

or similar work under section 198A(5) of the LRA. This is because section 198A(5) contains two equal pay principles which must be implemented by the employer and this is equal pay for the same work and equal pay for similar work (which is essentially equal pay for substantially the same work) and these two equal pay principles are also found in section 6(4) of the EEA as two causes of action in the form of equal pay for the same work and equal pay for substantially the same work.

It is further submitted that the definitions of the same work and work that is substantially the same as set out in regulations 4(1)-(2) of the Employment Equity Regulations should be read with the submissions made above under paragraph 5.4 relating to the meaning to be accorded to the phrase "interchangeable" under the definition of the same work and the meaning to be accorded to the phrase "sufficiently similar" under the definition of work that is substantially the same under paragraph 5.5 above. It is prudent to set out here the definitions of the same work and work that is substantially the same under regulations 4(1)-(2) of the Employment Equity Regulations together with the submissions made under paragraphs 5.4-5.5 above. Regulation 4(1) of the Employment Equity Regulations defines the same work as follows:

> "the work performed by an employee - (1) is the same as the work of another employee of the same employer, if their work is *identical or interchangeable*".

It is argued under paragraph 5.4 above that the word "interchangeable" as referred to in regulation 4(1) of the Employment Equity Regulations should be interpreted according to its dictionary meaning which is "able to be exchanged with each other without making any difference or without being noticed".

Regulation 4(2) of the Employment Equity Regulations on the other hand defines work that is substantially the same as follows:

> "the work performed by an employee - … (2) 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."

It is argued under paragraph 5.5 above that the phrase “sufficiently similar” as referred to in regulation 4(2) of the Employment Equity Regulations should be interpreted according to its dictionary meanings which is “enough for a particular purpose” under *sufficiently* and “looking or being almost the same, although not exactly” under *similar*.

11.2 Fixed-term contract employees

Section 198B(1) defines a fixed-term contract to mean a contract of employment that terminates on: (a) the occurrence of a specified event; (b) the completion of a specified project or task; or (c) a fixed date excluding an employee’s normal or agreed retirement age.[297] Section 198B does not apply to employees earning in excess of the threshold prescribed by the Minister.[298] This means that the section will apply to those employees who earn the threshold amount and less notwithstanding that the heading of section 198B refers to “… employees earning below earnings threshold”. The section further does not apply to: (a) an employee who is employed in terms of a fixed-term contract which is permitted in terms of any statute, collective agreement or sectoral determination; (b) an employer who employs less than 10 employees; or (c) an employer that employs less than 50 employees and whose business has been operating for less than two years unless the employer conducts more than one business or the business was formed as a result of the division or dissolution of an existing business.[299] An employer can only employ an employee on a fixed-term contract or successive fixed-term contracts for longer than three months if the nature of the work is of a limited or definite duration or if the employer can demonstrate any justifiable reason for fixing the terms of the contract beyond three months.[300] Section 198B(4) of the LRA sets out the following list of reasons which would amount to a justifiable reason for fixing the terms of the contract beyond three months as contemplated in section 198B(3)(b) of the LRA:

[297] Section 198B(1)(a)-(c) of the LRA.
[298] Section 198B(2)(a) of the LRA.
[299] Section 198B(2)(b)-(3).
[300] Section 198B(3)(a)-(b) of the LRA.

> "(a) [the employee] is replacing another employee who is temporarily absent from work;
> (b) [the employee] is employed on account of a temporary increase in the volume of work which is not expected to endure beyond 12 months;
> (c) [the employee] is a student or recent graduate who is employed for the purpose of being trained or gaining work experience in order to enter a job or profession;
> (d) [the employee] is employed to work exclusively on a specific project that has a limited or defined duration;
> (e) [the employee] is a noncitizen who has been granted a work permit for a defined period;
> (f) [the employee] is employed to perform seasonal work;
> (g) [the employee] is employed for the purpose of an official public works scheme or similar public job creation scheme;
> (h) [the employee] is employed in a position which is funded by an external source for a limited period; or
> (i) [the employee] has reached the normal or agreed retirement age applicable in the employer's business".

A fixed-term contract which is in contravention of this is deemed to be of indefinite duration.[301] Section 198B(8)(a) of the LRA sets out the equal pay provision as follows:

> "An *employee* employed in terms of a fixed term contract for longer than three months must not be treated less favourably than an *employee* employed on a permanent basis performing the same or similar work, unless there is a justifiable reason for different treatment."

It is important to note that the equal pay provision in section 198B(8)(a) is not dependent on the fixed-term contract being deemed to be of an indefinite duration as contemplated in section 198B(5) and all that is required to trigger the equal pay provision is for the employee to be employed on a fixed-term contract for longer than three months and he/she is not excluded from the protection of section 198B by virtue of section 198B(2)(a)-(c) of the LRA as set out above. Simply put, an employee employed in terms of a fixed-term contract for longer than three months, whether or not her fixed-term contract is deemed to be of an indefinite duration, and who is not excluded from protection in terms of section 198B(2)(a)-(c) of the LRA *must not be treated less favourably* as compared to a permanent employee (of the same employer) performing the same or similar work unless the employer can show a justifiable reason for the different treatment. This being the case, one of the questions which arises is whether a fixed-term employee whose contract is deemed to be of an indefinite duration as contemplated in section 198B(5) of the LRA and a fixed-term employee whose contract is for a fixed-term which complies with section 198B must be provided with same treatment as compared to a comparable

[301] Section 198B(5) of the LRA.

permanent employee as contemplated in section 198B(8)(a) of the LRA. This question cannot be answered from South African law without more, and to this end, it is important to seek guidance from international labour law and United Kingdom law in Chapters 3-4 of this thesis in order to provide an answer thereto.

It is clear from a reading of section 198B(8)(a) of the LRA that it does not apply to work of equal value but is limited to work that is the same or similar. The LRA does not define what is meant by the phrase "must not be treated less favourably" under section 198B(8)(a) of the LRA and further does not explain what is meant by work that is the same or similar. A reading of the phrase "must not be treated less favourably" under section 198B(8)(a) of the LRA seems to require that the fixed-term employee must be given the *same terms and conditions of employment* as those enjoyed by a permanent employee of the employer who is engaged in the same or similar work. Clause 38 of the Memo,[302] however, states that fixed-term employees should be treated "*on the whole* not less favourably" under section 198B(8)(a) of the LRA. Clause 38 of the Memo refers to this as follows:

> "An employee employed on a fixed term contract for more than three months (or any other period determined by a sectoral determination or collective agreement concluded at a bargaining council) must be treated *on the whole not less favourably* than an employee on an indefinite contract performing the same or similar work, unless there is a justifiable reason for treating the employee differently. What may constitute a justifiable reason for this purpose is dealt with in section 198D."[303]

The explanation given in section 38 of the Memo regarding section 198B(8)(a) suggests that section 198B(8)(a) does not require the employer to provide the fixed-term employee with the same terms and conditions of employment as its permanent employees engaged in the same or similar work as all that the employer is required to do is to provide the fixed-term employee with treatment that is *on the whole not less favourably* as compared to its permanent employees engaged in the same or similar work. If the intention and or

302 It has been discussed above under para 11.1 Temporary Service Employees that an explanatory memorandum to a Bill may assist in determining the purpose of provisions of the Act which resulted from the Bill and this discussion need not be repeated here.

303 Emphasis added.

purpose of the phrase "must not be treated less favourably" under section 198B(8)(a) of the LRA was intended to mean "must be treated *on the whole* not less favourably" as stated in clause 38 of the Memo then it is difficult to understand why the legislature did not simply include the words "on the whole" under section 198B(8)(a) in order for the phrase to read *must be treated on the whole not less favourably* where its intended purpose was to bring about a result that is not exactly the same but one that is on the whole not less favourable. The issue then is whether the phrase "must not be treated less favourably" under section 198B(8)(a) of the LRA must be interpreted to mean treatment that is the same or whether it must be interpreted to mean treatment that is on the whole not less favourable. This uncertainty cannot be answered from South African law without more, and to this end, it is important to seek guidance from international labour law and United Kingdom law in Chapters 3-4 of the thesis in order to answer this uncertainty.

It is also important to explain what is meant by work that is the same or similar under section 198B(8)(a) of the LRA because, similar to the situation under section 198A(5) of the LRA as discussed under paragraph 11.1 above, an employer is not under an obligation in terms of section 198B(8)(a) to treat a fixed-term employee employed for longer than three months (who is not excluded from the protection of section 198B) *not less favourably* if it can show that his/her work is not the same or similar to the work performed by its permanent employees. Such fixed-term employee who launches a claim in terms of section 198D(1) read with section 198B(8)(a) of the LRA in order to force the employer to treat her not less favourably will also have to point to those permanent employees of the employer who are receiving better treatment than her and she will further have to show that those employees are performing the same or similar work. Should she fail to show that the comparator employees are performing the same or similar work then the claim will not succeed for lack of proving one of the elements in order for section 198B(8)(a) of the LRA to be enforced.

It is not necessary to analyse here how work that is the same or similar should be interpreted as this has been done under paragraph 11.1 above in relation to section 198A(5) of the LRA which deals with the treatment to be accorded to a deemed employee

as compared to other employees who are engaged in the same or similar work. It is, however, prudent to set out here the concluding submissions made with regard to the meaning to be accorded to work that is the same or similar under section 198A(5) of the LRA (under paragraph 11.1 above) and it is argued that these submissions apply *mutatis mutandis* to how the same or similar work should be interpreted under section 198B(8)(a) of the LRA. The same work referred to under section 198B(8)(a) of the LRA should be interpreted in accordance with the definition of the same work as set out in regulation 4(1) of the Employment Equity Regulations read with the dictionary meaning of the word "interchangeable" as referred to under the regulation which means "able to be exchanged with each other without making any difference or without being noticed". Work that is similar as referred to under section 198B(8)(a) of the LRA should be interpreted in accordance with the definition of work that is substantially the same as set out in regulation 4(2) of the Employment Equity Regulations read with the dictionary meanings of the phrase "sufficiently similar" as referred to under the regulation which means "enough for a particular purpose" under sufficiently and "looking or being almost the same, although not exactly" under similar.[304]

11.3 Part-time employees

Section 198C(1)(a) of the LRA defines a part-time employee to mean an employee who is remunerated wholly or partly in relation to the time that the employee works and who works less hours as compared to a comparable full-time employee.[305] A comparable employee is defined as an employee who is remunerated wholly or partly in relation to the time that the employee works and who is identifiable by the custom and practice of the employer as being a full-time employee.[306] Section 198C does not apply to part-time employees who earn in excess of the threshold prescribed by the Minister.[307] This means

---

304 See paragraph 11.1 Temporary Service Employees above.

305 Section 198C(1)(a) of the LRA. S 198(1)(b)(i)-(ii) of the LRA defines a comparable full-time employee as follows: "(i) is an *employee* who is remunerated wholly or partly by reference to the time that the *employee* works and who is identifiable as a fulltime *employee* in terms of the custom and practice of the employer of that *employee;* and (ii) does not include a fulltime *employee* whose hours of work are temporarily reduced for *operational requirements* as a result of an agreement".

306 Section 198C(1)(b)(i) of the LRA.

307 Section 198C(2)(a) of the LRA.

that the section applies to those part-time employees who earn the threshold amount and less notwithstanding that the heading of section 198C refers to "… employees earning below earnings threshold" which seems to exclude those part-time employees who earn the threshold amount. Section 198C also does not apply in the following circumstances: (a) to employees who ordinarily work less than twenty four hours a month for an employer; (b) during the first three months of continuous employment with an employer; and (c) to an employer who employs less than ten employees or who employs less than fifty employees and whose business has been in operation for less than two years unless the employer conducts more than one business or the business was formed by the division or dissolution for any reason of an existing business.[308]

Section 198C(3)(a) of the LRA sets out the equal pay provision as follows:

> "(3) Taking into account the working hours of a part-time *employee,* irrespective of when the part-time *employee* was employed, an employer must—
>
> (a) treat a part-time *employee* on the whole not less favourably than a comparable fulltime *employee* doing the same or similar work, unless there is a justifiable reason for different treatment."

Section 198C(3)(a) of the LRA obliges an employer to provide a part-time employee, who is not excluded from the section in terms of section 198C(2)(a)-(d) of the LRA, with treatment that is *on the whole not less favourably* as compared to a comparable full-time employee engaged in the same or similar work. It is clear from section 198C(3)(a) that it does not apply to work of equal value and is limited to work that is the same or similar. Section 198C(3)(a) of the LRA also states that the employer must take the working hours of a part-time employee into account when providing her with treatment that is on the whole not less favourably. Section 198C, however, does not explain what is meant by treatment that is *on the whole not less favourably* and does not explain how the working hours of the part-time employee should be taken into account when providing her with treatment that is on the whole not less favourably. These issues cannot be further analysed here because South African law does not provide answers thereto and it is thus important to obtain guidance from international labour law and United Kingdom law in

---

308 Section 198C(2)(b)-(d) of the LRA.

Chapters 3-4 of this thesis in order to properly address these uncertainties. The need to seek guidance from international labour law is buttressed by clause 38 of the Memo which states the following under section 198C of the LRA:

> "The proposed section 198C seeks to regulate the work of vulnerable part-time employees by reflecting the provisions regulating part-time employees in the European Union, and the ILO Convention on Part-time Work (Convention 175, 1994)."

It is also important to explain what is meant by work that is the same or similar under section 198C(3)(a) of the LRA because, similar to the situations under section 198A(5) and section 198B(8)(a) of the LRA as discussed under paragraphs 11.1-11.2 above, an employer is not under an obligation in terms of section 198C(3)(a) to treat a part-time employee who is not excluded from the protection of the section *on the whole not less favourably* if it can show that his/her work is not the same or similar to the work performed by its comparable full-time employees. Such part-time employee who launches a claim in terms of section 198D(1) read with section 198C(3)(a) of the LRA in order to force the employer to treat her *on the whole not less favourably* will also have to point to those comparable full-time employees of the employer who are receiving better treatment than her and she will further have to show that those employees are performing the same or similar work. Should she fail to show that the comparable full-time employees are performing the same or similar work then the claim will not succeed for lack of proving one of the elements in order for section 198C(3)(a) of the LRA to be enforced.

The meaning to be accorded to work that is the same or similar has been analysed under paragraphs 11.1-11.2 above as it relates to sections 198A(5) and 198B(8)(a) of the LRA which deals with the treatment to be accorded to a temporary service employee who is deemed to be an employee of the client as compared to other employees engaged in the same or similar work and the treatment to be accorded to a fixed-term employee as compared to permanent employees engaged in the same or similar work. It is thus not necessary to repeat this analysis here and it is submitted that the analysis applies *mutatis mutandis* to how the same or similar work should be interpreted under section 198C(3)(a) of the LRA. It is, however, prudent to set out here the concluding submissions made with regard to the meaning to be accorded to work that is the same or similar under sections

198A(5) and 198B(8)(a) of the LRA (under paragraphs 11.1-11.2 above) as this is the meaning contended for in relation to work that is the same or similar under section 198C(3)(a) of the LRA. The same work referred to under section 198C(3)(a) of the LRA should be interpreted in accordance with the definition of the same work as set out in regulation 4(1) of the Employment Equity Regulations read with the dictionary meaning of the word "interchangeable" as referred to under the regulation which means "able to be exchanged with each other without making any difference or without being noticed". Work that is similar as referred to under section 198C(3)(a) of the LRA should be interpreted in accordance with the definition of work that is substantially the same as set out in regulation 4(2) of the Employment Equity Regulations read with the dictionary meanings of the phrase "sufficiently similar" as referred to under the regulation which means "enough for a particular purpose" under sufficiently and "looking or being almost the same, although not exactly" under similar.[309]

Section 198C(6)(a)-(b) of the LRA explains how a comparable full-time employee must be identified (chosen) as follows: (a) a full-time employee employed by the employer on the same type of employment relationship engaged in the same or similar work in the same workplace as the part-time employee; and (b) If there is no such comparable full-time employee, then a comparable full-time employee employed by the same employer of the part-time employee in any other workplace. The section does not exclude a comparable full-time employee who works at a different workplace to the part-time employee provided that the comparable full-time employee at the different workplace is employed by the same employer.

11.4 The grounds of justification and onus

Sections 198A, 198B and 198C of the LRA state that an employee should be treated "on the whole not less favourably" and "not less favourably" respectively, unless there is a justifiable reason for the different treatment. Section 198D(2) of the LRA deals with the justifiable reasons (grounds of justification) that can be relied upon. It provides that a

[309] See paragraphs 11.1-11.2 above.

justifiable reason would include that the different treatment is as a result of the application of a system (for e.g. a job evaluation system) that takes the following into account: (a) seniority, experience, length of service; (b) merit; (c) the quality or quantity of work performed; or (d) any other criteria of a similar nature; and such reason is not prohibited by section 6(1) of the EEA.[310] The reference to unfair discrimination in section 6(1) of the EEA at the end of the list of justifiable reasons leads to the deduction that the onus to prove that the differential treatment is *fair* rests on the employer. It is also important to note that sections 198A(5), 198B(8)(a) and 198C(3)(a) of the LRA which sets out the equal pay provisions relating to the various non-standard employees do not require these employees to prove unfair discrimination in order to succeed with an equal pay claim in terms of either section. These employees merely have to comply with the requirements in terms of the respective sections. The normal manner of proving an unfair discrimination claim relating to pay does not apply to these sections and as such sections 198A-198D contains a novel equal pay legal framework relating to certain non-standard employees.

12. SECTION 27 OF THE EEA

Section 27 of the EEA, unlike section 6(4) of the EEA and (to an extent) sections 198A-198C of the LRA, is not dependent on a claim being instituted in order to achieve equal pay. Section 27 of the EEA rather obliges an employer to take a proactive approach to equal pay by progressively reducing disproportionate income differentials and/or unfair discrimination in terms of section 6(4) where this is reflected in the remuneration and benefits statement as contemplated in section 27(1) of the EEA.[311] Section 27 of the EEA does not deal with the various equal pay causes of action including the defences thereto. It simply states, that where the remuneration and benefits statement reflects

---

[310] Section 198D(2)(a)-(d) of the LRA.

[311] Landman A "The Anatomy of Disputes about Equal Pay for Equal Work" (2002) 14 *SA Merc LJ* states the following at 341 "At least two methods exist to remedy discrimination manifesting in unequal wages. The first is case-by-case litigation. This may be done in terms of the Employment Equity Act and, for a limited number of employees, the Promotion of Equality and Prevention of Unfair Discrimination Act. The second method may be described as a proactive or preventative approach, in that employers are required to implement pay equity in their organizations within a specified time, coupled with a monitoring, inspection, and reporting system. This approach has been implemented, for example, in a number of Canadian provinces…".

disproportionate income differentials or unfair discrimination in terms of section 6(4) then the employer must take steps to progressively reduce this. Section 27 of the EEA is thus a different vehicle to achieving equal pay. Equal pay in this part of the work is used in the sense of reducing unfair pay discrimination and disproportionate income differentials and includes pay equity which requires fairness in pay. Oelz *et al* state that pay equity is about fairness in pay and it entails ensuring that the same or similar jobs are paid equally and jobs that are not the same, but of equal value, are also paid equally.[312] The term *pay equity* has been used by Pieterse under paragraph 10.1 above[313] and it is used below under this paragraph 12 in both the Integration of Employment Equity Code[314] as well as the Equal Pay Code.[315]

Section 27(1) of the EEA states that every designated employer must submit a statement to the Employment Conditions Commission ("ECC") on the remuneration and benefits received in each occupational level of that employer's workforce. Section 27(2) of the EEA further states that where disproportionate income differentials or unfair discrimination as contemplated in section 6(4) (relating to equal pay) are reflected in the statement, then the employer is under an obligation to take measures to progressively reduce such differentials subject to guidance that may be given by the Minister of Labour. Section 27 goes further and mentions that the measures *may* include the following: (a) collective bargaining; (b) compliance with sectoral determinations; (c) applying the norms and benchmarks set by the ECC; and (d) relevant measures contained in skills

[312] 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 30 state that Pay Equity is about fairness in pay and it entails ensuring that the same or similar jobs are paid equally and jobs that are not the same, but are of equal value, are paid equally.

[313] See the use of the term pay equity by Pieterse M "Towards Comparable Worth? *Louw v Golden Arrow Bus Services*" (2001) 118(11) *SALJ* 9 at 17 under para 10.1 of this thesis where he refers to *pay equity* legislation.

[314] See the use of the term pay equity in items 12.3.1-12.3.3 of the Integration of Employment Equity Code under this paragraph 12 where it refers to auditing existing remuneration policies in order to ensure that they are based on *pay equity*.

[315] See the use of the term pay equity in item 1.2 read with item 5.2 of the Equal Pay Code under this paragraph 12 where it refers to an objective job evaluation system as being a measure which should be used to promote the implementation of pay *equity*.

development legislation.[316]

The measures listed in section 27(3) which may be taken by an employer to progressively reduce unfair pay discrimination or disproportionate income differentials is not a closed list and this is clear from the use of the word *may* in the section. This means that an employer may take other measures not listed in section 27(3) of the EEA and the issue then arises as to what these measures could be. Besides listing some of the measures that may be taken to progressively reduce disproportionate income differentials or unfair discrimination in terms of section 6(4) of the EEA, section 27 of the EEA does not provide guidance to a designated employer on how to go about doing so nor does it mention where such guidance can be found. The issue which arises from this is where can a designated employer find guidance relating to measures that can be taken to progressively reduce disproportionate income differentials or unfair discrimination in terms of section 6(4) of the EEA.

In order to address these issues one cannot start with section 27 of the EEA but has to start with the Equal Pay Code. Item 3.8 of the Equal Pay Code states that employers who are required in terms of section 27 of the EEA to reduce disproportionate income differentials or unfair discrimination in terms of section 6(4) of the EEA are provided with guidance in this regard in the Integration of Employment Equity Code. It is strange that one has to read item 3.8 of the Equal Pay Code in order to know that the guidance for employers to reduce disproportionate income differentials or unfair discrimination in terms of section 6(4) of the EEA is found in the Integration of Employment Equity Code. It is submitted that it should specifically be stated in section 27 of the EEA itself that guidance for employers to reduce disproportionate income differentials or unfair discrimination in terms of section 6(4) is provided for in the Integration of Employment Equity Code.

---

316 Section 27(3)(a)-(d) of the EEA. Section 27(4) of the EEA states that the ECC is under an obligation to research and investigate norms and benchmarks for proportionate income differentials and advise the Minister on appropriate measures for reducing disproportional income differentials.

Two of the objectives of the Integration of Employment Equity Code is to provide guidelines on eliminating unfair discrimination and to assist employers to ensure that their human resource practices and policies are free from unfair discrimination.[317] The Integration of Employment Equity Code provides the following guidance relevant to section 27 of the EEA. It prohibits an employer from unfairly discriminating in the terms and conditions of employment available to employees and specifically states that an employer must provide equal pay for equal work and work of equal value.[318] The Integration of Employment Equity Code states that every (designated) employer should audit both its terms and conditions of employment and its remuneration policies in order to ensure equal pay.[319] It states the following with regard to an employer auditing its terms and conditions of employment: (a) an audit relating to the terms and conditions of employment is required in order to identify whether they contain any unfair direct or indirect discriminatory policies and practices; (b) all changes in the terms and conditions of employment must be monitored in order to ensure that the unfair discrimination is removed; and (c) audits should be conducted regularly in order to test the perceptions of employees about whether the terms and conditions of employment are non-discriminatory.[320] It is submitted that this type of audit can be described as an equal terms and conditions of employment audit.

The Integration of Employment Equity Code goes on to state that remuneration differentials (income differentials) generally constitute direct unfair discrimination where an employer pays a designated employee less than a non-designated employee doing the same work or work of equal value by reason of her being a designated employee. It further states that remuneration differentials can also constitute indirect unfair discrimination where it arises from remuneration policies and practices that have an adverse or disparate impact on employees from the designated groups. The Integration of Employment Equity Code states that an employer should monitor income

[317] Item 2.1-2.2 of the Integration of Employment Equity Code.
[318] Items 11.2.1, 11.4.1 of the Integration of Employment Equity Code.
[319] Item 11.3.1 of the Integration of Employment Equity Code.
[320] Item 11.3.1 of the Integration of Employment Equity Code.

(remuneration) differentials in order to ensure that the differentials do not contribute to unfair discrimination (and disproportionate income differentials).[321]

In order to address remuneration (income) differentials the Integration of Employment Equity Code provides an employer with the following guidance on how to go about auditing its remuneration policies (including remuneration practices): (a) audit the existing remuneration policies in order to ensure that they are based on pay equity; (b) conduct regular audits among employees to identify lack of awareness about applicable criteria and perceptions of unfair discrimination in remuneration; and (c) develop a strategy to remove barriers or discrimination that cannot be justified in consultation with the relevant stakeholders.[322] It is submitted that this can be described as an equal pay audit which should fall under the ambit of an equal terms and conditions of employment audit as remuneration is a term and condition of employment.

It is submitted that an equal terms and conditions audit taken together with an equal pay audit as provided for in the Integration of Employment Equity Code constitutes a measure which falls within section 27(3) of the EEA which may be taken by an employer to progressively reduce unfair pay discrimination or disproportionate income differentials. It is further submitted that an equal terms and conditions audit including an equal pay audit should explicitly be listed under section 27(3) of the EEA as a measure which can be taken by an employer in order to progressively reduce unfair pay discrimination or disproportionate income differentials.

The Integration of Employment Equity Code provides further guidance to remove remuneration differentials by using objective job evaluation systems. It states that job evaluation systems should be objective as remuneration differentials often emerge from job evaluation systems (which are not objective).[323] It is clear from this that the Integration of Employment Equity Code regards an objective job evaluation system as a measure

[321] Items 12.2.1, 12.3.6 of the Integration of Employment Equity Code.
[322] Items 12.3.1-12.3.3 of the Integration of Employment Equity Code.
[323] Item 12.3.4 of the Integration of Employment Equity Code.

which can be taken to address remuneration differentials. The Equal Pay Code also refers to an objective job evaluation system as being a measure which should be used to promote the implementation of pay equity and which is a necessary element of applying the principle of equal pay in all contexts and to eliminate residual structural inequalities related to legislated and practised racial discrimination that applied in the labour market in South Africa.[324] Based on this, it is submitted that an objective job evaluation system which is free from unfair discrimination in section 6(4) and disproportionate income differentials will assist in complying with the aims of section 27 of the EEA, and to this end, it constitutes a measure which can be taken to progressively reduce unfair discrimination and disproportionate income differentials and should specifically be listed as such under section 27(3) of the EEA.

Guidance relating to how an employer should go about conducting a job evaluation which is objective is provided for in the Equal Pay Code. The Equal Pay Code states that in order to ascertain the value of the jobs an objective assessment must be undertaken in accordance with the following basic criteria:

> "**5.4.1. The responsibility demanded of the work, including responsibility for people, finances and material.** This includes tasks that have an impact on who is accountable for delivery of the enterprise's or organisation's goals, for example, its profitability, financial soundness, market coverage and the health and safety of its clients. It is important to consider the various types of responsibility associated with the enterprise's or organisation's goals independently from the hierarchical level of the job or the number of employees it involves supervising.
>
> **5.4.2. The skills, qualifications, including prior learning and experience required to perform the work, whether formal or informal.** This includes knowledge and skills which are required for a job. What is important is not how these were acquired but rather that their content corresponds to the requirements of the job being evaluated. Qualifications and skills can be acquired in various ways including academic or vocational training certified by a diploma, paid work experience in the labour market, formal and informal training in the workplace and volunteer work.

324 Item 1.2 read with item 5.2 of the Equal Pay Code.

5.4.3. Physical, mental and emotional effort required to perform the work. This refers to the difficulty related to and the fatigue and tension caused by performing job tasks. It is important not to only consider physical efforts but also take mental and psychological effort into consideration.

5.4.4. The assessment of working conditions may include an assessment of the physical environment, psychological conditions, time when and geographic location where the work is performed. For example, one may consider factors such as noise levels and frequent interruptions for office jobs as conditions of work."[325]

Item 5.5 of the Equal Pay Code states that best practice indicates that these four basic criteria should form part of every job evaluation as they are regarded as being sufficient to evaluate all the tasks performed in an organisation regardless of the economic sector concerned. The weight to be attached to each of the criteria may vary depending on the sector, the employer and the job. The criteria furthermore do not constitute any particular preference in respect of the weight to be allocated.[326] The Equal Pay Code goes on to state that pay discrimination based on sex is an international phenomenon found in all countries and the International Labour Organisation has suggested that this is due to stereotypes with regard to women's work, traditional job evaluation methods designed on the basis of male dominated jobs and the weaker bargaining power of female workers.[327]

The Equal Pay Code cautions that the use of job evaluation methods, does not in itself, mean that there is no unfair discrimination. This is so because traditional methods of job evaluation were designed on the basis of male-dominated jobs whereas female jobs often involve different requirements from those of male jobs, such as cleaning and caring for others, which may be undervalued because of the erroneous assumption that the skills involved are intrinsic to women and not acquired through experience and learning.[328] It states that it is important to be vigilant when choosing a specific job evaluation method and to ensure that its content is designed for equal application to both female and male

[325] Item 5.4.1-5.4.4 of the Equal Pay Code.
[326] Item 5.6 of the Equal Pay Code.
[327] Items 6.1, 6.1.1-6.1.3 of the Equal Pay Code.
[328] Items 6.2, 6.2.1-6.2.2, 6.2.5 of the Equal Pay Code.

dominated jobs.[329] This will require employers to establish the value of the male and female dominated jobs in an attempt to ascertain whether the particular jobs have been undervalued and to align the female-dominated jobs with the comparable male-dominated jobs.[330]

It is submitted that it should specifically be stated in section 27 of the EEA itself that guidance relating to how an employer should go about conducting a job evaluation which is objective is provided for in the Equal Pay Code.

While section 27(3)(a) of the EEA mentions collective bargaining as a measure which can be taken by an employer to reduce disproportionate income differentials or unfair pay discrimination, it does not provide guidance to a designated employer on how to go about doing so by means of collective bargaining nor does it mention where such guidance can be found. It should, however, be noted that there is a Code of Good Practice: Collective Bargaining, Industrial Action and Picketing[331] issued under the LRA[332] which deals with collective bargaining, *inter alia*, but it is silent on the role of collective bargaining as far as equal pay is concerned. It should also be noted that section 23 of the LRA which deals with the legal effect of collective agreements does not make reference to the principle of equal pay insofar as the collective bargaining parties agreeing on terms and conditions of employment is concerned. This being what it is, it is important to seek guidance from international labour law and United Kingdom law in Chapters 3-4 of this thesis in order to provide much needed guidance on this aspect.

Another issue is if an employer is under an obligation to take measures to progressively reduce pay differentials as contemplated in section 27(2) of the EEA, is the employer allowed to reduce such differentials by reducing the pay of the higher paid employees in question in order to bring it in line with that of the lower paid employees (downward

---

[329] Item 6.2.4 of the Equal Pay Code.
[330] Item 6.3 of the Equal Pay Code.
[331] The Code of Good Practice: Collective Bargaining, Industrial Action and Picketing *GG* No 42121 of 19 December 2018.
[332] Issued under section 203(1) of the LRA.

equalisation) or whether it is confined to only do so by increasing the pay of the lower paid employees to the rate enjoyed by the higher paid employees (upward equalisation). Section 27 of the EEA does not deal with this important aspect and no guidance can be derived therefrom on this aspect. The Equal Pay Code does, however, provides guidance relating to whether or not unequal pay can be addressed by reducing the pay of employees in order to bring about equal pay by stating in item 8.1.8 that where pay differentials is found to be unjustifiable then such differentials has to be addressed but cannot be addressed by reducing the pay of employees. It is submitted that this is the better position, and it should therefore specifically be stated in section 27 of the EEA that an employer is not allowed to address pay differentials contemplated in section 27(2) of the EEA by reducing the pay of employees (downward equalisation). It is further submitted that the converse of this is that such employer is confined to address the pay differentials as contemplated in section 27(2) of the EEA by increasing the pay of employees (upward equalisation).

The progressive realisation of the right to equal pay was given effect to by the Industrial Court in *Sentrachem 1* in its order. The Court noted that the respondent intended to remove the wage discrimination over a period of time whereas the applicant persisted for an order which required the immediate elimination of the wage discrimination. The Court then held that it would not be practicable for the respondent to remove the wage discrimination immediately but it would be practicable and reasonable for this to be done within a period of six months and it handed down an order to this effect.[333] It should be noted that the finding of wage discrimination in *Sentrachem 1* to which this order relates was set aside by the High Court on review in *Sentrachem 2*.[334] Notwithstanding this, it is submitted that the order made in *Sentrachem 1* relating to the removal of wage discrimination over a period of time can still survive the setting aside of the order of wage discrimination to which it was attached, not as an authoritative statement or principle of

[333] At 430C and 430E-F.
[334] See para 3 of this Chapter for a discussion of *Sentrachem 2*.

law, but as guidance and as an example relating to an equal pay order which is not immediate.

Based on this, it is submitted that the order given by the Industrial Court in *Sentrachem 1* to the effect that the respondent had six months within which to remove the unfair pay discrimination should serve as an example for the CCMA and the Labour Courts to the effect that an order to correct unfair pay discrimination does not have to be immediate where it will not be practicable and reasonable to do so. It is submitted that examples of when it will not be practicable and reasonable to order the immediate removal of unfair pay discrimination will be where it will involve a lengthy process to correct or where the employer produces credible evidence to show that it will be forced to close its business if it is ordered to correct the pay discrimination immediately. This is by no means a *numerus clausus*. It is submitted that this type of order allows for the progressive realisation of the right to equal pay and should be used in appropriate circumstances. It is further submitted that in this instance the progressive realisation of the right to equal pay operates in the form of a court order in order to allow the employer a period of time within which to correct the unfair pay discrimination.

It is further submitted that this type of court order would be an exception to the normal course which would be to order the immediate removal of the unfair pay discrimination with all that is encompasses. It can thus not be sought in the absence of proving to the satisfaction of the CCMA or the Court that it would be unreasonable and/or impracticable to immediately correct the unfair pay discrimination. It is submitted that the power to make such an order should specifically be stated in section 48 of the EEA which sets out the powers of a Commissioner in arbitration proceedings, where the CCMA has the power to entertain an unfair pay discrimination claim in terms of section 6(4) of the EEA, and in section 50(2) of the EEA which sets out the powers of the Labour Court with reference to this being mentioned in section 27 of the EEA.

13. CONCLUSION

This Chapter has involved a lengthy discussion and analyses of the South African equal pay legal framework with the focus being placed on seeking to provide answers/solutions to the problems highlighted in Chapter 1 by only having reference to South African law. It is necessary to hereunder state, in relation to each of the problems highlighted in Chapter 1 as dealt with above, whether South African law can provide answers/solutions to the problems highlighted in Chapter 1 and, if so, to what extent it can do so. It is also necessary to state the need to analyse international labour law and United Kingdom law in relation to each of the highlighted problems in order to assist in providing answers/solutions thereto.

13.1 Terms and Conditions of Employment

The issue posed in Chapter 1 of this thesis[335] and repeated under paragraph 5.1 above concerns what can fall within the ambit of “terms and conditions of employment” in section 6(4) of the EEA as there is no definition provided therefor in the EEA, the Employment Equity Regulations or the Equal Pay Code. The nub of the argument put forth under paragraph 5.1 above is that South African law can assist with this issue in the following way:

(a) The following terms and conditions of employment listed in the Integration of Employment Equity Code fall within the ambit of “terms and conditions of employment” in section 6(4) of the EEA: (i) working time and rest periods; (ii) annual leave; (iii) sick leave; (iv) maternity leave; (v) family responsibility leave; (vi) any other types of leave; (vii) rates of pay; (viii) overtime rates; (ix) allowances; (x) retirement schemes; (xi) medical aid; and (xii) other benefits. This list of terms and conditions of employment should specifically be set out in the Equal Pay Code in order to promote legal certainty regarding what can fall within the ambit of terms and conditions of employment in section 6(4) of the EEA.[336]

[335] See Chapter 1, para 2 of this thesis.
[336] See para 5.1 above.

No submission can be made at this stage regarding the inclusion of some or all of the payments listed in both lists of payments as set out in the BCEA Schedule for inclusion in the Equal Pay Code under terms and conditions of employment contemplated in section 6(4) of the EEA. Such submission can, however, be made later in this thesis if international labour law and/or United Kingdom law provides guidance which can assist in this regard.[337]

This is the extent to which South African law can contribute towards addressing the issue and it is thus prudent to analyse international labour law and United Kingdom law on this score in order to further contribute towards addressing the issue.[338]

13.2 Same Employer

The issue raised in Chapter 1 of this thesis[339] and repeated under paragraph 5.2 above relates to there being no definition in the EEA or the Employment Equity Regulations and the Equal Pay Code of what or who would constitute "the same employer" for the purpose of section 6(4) of the EEA and as a result thereof the following questions were posed: Does it mean the same company owned by the same employer at the same location? Does it cover the same company owned by the same employer at a different location? With regard to the State, is the State the same employer? or is the State different employers depending on for example the different Departments and the different geographical locations? The questions posed in essence deals with who is the "same employer" in the private sector as well as the public sector. It is argued above under paragraph 5.2 that South African law can contribute towards answering these questions in the following ways:

337 See para 5.1 above.
338 An analysis of international labour law and United Kingdom law on this aspect will be undertaken in Chapters 3-4 of this thesis.
339 See Chapter 1, para 2 of this thesis.

(a) An employer in the private sector who owns different branches of the same company will be regarded as the "same employer" of all the employees employed in the various branches including those based at its head office.[340]

(b) The State is the employer of everyone in the public service (sector). This means the following: (i) employees employed in *different Departments* in the *same province* are employed by the "same employer" which is the State; (ii) employees employed in the *same Department* but in *different provinces* are employed by the "same employer" which is the State; (iii) employees employed in *different Departments* in *different provinces* are employed by the "same employer" which is the State.[341]

While South African law does assist in addressing the questions posed above, it will be prudent to seek to strengthen the answers to these questions by analysing the same employer aspect as dealt with under the equal pay legal framework in international labour law and United Kingdom law.[342]

13.3 The Comparator (employees of the same employer)

The issue raised in Chapter 1 of this thesis[343] and repeated under paragraph 5.3 above relates to there being no parameters provided for in the EEA, the Employment Equity Regulations or the Equal Pay Code with regard to the choosing and attendant suitability of the comparator under section 6(4) of the EEA and as a result thereof the following questions were raised: Whether the comparator must be employed at the same time as the claimant (must their employment be contemporaneous)? Put differently, is it possible for a claimant to compare herself/himself with a comparator who is a successor or predecessor? Is it possible for a claimant to compare himself/herself with a hypothetical

[340] See the discussion of *MEC for Transport: KwaZulu-Natal and Others v Jele* [2004] 12 BLLR 1238 (LAC) under paragraph 5.2 of this Chapter.

[341] See the discussion of *Minister of Correctional Services & Others v Duma* [2017] ZALAC 78 and *MEC for Transport: KwaZulu-Natal and Others v Jele* [2004] 12 BLLR 1238 (LAC) under paragraph 5.2 of this Chapter.

[342] An analysis of international labour law and United Kingdom law on this aspect will be undertaken in Chapters 3-4 of this thesis.

[343] See Chapter 1, para 2 of this thesis.

comparator? Is it possible for a claimant to choose a comparator who is a job applicant and who was offered a higher salary than that offered to her but who refused employment? Is it possible for a claimant to choose a comparator who is her subordinate (engaged in work of lesser value) but who is paid more than the claimant? The crux of the arguments made under paragraph 5.3 above relating to how these questions should be answered by utilising South African law are as follows:

(a) An equal pay claimant can use a hypothetical comparator in the following three scenarios:

(i) Where an equal pay claimant bases her claim on a job evaluation system then it is possible for her to launch an equal pay claim and compare herself with the system based hypothetical comparator;[344]

(ii) An equal pay claimant will not need to choose a comparator where she is able to prove that her employer has a racist employment practice in place regarding the computation of salary and her salary has been computed in line with the racist practice resulting in unfair pay discrimination relating to race. A hypothetical comparator can arise here where the claimant in proving the existence of a racist employment practice shows that had she been white then she would have received the salary that she asked for and as such she compares her position to that of a white hypothetical comparator. It should be noted that this is not restricted to unfair pay discrimination based on race and can include other prohibited grounds of discrimination both listed and arbitrary and the claimant does not need to show that the hypothetical comparator would have been employed on the same work, substantially the same work or work of equal value;[345] and

(iii) An equal pay claimant can base her equal pay claim on the ground that if a male employee was hired to perform her work then he would have been employed on better terms and conditions of employment/higher pay. The equal pay claimant makes use of a

---

[344] See the discussion of *Louw v Golden Arrows Bus Services (Pty) Ltd* under para 5.3 above.
[345] See the discussion of *Mutale v Lorcom Twenty Two CC* [2009] 3 BLLR 217 (LC) under para 5.3 above.

hypothetical comparator in this scenario. An example of this is where a job applicant is offered a higher salary than that enjoyed by the claimant and the job applicant does not subsequently become an employee of the same employer. It should be noted that this is not restricted to unfair pay discrimination based on sex and can include other prohibited grounds of discrimination both listed and arbitrary. It should, however, be noted that this scenario does not apply to equal pay for work of equal value but is restricted to equal pay for the same work and substantially the same work.[346]

(b) An equal pay claimant can compare herself with an employee who is a subordinate to her and who is engaged in work of a lesser value but who earns higher pay than her. Such comparator is a suitable comparator in the circumstances.[347]

While South African law does assist the arguments put forth in addressing the questions posed above, it is prudent to ascertain what the position relating to these questions are in international labour law and United Kingdom law in order to determine whether the arguments put forth to the questions, based on South African law, are supported by international labour law and/or United Kingdom law.[348]

The requirement of contemporaneous employment of the claimant and comparator which encompasses the use of a comparator who is a successor or predecessor has not come before the South African Labour Courts or been dealt with elsewhere in South African law and no guidance can be extracted from South African law in order to answer the questions relating thereto as posed above.[349]

---

346 See the discussion of item 6.5 of the Equal Pay Code under para 5.3 above.

347 See the discussion of *Mdunjeni-Ncula v MEC, Department of Health & Another* (PA10/2019) [2021] ZALAC 29 under para 5.3 above.

348 An analysis of international labour law and United Kingdom law on this aspect will be undertaken in Chapters 3-4 of this thesis.

349 An analysis of international labour law and United Kingdom law on this aspect will be undertaken in Chapters 3-4 of this thesis.

13.4 Same work

The issue raised in Chapter 1 of this thesis[350] and repeated under paragraph 5.4 above relates to there being no definition in the EEA, the Employment Equity Regulations or the Equal Pay Code as to what would constitute "work that is *interchangeable*" under regulation 4(1) of the Employment Equity Regulations which provides a definition of the same work for the purpose of the first cause of action, equal terms and conditions (pay) for the same work. It is argued under paragraph 5.4 above, that the word *interchangeable* referred to under regulation 4(1) of the Employment Equity Regulations should be accorded its dictionary meaning which is *able to be exchanged with each other without making any difference or without being noticed*. This argument is made based on South African law on its own without more. It will, however, be prudent to ascertain how equal pay for the same work is dealt with in international labour law and United Kingdom law in order to ascertain whether there are any lessons that can be learnt for South African law on this score.[351]

13.5 Substantially the same work

The issue raised in Chapter 1 of this thesis[352] and repeated under paragraph 5.5 above relates to there being no definition in the EEA, the Employment Equity Regulations or the Equal Pay Code as to what would constitute "work that is *sufficiently similar*" under regulation 4(2) of the Employment Equity Regulations which provides a definition of work that is substantially the same for the purpose of the second cause of action, equal terms and conditions (pay) for substantially the same work. It is argued under paragraph 5.5 above, that the words *sufficiently similar* referred to under regulation 4(2) of the Employment Equity Regulations should be accorded its dictionary meaning which is *enough for a particular purpose* and *looking or being almost the same, although not exactly*. This argument is made solely based on South African law. It remains prudent to

---

[350] See Chapter 1, para 2 of this thesis.
[351] An analysis of international labour law and United Kingdom law on this aspect will be undertaken in Chapters 3-4 of this thesis.
[352] See Chapter 1, para 2 of this thesis.

ascertain how equal pay for substantially the same work is dealt with in international labour law and United Kingdom law in order to ascertain whether there are any lessons that can be learnt for South African law in this regard.

13.6 Does section 6(4) only apply to listed grounds?

The question raised in Chapter 1 of this thesis[353] and repeated under paragraph 6 above relates to whether section 6(4) of the EEA only applies to listed grounds as it states the following in setting out the causes of action, "… based on any one or more of the *grounds listed* in subsection (1), is unfair discrimination". This gives the impression that the three equal pay causes of action can only be brought on the listed grounds. It is argued under paragraph 6 above based on *Pioneer Foods* that the interpretation to be accorded to the phrase in section 6(4) of the EEA which states "… based on any one or more of the grounds listed in subsection (1), is unfair discrimination" should be interpreted to also include arbitrary grounds of discrimination and is not limited to the listed grounds.[354]

This argument made is the final conclusion to be given on this issue and no reference to international labour law and United Kingdom law is needed as this issue can definitively be answered from domestic law itself without more.

13.7 The onus provision in section 11 of the EEA

13.7.1 Section 11(1) of the EEA relating to proving unfair discrimination on a listed ground

The following issues raised in Chapter 1 of this thesis[355] and repeated under paragraph 8 above concerning section 11(1)(a)-(b) of the EEA are as follows: (a) section 11(1)(a) of the EEA states that upon an *allegation* of unfair discrimination on a listed ground, the

---

353 See Chapter 1, para 2 of this thesis.
354 See the discussion of *Pioneer Foods v WAR* 2016 ZALCCT 14 under paragraph 6 above.
355 See Chapter 1, para 3 of this thesis.

employer must prove on a balance of probabilities that the discrimination did not take place or is rational and not unfair, or is otherwise justifiable. The question which arises is whether a *mere allegation* of unfair discrimination is sufficient to shift the onus to the employer; (b) Section 11(1)(b) of the EEA refers to a justification that can be proffered by the employer which is "rational and not unfair, or is otherwise justifiable." The questions which arise is whether the phrase adds to the grounds of justification in section 6(2) of the EEA? Whether rational and not unfair means something different from the grounds of justification in section 6(2) of the EEA and whether the phrase "or is otherwise justifiable" creates an open-ended ground of justification?[356]

With regard to the question under (a) above, the nub of the submissions relating thereto made under paragraph 8 above are as follows. The approach argued for by Du Toit, to the effect that the word *alleged* in section 11(1) of the EEA means something less than making out a *prima facie* case as this would be required in the normal course where the burden of proof is not reversed as is the case in section 11(1) and this something less is for the claimant employee to produce evidence which is sufficient to raise a credible possibility that unfair discrimination has taken place and this will then call for the employer to prove the contrary,[357] fits more contextually within section 11(1) of the EEA for the following two reasons: (i) it does not follow the literal meaning to be attached to the phrase *mere allegation* which if followed would lead to employers being required to answer meritless equal pay claims in the absence of the claimant adducing an iota of evidence; and (ii) it does not follow the equal pay case law cited under paragraph 8 above which requires an equal pay claimant to at least establish a *prima facie* case of discrimination[358] and this is correct because if this was required by section 11(1) then it could have simply been stated that the claimant must establish a *prima facie* case in order to put the employer on its defence. Du Toit's approach should be followed, and to this end, section 11(1) only requires an equal pay claimant to produce sufficient evidence in order to raise

[356] See the discussion under para 8 above.
[357] See the discussion of Du Toit D *et al Labour Relations Law: A Comprehensive Guide* 6th ed (LexisNexis 2015) under para 8 above.
[358] See the discussion of *Mangena v Fila* (JS 343/05) [2009] ZALC 81; *Louw v Golden Arrows Bus Services (Pty) Ltd* (2000) 21 *ILJ* 188 (LC); *Ex Parte Minister of Justice: re R v Jacobson & Levy* 1931 AD 466 at 478; and *Ntai & Others v SA Breweries Ltd* (2001) 22 *ILJ* 214 (LC) under para 8 above.

a credible possibility that unfair pay discrimination has taken place and if she succeeds in doing so then the onus is on the employer to prove its defence on a balance of probabilities as required by section 11(1). The *sufficient evidence* should be more than the making of a bald allegation and less than establishing a *prima facie* case.[359]

While the question relating to whether a *mere allegation* of unfair discrimination is sufficient to shift the onus to the employer has been answered based on South African law alone, it remains prudent to ascertain what the position relating to this question is under international labour law and United Kingdom law in order to determine whether the answer put forth to the question based on South African law is supported by international labour law and/or United Kingdom law.[360]

With regard to the questions under (b) above, the gravamen of the submissions relating thereto made under paragraph 8 above are as follows: (a) Du Toit is correct in his view that "rational" and "not unfair" and "is otherwise justifiable" as referred to in section 11(1)(b) of the EEA refers to the grounds of justification in section 6(2) of the EEA; (b) The phrase "rational and not unfair, or is otherwise justifiable" does not add to the grounds of justification in section 6(2) of the EEA, neither does the phrase "or is otherwise justifiable" create an open-ended ground of justification; (c) As it is argued that the grounds of justification in section 6(2) of the EEA are not applicable to equal pay claims, it is submitted that section 11(1)(b) of the EEA should be read to refer to regulation 7(1)(a)-(g) of the Employment Equity Regulations which lists the specific grounds of justification to equal pay claims and regulation 7(2)(a)-(b) of the Employment Equity Regulations which provides guidance relating to when a pay difference based on the specific grounds listed therein will be *fair* and *rational* when established *in accordance with the onus provision in section 11 of the EEA*; and (d) an employer who attracts the onus under section 11(1)(b) of the EEA read with regulation 7 of the Employment Equity Regulations also has to prove that the factor which it relies on for the pay differential does

359 See the discussion under para 8 above.

360 An analysis of international labour law and United Kingdom law on this aspect will be undertaken in Chapters 3-4 of this thesis and the final conclusions and recommendations will be made in Chapter 5.

not amount to indirect discrimination as referred to in regulation 7(2)(a)-(b) of the Employment Equity Regulations.

The arguments made above utilising South African law does answer the questions arising from section 11(1)(b) of the EEA as set out above. It is, however, still prudent to ascertain what the position of the onus relating to equal pay is in international labour law and United Kingdom law in order to learn possible lessons for the onus provision in section 11(1) of the EEA.[361]

13.7.2 Section 11(2) of the EEA relating to proving unfair discrimination on an arbitrary ground

The following questions raised in Chapter 1 of this thesis[362] and repeated under paragraph 8 above concerning section 11(2) of the EEA are as follows: (a) Is the adding of the phrase "arbitrary ground" in section 6(1) as read with section 11(2) of the EEA a third ground on which an unfair discrimination claim can be brought or is it the same as an unlisted ground; (b) Where does the *Harksen* test fit in with regard to proving unfair discrimination on an unlisted ground?[363] and (c) Is the proving of "irrationality" something different to proving unfair discrimination?[364]

With regard to the questions set out under (a)-(c) above the crux of the submissions relating thereto made under paragraph 8 above are as follows: (a) The adding of the phrase "arbitrary ground" in section 6(1) as read with section 11(2) of the EEA does not create a third ground on which an unfair discrimination claim can be brought, and it is synonymous with an unlisted ground of unfair discrimination.[365] A claimant who relies on

---

[361] An analysis of international labour law and United Kingdom law on this aspect will be undertaken in Chapters 3-4 of this thesis.

[362] See Chapter 1, para 3 of this thesis.

[363] In *Harksen v Lane NO & Others* 1997 (11) BCLR 1489 (CC) at para 53 the Constitutional Court held that the employee must prove that the ground is based on attributes and characteristics that have the ability to impair the fundamental human dignity of people in a comparably serious manner.

[364] See the discussion under para 8 above.

[365] See the discussion of *Ndudula & 17 Others v Metrorail-Prasa (Western Cape)* [2017] ZALCCT 12 and *Mdunjeni-Ncula v MEC, Department of Health & Another* (PA10/2019) [2021] ZALAC 29 under paragraph 8 above.

an arbitrary ground is obliged to specifically state what that ground is and cannot baldly claim unfair pay discrimination on an arbitrary ground;[366] (b) Section 11(2) of the EEA must be read with the test for unfair discrimination based on unlisted grounds in *Harksen v Lane*[367] and this requires a claimant to prove that the arbitrary ground is based on attributes or characteristics which has the potential to impair his/her dignity or affect him/her in a comparably serious manner.[368] This is the relevance of the *Harksen* test with regard to proving unfair discrimination on an unlisted ground; (c) Rationality forms part of the enquiry regarding whether or not the discrimination is unfair and does not constitute a test on its own. The test for unfair discrimination includes the sub-test of rationality but rationality is not the test for unfair discrimination in and of itself.[369]

The submissions made under this heading are the final conclusions to be given on the issues raised above and no reference to international labour law and United Kingdom law is needed as these are issues which can definitively be answered from domestic law itself without more.

13.8 Access to Pay Related Information

The lack of provisions in the EEA, the Employment Equity Regulations and the Equal Pay Code relating to accessing pay related information was raised in Chapter 1 of this thesis[370] and repeated under paragraphs 9.1-9.2 above. The nub of the submissions relating thereto made under paragraphs 9.1-9.2 above are as follows:

(a) Section 78(1)(b) of the BCEA which gives employees the right to discuss their terms and conditions of employment with each other, their employer or any other person and

---

366 See the discussion of *DM Sethole & 18 Others v Dr Kenneth Kaunda District Municipality* [2017] ZALCJHB 484 under para 8 above.

367 1997 (11) BCLR 1489 (CC) at para 53.

368 See the discussion of *Ndudula & 17 Others v Metrorail-Prasa (Western Cape)* [2017] ZALCCT 12 and *Harksen v Lane NO & Others* 1997 (11) BCLR 1489 (CC) under para 8 above.

369 See the discussion of *Leonard Dingler Employee Representative Council v Leonard Dingler (Pty) Ltd* (1998) *ILJ* 285 (LC); *Hoffman v SA Airways* 2001 (1) SA 1 (CC) and *Minister of Correctional Services and Others v* Duma [2017] ZALAC 78 discussed under para 8 above.

370 See Chapter 1, para 4 of this thesis.

section 78(2) of the BCEA which protects this right should specifically be mentioned in the EEA;[371]

(b) An employee will not be able to access the remuneration and benefits statement which the employer is obliged to submit in terms of section 27(1) of the EEA in order to found a claim for equal pay because the ECC is not allowed to disclose any information pertaining to individual employees or employers. While a party to collective bargaining is able to request such information, such information will not be admissible as evidence in an equal pay claim as the disclosure thereof is limited to collective bargaining;[372]

(c) An employee of a public body will be able to access pay related information (classification, salary scale, remuneration and responsibilities of the position held or services performed) of a fellow employee (comparator) or a former employee (predecessor comparator) in terms of PAIA and access to this information cannot be refused in terms of the Act. In order to access this information, the employee will have to comply with the procedural requirements relating to a request for access to that record of information;[373]

(d) An employee of a private body will be able to access pay related information (classification, salary scale, remuneration and responsibilities of the position held or services performed) of a fellow employee (comparator) or former employee (predecessor comparator) in terms of PAIA and the Act specifically states that access to this type of information cannot be refused. In order to access this information, the employee will have to comply with the procedural requirements relating to a request for access to that information and prove that the record is required for the exercise or protection of his/her rights;[374]

---

[371] See the discussion of sections 78(1)(b) and 79(2) of the BCEA under para 9.1 above.

[372] See the discussion of section 27 of the EEA under para 9.1 above.

[373] See the discussion of PAIA relating to the right to access information from a public body under para 9.2.1(a) above.

[374] See the discussion of PAIA relating to the right to access information from a private body under para 9.2.1(b) above.

(e) If an institution or functionary performs a public function or exercises a public power in terms of any legislation as contemplated under the definition of "public body" in section 1 of PAIA then the following two scenarios can occur with regard to an employee accessing pay related information from such institution or functionary:

- Firstly, if the functionary or institution produces a record pursuant to the exercise of a public power or performance of a public function and/or which involves funds from the public purse and which relates to information about an employee (including a former employee) concerning his/her " … classification, salary scale, remuneration and responsibilities of the position held or services performed by the individual" then an equal pay claimant will be able to access this information by complying with the procedural requirements which, in essence, relates to the form of the request and the fees payable. Access to this information cannot be refused as it is not prohibited in terms of any ground of refusal and is specifically listed as one of the records to which access cannot be refused.[375]

- Secondly, if on the other hand, the functionary or institution produces a record outside the exercise of a public power or performance of a public function and/or which does not involve funds from the public purse and which relates to information about an employee (including a former employee) concerning his/her " … classification, salary scale, remuneration and responsibilities of the position held or services performed by the individual" then the functionary or institution is regarded as a private body with regard to such record and an equal pay claimant will not be able to access this record as being that of a public body – he/she will have to access this record as being that of a private body and will have to, in addition to the requirements required for access to a record of a public body, prove that the information is required for the exercise or protection of his/her rights.[376]

---

[375] See the discussion of PAIA relating to the right to access information from a public body under para 9.2.1(a) above.

[376] See the discussion of PAIA relating to the right to access information from a public body under para 9.2.1(a) above.

(f) The right of an employee to access pay related information from both a public body and private body in terms of PAIA as summarised under paragraphs (c)-(e) above should specifically be mentioned in the EEA.

(g) The process to follow where access to a record of a public body or a private body is refused should be mentioned in the EEA as well as the bodies and courts that may be approached in the process. It should also be mentioned in the EEA that the Labour Court is one such court which can be approached by an employee.[377]

While PAIA does provide assistance to an equal pay claimant to obtain pay related information it does have its limitations in that the information sought will not be a direct answer as to why a claimant is being paid less than a fellow comparator employee as it has not been enacted to deal specifically with access to pay related information for the purpose of equal pay rights in section 6(4) of the EEA. It is then prudent to ascertain how access to pay related information is dealt with under international labour law and United Kingdom law in order to ascertain whether any lessons can be learnt for South African equal pay law on this score.[378]

13.9 Grounds of Justification

The following uncertainties raised in Chapter 1 of this thesis[379] and repeated under paragraphs 10.1-10.3 above concerning the grounds of justification to equal pay claims are as follows: (a) The first uncertainty is whether the grounds of justification in section 6(2) of the EEA can apply to equal pay claims in terms of section 6(4) of the EEA; (b) The second uncertainty is whether the grounds of affirmative action and/or the inherent requirements of the job are capable of falling within the ambit of regulation 7(1)(g) of the Employment Equity Regulations which refers to “any other relevant factor that is not unfairly discriminatory in section 6(1) of the EEA” and in this way operate as grounds of

[377] See the discussion under paragraphs 9.2.1(c), 9.2.1(c)(i), 9.2.1(c)(ii) of PAIA.
[378] An analysis of international labour law and United Kingdom law on this aspect will be undertaken in Chapters 3-4 of this thesis.
[379] See Chapter 1, paras 5 and 7 of this thesis.

justification to equal pay claims; and (c) The third uncertainty is whether an employer can rely on measures taken in terms of section 27(2) of the EEA as a ground of justification falling under "any other relevant factor that is not unfairly discriminatory in terms of section 6(1) of the Act" in terms of regulation 7(1)(g) of the Employment Equity Regulations?

With regard to the uncertainties set out under paragraphs (a)-(c) above, the gravamen of the submissions relating thereto made under paragraphs 10.1-10.3 above are as follows: (a) Affirmative action and the inherent requirements of the job are not suitable grounds of justification to equal pay claims; (b) The grounds of affirmative action and the inherent requirements of the job cannot fall under the ambit of "any other relevant factor that is not unfairly discriminatory in terms of section 6(1) of the Act" as set out in regulation 7(1)(g) of the Employment Equity Regulations and in this way operate as grounds of justification to equal pay claims because of unsuitability; (c) It will be difficult to refuse to recognise the progressive realisation of the right to equal pay as a ground of justification, falling under regulation 7(1)(g) of the Employment Equity Regulations, where it is genuine and in circumstances where it gives effect to section 27(2) of the EEA. The taking of measures in terms of section 27(2) of the EEA in order to progressively reduce disproportionate income differentials and/or unfair pay discrimination in section 6(4) of the EEA should specifically be listed as a ground of justification under regulation 7(1) of the Employment Equity Regulations.[380]

It is important to test the arguments made in paragraphs (a)-(b) above, by analysing the grounds of justification in international labour law and United Kingdom law in order to ascertain whether or not they contain such grounds of justification as set out in section 6(2) of the EEA.[381]

---

380 See the discussion under paragraphs 10.1-10.3 above.

381 An analysis of international labour law and United Kingdom law on this aspect will be undertaken in Chapters 3-4 of this thesis.

With regard to the submissions made under paragraph (c) it will be prudent to ascertain what the position is under international labour law and United Kingdom law relating to the progressive realisation of the right to equal pay.[382]

The following questions have arisen during the course of the discussion relating to the grounds of justification under the Employment Equity Regulations in paragraph 10.2 above:

(a) Whether the factor of *responsibility* can fall under the ambit of "any other relevant factor that is not unfairly discriminatory in terms of section 6(1) of the Act" in terms of regulation 7(1)(g) of the Employment Equity Regulations as it is not listed under regulation 7(1) of the Employment Equity Regulations but it has been referred to as being a ground of justification to unequal pay (pay differentials) by the Labour Court in *TGWU*.[383] Before making a submission to answer this question, it is prudent to ascertain what the position is under international labour law and United Kingdom law regarding the factor of responsibility operating as a ground of justification to an equal pay claim.[384]

(b) Whether the factor of different wage setting structures resulting in a pay difference between employees engaged in the same work can fall under the ambit of "any other relevant factor that is not unfairly discriminatory in terms of section 6(1) of the Act" in terms of regulation 7(1)(g) of the Employment Equity Regulations as it is not listed under regulation 7(1) of the Employment Equity Regulations but it has, in essence, been found to be a ground of justification to unequal pay by the Labour Court in *Heynsen*.[385] Before making a submission to answer this question, it is prudent to ascertain what the position is under international labour law and United Kingdom law regarding the factor of different

[382] An analysis of international labour law and United Kingdom law on this aspect will be undertaken in Chapters 3-4 of this thesis.
[383] See this question and the discussion giving rise thereto under para 10.2 above.
[384] An analysis of international labour law and United Kingdom law on this aspect will be undertaken in Chapters 3-4 of this thesis.
[385] See this question and the discussion giving rise thereto under para 10.2 above.

wage setting structures resulting in a pay difference between employees engaged in the same work operating as a ground of justification to an equal pay claim.[386]

13.10 Equal Pay Relating to Non-Standard (Atypical) Employees in terms of the LRA

13.10.1 Temporary service employees

The issues raised in Chapter 1 of this thesis[387] and repeated under paragraph 11.1 above concerning the equal pay provision in section 198A(5) of the LRA are as follows: (a) What does the phrase *must be treated on the whole not less favourably* as referred to in section 198A(5) of the LRA mean?; and (b) What will constitute work that is the *same* or *similar* for the purpose of section 198A(5) of the LRA?

With regard to the issue under (a) above, the crux of the submissions relating thereto made under paragraph 11.1 above are as follows. There are two possible views based on South African law which could be argued in respect of the meaning to be accorded to the phrase *must be treated on the whole not less favourably* under section 198A(5) of the LRA. The *first argument* is that on the whole not less favourably under section 198A(5) of the LRA read with the Constitutional Court's remarks in *Assign Services* and the example of what would constitute treatment that is on the whole not less favourably in clause 38 of the Memo is that the phrase means that the deemed employee must be given the *same terms and conditions* as the deemed employer's employees who are engaged in the same or similar work.[388]

The *second argument* based on taking the words "on the whole" under the phrase "on the whole not less favourably" in section 198A(5) of the LRA into account read with the dictionary meaning of the words "on the whole" and the limited guidance deduced from the use of the phrase *on the whole not less favourable* under section 197(3)(a) of the LRA

[386] An analysis of international labour law and United Kingdom law on this aspect will be undertaken in Chapters 3-4 of this thesis.
[387] See Chapter 1, para 6 of this thesis.
[388] See the discussion of section 198A(5) of the LRA under para 11.1 above.

is that the phrase *must be treated on the whole not less favourably* under section 198A(5) of the LRA does not oblige the deemed employer to provide the deemed employee with the same terms and conditions as its employees who are engaged in the same or similar work but allows the deemed employer to provide the deemed employee with, for example, a package, on condition, that the package does not result in treatment that is on the whole not less favourable as compared to the terms and conditions of employment enjoyed by those employees of the deemed employer who are engaged in the same or similar work.[389]

It is difficult to choose at this point, by only having reference to South African law, which of the arguments are correct as they both can be substantiated and argued from a proper basis,[390] and to this end, it is necessary to seek guidance from international labour law and United Kingdom law.[391]

With regard to the issue under (b) above, the nub of the submissions relating thereto made under paragraph 11.1 above are as follows. Regulations 4(1)-(2) of the Employment Equity Regulations which defines what is meant by work that is the same and work that is substantially the same as referred to under the causes of action in section 6(4) of the EEA, equal pay for the same work and equal pay for substantially the same work read with the submissions made above under paragraph 5.4 above relating to the meaning to be accorded to the phrase "interchangeable" under the definition of the same work and the meaning to be accorded to the phrase "sufficiently similar" under the definition of work that is substantially the same under paragraph 5.5 above, should be followed when interpreting the same or similar work under section 198A(5) of the LRA.[392] It should be noted that any guidance that can be gained from international labour law and United Kingdom law regarding how they approach the same work and substantially the

389 See the discussion of section 198A(5) of the LRA under para 11.1 above.
390 See the discussion of section 198A(5) of the LRA under para 11.1 above.
391 An analysis of international labour law and United Kingdom law on this aspect will be undertaken in Chapters 3-4 of this thesis.
392 See the discussion regarding this issue under para 11.1 above.

same work for purposes of these terms in section 6(4) of the EEA will also be relevant for these terms under section 198A(5) of the LRA.[393]

Besides the need to refer to international labour law and United Kingdom law in order to provide guidance as specifically sought for in the above paragraphs, any further lessons which can be learnt from these laws for the South African equal pay law relating to temporary service employees under section 198A(5) of the LRA should also be sought for and stated in Chapters 3 and 4 of this thesis.

13.10.2 Fixed-term contract employees

The issues raised in Chapter 1 of this thesis[394] and repeated under paragraph 11.2 above concerning the equal pay provision in section 198B(8)(a) of the LRA are as follows: (a) What does the phrase *must not be treated less favourably* as referred to in section 198B(8)(a) of the LRA mean?; and (b) What will constitute work that is the *same* or *similar* for the purpose of section 198B(8)(a) of the LRA? The following question has arisen during the course of the discussion relating to fixed-term workers under section 198B of the LRA in paragraph 11.2 above and it relates to the issue raised in (a) above and will accordingly be dealt with under (a). Whether a fixed-term employee whose contract is deemed to be of an indefinite duration as contemplated in section 198B(5) of the LRA and a fixed-term employee whose contract is for a fixed-term which complies with section 198B must be provided with the same treatment as compared to a comparable permanent employee as contemplated in section 198B(8)(a) of the LRA.

With regard to the issue under (a) above, the crux of the submissions relating thereto made under paragraph 11.2 above are as follows. There is uncertainty regarding whether the phrase *must not be treated less favourably* in section 198B(8)(a) of the LRA must be interpreted to mean *treatment that is the same* or *treatment that is on the whole not less*

[393] An analysis of international labour law and United Kingdom law on this aspect will be undertaken in Chapters 3-4 of this thesis.
[394] See Chapter 1, para 6 of this thesis.

favourably.[395] There is further uncertainty regarding whether a fixed-term employee whose contract is deemed to be of an indefinite duration as contemplated in section 198B(5) of the LRA and a fixed-term employee whose contract is for a fixed-term which complies with section 198B must be provided with the same treatment as compared to a comparable permanent employee as contemplated in section 198B(8)(a) of the LRA. This cannot be answered by only referring to South African law, and to this end, guidance is needed from international labour law and United Kingdom law.[396]

With regard to the issue under (b) above, the nub of the submissions relating thereto made under paragraph 11.2 above are as follows. Regulations 4(1)-(2) of the Employment Equity Regulations which defines what is meant by work that is the same and work that is substantially the same as referred to under the causes of action in section 6(4) of the EEA, equal pay for the same work and equal pay for substantially the same work read with the submissions made above under paragraph 5.4 above relating to the meaning to be accorded to the phrase “interchangeable” under the definition of the same work and the meaning to be accorded to the phrase “sufficiently similar” under the definition of work that is substantially the same under paragraph 5.5 above, should be followed when interpreting the same or similar work under section 198B(8)(a) of the LRA.[397] It should be noted that any guidance that can be gained from international labour law and United Kingdom law regarding how they approach the same work and substantially the same work for purposes of these terms in section 6(4) of the EEA will also be relevant for these terms under section 198B(8)(a) of the LRA.[398]

Besides the need to refer to international labour law and United Kingdom law in order to provide guidance as specifically sought for in the above paragraphs, any further lessons which can be learnt from these laws for the South African equal pay law relating to fixed-

---

395 See the discussion of section 198B(8)(a) of the LRA under para 11.1 above.

396 An analysis of international labour law and United Kingdom law on this aspect will be undertaken in Chapters 3-4 of this thesis.

397 See the discussion regarding this issue under para 11.2 above.

398 An analysis of international labour law and United Kingdom law on this aspect will be undertaken in Chapters 3-4 of this thesis.

term employees under section 198B(8)(a) of the LRA should also be sought for and stated in Chapters 3 and 4 of this thesis.

13.10.3 Part-time employees

The issues raised in Chapter 1 of this thesis[399] and repeated under paragraph 11.3 above concerning the equal pay provision in section 198C(3)(a) of the LRA are as follows: (a) What does the phrase *must treat a part-time employee on the whole not less favourably* as referred to in section 198C(3)(a) of the LRA mean?; (b) How should the working hours of the part-time employee be taken into account when providing her with treatment that is on the whole not less favourable; and (c) What will constitute work that is the *same* or *similar* for the purpose of section 198C(3)(a) of the LRA?

With regard to the issue under (a), no answer can be proffered, using South African law, as to what is meant by the phrase *must treat a part-time employee on the whole not less favourably*[400] and guidance on this issue will have to be sought from international labour law and United Kingdom law.[401]

With regard to the issue under (b), no explanation can be sourced from South African law regarding how the working hours of the part-time employee should be taken into account when providing her with treatment that is on the whole not less favourably[402] and guidance will also have to be sought from international labour law and United Kingdom law.[403]

With regard to the issue under (c), regulations 4(1)-(2) of the Employment Equity Regulations which defines what is meant by work that is the same and work that is substantially the same as referred to under the causes of action in section 6(4) of the

399 See Chapter 1, para 6 of this thesis.
400 See the discussion regarding this issue under para 11.3 above.
401 An analysis of international labour law and United Kingdom law on this aspect will be undertaken in Chapters 3-4 of this thesis.
402 See the discussion regarding this issue under para 11.3 above.
403 An analysis of international labour law and United Kingdom law on this aspect will be undertaken in Chapters 3-4 of this thesis.

EEA, equal pay for the same work and equal pay for substantially the same work read with the submissions made above under paragraph 5.4 above relating to the meaning to be accorded to the phrase "interchangeable" under the definition of the same work and the meaning to be accorded to the phrase "sufficiently similar" under the definition of work that is substantially the same under paragraph 5.5 above, should be followed when interpreting the same or similar work under section 198C(3)(a) of the LRA.[404] It should be noted that any guidance that can be gained from international labour law and United Kingdom law regarding how they approach the same work and substantially the same work for purposes of these terms in section 6(4) of the EEA will also be relevant for these terms under section 198C(3)(a) of the LRA.[405]

Besides the need to refer to international labour law and United Kingdom law in order to provide guidance as specifically sought for in the above paragraphs, any further lessons which can be learnt from these laws for the South African equal pay law relating to part-time employees under section 198C(3)(a) of the LRA should also be sought for and stated in Chapters 3 and 4 of this thesis.

13.11 Section 27 of the EEA

The following questions raised in Chapter 1 of this thesis[406] and repeated under paragraph 12 above concerning section 27 of the EEA are as follows: (a) What other measures can be taken in terms of section 27(3) of the EEA, in order to progressively reduce disproportionate income differentials or unfair discrimination in terms of section 6(4) of the EEA, besides those measures specifically listed in section 27(3) of the EEA?; (b) Where can a designated employer find guidance relating to measures that must be taken to progressively reduce disproportionate income differentials or unfair discrimination in terms of section 6(4) of the EEA?; (c) Whether an employer is allowed to progressively reduce pay differentials as contemplated in section 27(2) of the EEA by

404 See the discussion regarding this issue under para 11.3 above.
405 An analysis of international labour law and United Kingdom law on this aspect will be undertaken in Chapters 3-4 of this thesis and the final conclusions and recommendations will be made in Chapter 5.
406 See Chapter 1, para 7 of this thesis.

reducing the pay of the higher paid employees in question in order to bring it in line with that of the lower paid employees (downward equalisation) or whether it is confined to only do so by increasing the pay of the lower paid employees to the rate enjoyed by the higher paid employees (upward equalisation); and (d) Can a court order an employer to correct unfair pay discrimination over a certain period of time which will amount to the progressive realisation of the right to equal pay where it finds that an employer has committed unfair pay discrimination in terms of section 6(4) of the EEA but is unable to immediately correct the unfair pay discrimination?

With regard to the issue under (a), the submissions relating thereto made under paragraph 12 above are as follows: (i) An equal terms and conditions audit taken together with an equal pay audit as provided for in the Integration of Employment Equity Code falls within the ambit of section 27(3) of the EEA as a measure which may be taken by an employer to progressively reduce unfair pay discrimination or disproportionate income differentials and this should specifically be listed under section 27(3) of the EEA as such a measure; and (ii) An objective job evaluation system as mentioned in the Integration of Employment Equity Code and which is free from unfair discrimination in section 6(4) of the EEA and disproportionate income differentials will assist in complying with the aims of section 27 of the EEA and constitutes a measure which can be taken to progressively reduce unfair pay discrimination and disproportionate income differentials and should specifically be listed as such under section 27(3) of the EEA.[407] It is prudent to analyse international labour law and United Kingdom law in order to ascertain which proactive measures to equal pay are mentioned therein in order to strengthen the proactive measures listed in section 27(3) of the EEA.[408]

With regard to the issue under (b), the submissions relating thereto made under paragraph 12 above are as follows: (i) It should specifically be stated in section 27 of the EEA that guidance for employers to reduce disproportionate income differentials or unfair

[407] See the discussion regarding these issues under para 12 above.

[408] An analysis of international labour law and United Kingdom law on this aspect will be undertaken in Chapters 3-4 of this thesis.

discrimination in terms of section 6(4) of the EEA is provided for in the Integration of Employment Equity Code in the form of conducting equal terms and conditions audits and equal pay audits and how to go about doing this; and (ii) It should also specifically be stated in section 27 of the EEA that guidance relating to how an employer should go about conducting an objective job evaluation is provided for in the Equal Pay Code.[409] No guidance is provided from domestic law regarding how an employer should go about reducing disproportionate income differentials and/or unfair pay discrimination by means of collective bargaining. It is thus prudent to analyse international labour law and United Kingdom law in order to ascertain what guidance is provided to employers regarding the taking and implementing of proactive measures to equal pay in order to learn lessons for section 27(3) of the EEA.[410]

With regard to the issue under (c), the submissions relating thereto made under paragraph 12 above are as follows: (i) It should specifically be stated in section 27 of the EEA that an employer is not allowed to address pay differentials contemplated in section 27(2) of the EEA by reducing the pay of employees (downward equalisation); and (ii) The converse of this is that such employer is confined to address the pay differentials as contemplated in section 27(2) of the EEA by increasing the pay of employees (upward equalisation). Notwithstanding these submissions, it remains prudent to analyse international labour law and United Kingdom law on this aspect.[411]

With regard to the issue under (d), the submissions relating thereto made under paragraph 12 above are as follows. A court can order an employer to correct unfair pay discrimination over a certain period of time where it finds that it will not be practicable for the employer to do so immediately and this will amount to a court ordered form of the progressive realisation of the right to equal pay. The CCMA will also be able to make such an order where it has the power to entertain an unfair pay discrimination claim in terms of

---

409 See the discussion regarding these issues under para 12 above.

410 An analysis of international labour law and United Kingdom law on this aspect will be undertaken in Chapters 3-4 of this thesis.

411 An analysis of international labour law and United Kingdom law on this aspect will be undertaken in Chapters 3-4 of this thesis.

section 6(4) of the EEA. The power to make such an order should specifically be stated in section 48 of the EEA which sets out the powers of a commissioner in arbitration proceedings and section 50(2) of the EEA which sets out the powers of the Labour Court, with reference to this being made in section 27 of the EEA.[412] It will be prudent to analyse international labour law and United Kingdom law in order to ascertain whether the progressive realisation of the right to equal pay is capable of featuring in a court order.[413]

[412] See the discussion regarding these issues under para 12 above.

[413] An analysis of international labour law and United Kingdom law on this aspect will be undertaken in Chapters 3-4 of this thesis.

CHAPTER 3: INTERNATIONAL LEGAL FRAMEWORK REGULATING EQUAL PAY

> "Women and men have the right to receive equal remuneration for work of equal value (commonly referred to as "equal pay"). Not only should men and women get equal pay for doing the same or a similar job, but also when they do work that is completely different but which, based on objective criteria, is of equal value. Equal pay is a recognized human right, to which all men and women are entitled."[*]

1. INTRODUCTION

This Chapter deals exclusively with the international legal framework regulating equal pay while the study of United Kingdom equal pay law will be undertaken in Chapter 4 of this thesis. The purpose of this Chapter is to discuss and analyse international law relating to equal pay with the focus being on seeking to assist with answering the research questions to the extent and breadth called for in paragraphs 13.1-13.11 of Chapter 2 of this thesis. The rest of the discussion places the international legal framework relating to equal pay in context. The Chapter will conclude by summarising the guidance extracted from international law relating to equal pay (known as international labour law as is made clear in paragraph 2 below) as sought for in relation to the research questions.

This Chapter accordingly deals with the following: the use of international labour law in domestic labour law; the sources of international labour law; the various aspects falling under terms and conditions of employment (including "pay"); who is the employer for the purpose of bringing an equal pay claim against; the need for a suitable comparator for the purpose of an equal pay claim; a discussion of equal pay for the same work, substantially the same work and work of equal value; the onus in equal pay claims and the problems associated with accessing pay related information; the grounds of justification; the progressive realisation of the right to equal pay; equal pay for non-standard (atypical) employees and the proactive measures relating to equal pay.

---

[*] 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.

2. THE USE OF INTERNATIONAL LABOUR LAW

The use of international law in domestic law is dealt with in the Constitution[1] ("Constitution"), the Employment Equity Act[2] ("EEA") as well as the Labour Relations Act[3] ("LRA"). Section 39(1)(b) of the Constitution states that a court, tribunal or forum *must* consider international law when interpreting the Bill of Rights. Section 233 of the Constitution goes further and states that a court interpreting *any legislation* must give preference to any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with it. Already at this point, it is clear that the Constitution not only requires that its provisions must be interpreted in accordance with international law but also that any legislation, which would include the EEA and the LRA, be interpreted in accordance with international law. It is submitted that applying section 233 of the Constitution in the context of the EEA and the LRA means that the courts must prefer any reasonable interpretation of both Acts that is consistent with *international labour law* over any alternative interpretation that is inconsistent with same. This submission is supported by Biagi who states that international labour law is one category (a branch) of international law.[4] It is thus self-evident that the branch of international law which is relevant for the EEA and the LRA is international labour law.

Section 3(d) of the EEA states that the Act must be interpreted in compliance with the international law obligations of the Republic especially those contained in the International Labour Organisation Convention No. 111 of 1958 concerning Discrimination in Respect of Employment and Occupation. Section 3(c) of the LRA, similarly, states that any person applying the LRA must interpret its provisions in compliance with the public international law obligations of South Africa. Both the EEA and the LRA thus require their provisions to be interpreted in accordance with international labour law. Reference to international

---

1 Constitution of the Republic of South Africa, 1996 ("Constitution").
2 55 of 1998 ("EEA").
3 66 of 1995 ("LRA").
4 Biagi M "Freedom of association: six case studies" https://training.itcilo.org/actrav_cdrom1/english/global/law/lablaw.htm(last accessed on 1/11/2022).

law in the interpretative process is not directory but peremptory and should be complied with especially when interpreting provisions in the EEA and the LRA.

International labour law should thus not be seen as being foreign to our domestic labour law but should rather be embraced as forming part of our domestic labour law in the sense that it can assist domestic law where interpretations are needed and/or its experience is needed in order to better understand a specific aspect/s of domestic labour law.

3. SOURCES OF INTERNATIONAL LABOUR LAW

The sources of international labour law have received attention from the South African courts. It would be inappropriate to use a source which does not properly amount to a source of international labour law as this would result in the use of an incompatible source which is unsuitable for the intended purpose. In *SANDU v Minister of Defence*[5] the Constitutional Court made it clear that the Conventions and Recommendations of the International Labour Organisation ("ILO") are important sources of international labour law by stating the following:

> "Section 39 of the Constitution provides that when a court is interpreting chapter 2 of the Constitution, it must consider international law. In my view, the conventions and recommendations of the International Labour Organisation (the ILO), one of the oldest existing international organisations, are important resources for considering the meaning and scope of "worker" as used in section 23 of our Constitution."[6]

In *NUMSA & Others v Baderbop (Pty) Ltd & Another*[7] the Constitutional Court held that it has been accepted by the Court that the Conventions and Recommendations of the ILO are important sources of international labour law.[8] The courts have also recognised that regional instruments can constitute a source of international labour law. In *S v Makwanyane*[9] the Court succinctly set out the importance of referring to both ILO and regional instruments by stating the following:

---

5 1999 (6) BCLR 615 (CC).
6 *SANDU v Minister of Defence* 1999 (6) BCLR 615 (CC) at para 25.
7 2003 (3) SA 513 (CC).
8 At para 28.
9 1995 (3) SA 391 (CC).

> "International agreements and customary international law accordingly provide a framework within which Chapter Three can be evaluated and understood, and for that purpose, decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, the European Commission on Human Rights, and the European Court of Human Rights, and in appropriate cases, reports of specialised agencies such as the International Labour Organisation may provide guidance as to the correct interpretation of particular provisions of Chapter Three."[10]

In *NEHAWU v UCT*[11] the Constitutional Court similarly made reference to the ILO instruments as well as regional instruments as follows:

> "In giving content to this concept the courts and tribunals will have to seek guidance from domestic and international experience. Domestic experience is reflected both in the equity based jurisprudence generated by the unfair labour practice provision of the 1956 LRA as well as the codification of unfair labour practice in the LRA. International experience is reflected in the Conventions and Recommendations of the International Labour Organisation. Of course other comparable foreign instruments such as the European Social Charter 1961 as revised may provide guidance."[12]

It is then no surprise that the Conventions and Recommendations of the ILO are regarded as the most important source of international labour law with regional instruments of for example, the European Union, being regarded as a source of international labour law.[13] It is important to list the other sources which have been recognised as sources of international labour law in addition to the Conventions and Recommendations of the ILO. These other sources are as follows: (a) The Constitution of the ILO; (b) Less formal instruments, for instance, resolutions adopted by the ILO; (c) Case Law; (d) Instruments

---

10 At para 35.

11 2003 (2) BLLR 156 (CC) at para 34.

12 At para 34.

13 Valticos N and von Potobsky G *International Labour Law* 2nd ed (Kluwer Law and Taxation Publishers Deventer-Boston 1995) 49, 71-74. See Kombos C and Hadjisolomou M "The Mechanisms Used by the ILO and the EU in Combating Employment Discrimination in Pay: Converging Divergence?" *Electronic Journal of Comparative Law* 11(2) 2007 1-39 for an extensive discussion of the mechanisms used by the ILO and EU as far as pay discrimination is concerned. Chen CW *Compliance and Compromise: The Jurisprudence of Gender Pay Equity* (Martinus Nijhoff Publishers Leiden, Boston 2011) states the following at 61 regarding European Union Law: "The European Union law on gender pay equity in particular has been playing a major role in the development of the jurisprudence of gender pay equity in its member states." The ILO Equal Remuneration General Survey by the Committee of Experts on the Application of Conventions and Recommendations (International Labour Conference, 72nd Session 1986; International Labour Office, Geneva) states the following at para 3: "Observance of the principle of equal remuneration has been an objective of the ILO since its foundation. The original text of the Constitution already recognised in its article 41, among the general principles 'of special and urgent importance', the principle that men and women should receive 'equal remuneration for work of equal value'. The principle is again enshrined in the preamble to the present Constitution."

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 Freedoms 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.[14]

Two of the regional instruments of Africa which can amount to sources of international labour law and which are relevant to equal pay are the African Charter on Human and Peoples' Rights of 1986[15] (commonly referred to as the Banjul Charter) and the SADC Protocol on Gender and Development of 2008.[16] Article 15 of the African Charter on Human and Peoples Rights of 1986 provides that every person has the right to receive equal pay for equal work. Article 19(2)(a) 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. This is the high-water mark of these two regional instruments as far as equal pay law is concerned, and no further reference will be made to them as they do not assist with the answering of the research questions in this thesis.

3.1 The European Union Directives and Treaties relevant to equal pay

Before delving into the relevant international labour law which can assist with the answering of the research questions to the extent sought for in paragraphs 13.1-13.11 of Chapter 2 of this thesis, it is important to provide a brief background to the European Union ("EU") Directives which relate to pay discrimination and discrimination in working

---

14 Valticos N and von Potobsky G *International Labour Law* 2nd ed (Kluwer Law and Taxation Publishers Deventer-Boston 1995) 49, 66, 68-71, 73-75.

15 https://www.achpr.org/legalinstruments/detail?id=49 (last accessed on 1/11/2022).

16 https://www.sadc.int/sites/default/files/2021-08/Protocol_on_Gender_and_Development_2008.pdf (last accessed on 1/11/2022).

conditions as there are Directives that have been repealed but whose provisions have been brought into a single Directive which is in effect/operation. This is important to mention here because the repealed Directives have been the subject of many cases on pay discrimination before the European Court of Justice and these cases provide a rich source of international labour law on the subject. It is also important to deal here with the principle of equal pay as found in Article 119 of the Treaty of Rome of 25 March 1957 and the repeal of this article in later treaties (which have expanded on the principle of equal pay) because the principle of equal pay (as expanded) in these various treaties have been dealt with by the European Court of Justice.

Three important Directives were adopted in the EU to deal with discrimination in pay, working conditions and the burden of proof. These are Directive 75/117/EEC of 10 February 1975 relating to the application of the principle of equal pay for men and women ("Equal Pay Directive"),[17] Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions ("Equal Treatment Directive")[18] and Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex ("Burden of Proof Directive"). The Equal Pay Directive gave effect to the principle of equal pay as set out in Article 119 of the Treaty of Rome of 25 March 1957 and extended the principle of equal pay as set out in the Treaty to include equal pay for work of equal value.[19] The Equal Treatment Directive gave effect to the principle of equal treatment which sought to achieve equal treatment for men and women in respect of working conditions, *inter alia*.[20] The Burden of Proof Directive gave effect to Article 119 of the Treaty of Rome, the Equal Pay Directive and the Equal Treatment Directive by requiring member states to take measures which would ensure that where

---

17 The Equal Pay Directive gave effect to the principle of equal pay as set out in Article 119 of the Treaty of Rome of 25 March 1957 and extended the principle of equal pay as set out in the Treaty to include equal pay for work of equal value. Davies ACL *EU Labour Law* (Edward Elgar Publishing 2012) 112-113.

18 Landau EC & Beigbeder Y *From ILO Standards to EU Law: The Case of Equality between Men and Women at Work* (Martinus Nijhoff Publishers 2008) state at 99 that the Equal Treatment Directive was inspired by the ILO Discrimination Convention.

19 Davies ACL *EU Labour Law* (Edward Elgar Publishing 2012) 112-113.

20 Article 1(1) of the Equal Treatment Directive.

claimants establish facts before a court or competent authority from which it may be presumed that the employer has directly or indirectly discriminated against them then the burden of proof would shift to the respondent to prove that it has not breached the principle of equal pay/equal treatment.[21]

The above three Directives (Equal Pay Directive, Equal Treatment Directive and the Burden of Proof Directive) were repealed by Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) of 5 July 2006 ("EU Recast Directive").[22] The provisions in these repealed Directives have, however, been consolidated and brought up to date with the developments arising out of the case law in the single text of the EU Recast Directive.[23] The provisions of the repealed Directives as interpreted by the European Court of Justice is thus still a rich source of jurisprudence from which to learn.[24] This is obviously subject to the condition that the provision/s and the interpretation thereon have not been superseded by the EU Recast Directive.

It is also important to note that Article 119 of the Treaty of Rome[25] which set out the principle of equal pay for equal work had been replaced by Article 141 of the Treaty

---

21 Articles 1(a) and 4(1) of the Equal Treatment Directive.

22 Article 34(1) of the Recast Directive 2006/54/EC provides that these three Directives shall be repealed with effect from 15 August 2009.

23 Para 1 of the Preamble to the Equal Treatment Directive. Davies ACL *EU Labour Law* (Edward Elgar Publishing 2012) 113. Burrows N & Robinson M "An Assessment of the Recast of Community Equality Laws" *European Law Journal* 2007 13(2) 186 state the following at 187: "Recast is not therefore an opportunity for root-and-branch reform of the law but an opportunity to reshape existing law. Recast was discussed in the Council as one way to ensure effectiveness of the operation of the legislative process in the context of an enlarged Union, which means that it is a technique intended to clarify and simplify existing legal rules."

24 Kombos C and Hadjisolomou M "The Mechanisms Used by the ILO and the EU in Combating Employment Discrimination in Pay: Converging Divergence?" *Electronic Journal of Comparative Law* 11(2) 2007 1 state the following at 35 regarding the European Court of Justice (ECJ): "The enforcement proper approach of the ECJ has been instrumental in ensuring enforcement of equal pay and it has adopted a dynamic approach that favoured equal pay and elevated it to a fundamental human right that is justiciable before national courts."

25 It should be noted that Article 119 of the Treaty of Rome is also referred to as Article 119 of the Treaty establishing the European Economic Community or Article 119 of the EEC Treaty for short. Burrows N & Mair J *European Social Law* (John Wiley & Sons Ltd 1996) state the following at 15: "The Treaty of Rome made very little detailed provision for social rights, with one of the most important exceptions being Article 119 which provided for equal pay for men and women…Equal pay was accepted largely on the basis that it was not only a social issue but also an economic issue and those States who were

Establishing the European Community (also referred to as Article 141 of the EC Treaty) which extended the principle to also apply to equal pay for work of equal value.[26] Article 141 has also in turn been replaced by Article 157 of the Treaty on the Functioning of the European Union.[27] It should be noted that Article 141 of the Treaty Establishing the European Community basically contains Article 119 of the Treaty of Rome but makes reference to equal pay for work of equal value and adds additional measures. Article 157 of the Treaty on the Functioning of the European Union contains the exact provisions as contained in Article 141 of the Treaty Establishing the European Community. It is then prudent to set out these Articles hereunder in order to grasp the equal pay provisions as set out therein:

Article 119 of the Treaty of Rome provided the following:

> "Each Member State shall during the first stage ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work.
>
> For the purpose of this Article, "pay" means the ordinary basic minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives, directly or indirectly, in respect of his employment from his employer.
>
> Equal pay without discrimination based on sex means:
>
> (a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement;
>
> (b) that pay for work at time rates shall be the same for the same job."

Article 141 of the Treaty Establishing the European Community provided the following:

---

already committed to the provision of equal pay for men and women were concerned to ensure the remaining states could not benefit from the exploitation of female workers."

[26] Consolidated versions of the Treaty on European Union and of the Treaty Establishing the European Community of 24 December 2002.

[27] Consolidated version of the Treaty on the functioning of the European Union of 26 December 2012. The Equal Pay: Overview of Landmark Case-Law of the Court of Justice of the European Union (Luxembourg: Publications Office of the European Union, 2019) publication states the following at 1: "Article 119 of the Treaty establishing the European Economic Community ('TEEC') laid down the principle of equal pay for equal work for women and men. In 1997, with the Amsterdam Treaty, Article 119 became Article 141 of the Treaty on the European Community ('TEC'). Today, after the Lisbon Treaty, the principle of equal pay is enshrined in Article 157 of the Treaty on the Functioning of the European Union ('TFEU'), but its content has remained basically unchanged. The provision stipulates that 'each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied'."

“1. Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.

2. For the purpose of this article, ‘pay’ means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer.

Equal pay without discrimination based on sex means:

(a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement;

(b) that pay for work at time rates shall be the same for the same job.

3. The Council, acting in accordance with the procedure referred to in Article 251, and after consulting the Economic and Social Committee, shall adopt measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value.

4. With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.”

Article 157 of the Treaty on the Functioning of the European Union provides as follows:

“1. Each Member State shall ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied.

2. For the purpose of this Article, ‘pay’ means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his employment, from his employer.

Equal pay without discrimination based on sex means:

(a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement;

(b) that pay for work at time rates shall be the same for the same job.

3. The European Parliament and the Council, acting in accordance with the ordinary legislative procedure, and after consulting the Economic and Social Committee, shall adopt measures to ensure the application of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation, including the principle of equal pay for equal work or work of equal value.

4. With a view to ensuring full equality in practice between men and women in working life, the principle of equal treatment shall not prevent any Member State from maintaining or adopting measures providing for specific advantages in order to make it easier for the underrepresented sex to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers.”

With this background in mind, it should thus be easier to follow references to the various Directives and Treaties of the EU in the discussion below as well as the attendant case law of the European Court of Justice.

4. INTERPRETATION OF TERMINOLOGY: 'TERMS AND CONDITIONS OF EMPLOYMENT', 'THE SAME EMPLOYER', 'THE COMPARATOR' (EMPLOYEES OF THE SAME EMPLOYER), 'SAME WORK, SUBSTANTIALLY THE SAME WORK, WORK OF EQUAL VALUE'

4.1 The interpretation of "terms and conditions of employment"

The ILO Equal Remuneration Convention[28] ("Equal Remuneration Convention") requires member states to apply the principle of equal pay to both men and women according to methods which they find appropriate.[29] The Convention does not refer to the phrase "terms and conditions of employment" but refers to the phrase "remuneration". The ILO Discrimination (Employment and Occupation) Convention[30] ("Discrimination Convention") on the other hand expressly prohibits unfair discrimination in relation to terms and conditions of employment.[31] The Equal Pay Guide ("Equal Pay Guide") published by the ILO is intended to be used in order to better understand the application of the equal pay principle in law and in practice, *inter alia*.[32] This is similar to a Code of Good Practice in South African Labour Law. It states that the Discrimination Convention is closely linked

---

28 No. 100 of 1951 ("Equal Remuneration Convention"). South Africa has ratified the Equal Remuneration Convention on 30 March 2000 https://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:102888 (last accessed on 1/11/2022).

29 Article 2(1) of the Equal Remuneration Convention. Landau EC & Beigbeder Y *From ILO Standards to EU Law: The Case of Equality between Men and Women at Work* (Martinus Nijhoff Publishers 2008) state at 67 that the Equal Remuneration Convention is universally recognised and is one of the Core Conventions of the ILO human rights Conventions. Chen CW *Compliance and Compromise: The Jurisprudence of Gender Pay Equity* (Martinus Nijhoff Publishers Leiden, Boston 2011) states the following at 39: "The ILO Convention No. 100 on Equal Remuneration is the only international treaty which endeavors to promote gender pay equity world-wide and to resolve the issue of the gender wage gap. It is considered as one of the core ILO conventions."

30 No. 111 of 1958 ("Discrimination Convention").

31 Article 1(1)(a) read with article 1(3) of the Discrimination Convention.

32 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) ("Oelz, Olney and Manuel Equal Pay Guide") at iv.

to the Equal Remuneration Convention.[33] This means that both Conventions read together prohibits unfair discrimination in terms and conditions of employment, as well as pay, which is arguably the most important term and condition of employment. This is buttressed by the fact that there is more case law from the European Court of Justice (as discussed in paragraph 4.1.1 below) dealing with unfair discrimination in pay than with unfair discrimination concerning other terms and conditions of employment. The EU Recast Directive prohibits both unfair discrimination in pay as well as in terms and conditions of employment in one instrument.[34] The Equal Remuneration Convention defines remuneration to include the basic wage and any additional emoluments whatsoever payable directly or indirectly (whether in cash or in kind) by the employer to the worker and arising out of the worker's employment.[35] The ILO Equal Remuneration General Survey by the Committee of Experts on the Application of Conventions and Recommendations[36] ("ILO Equal Remuneration General Survey") states that the definition of remuneration in the Equal Remuneration Convention is couched in broad terms which ensures that equality is not limited to the basic wage and neither can it be restricted by relying on semantic distinctions. It further states that the phrase "any additional emoluments whatsoever" in the definition of remuneration includes "elements

---

33 Oelz, Olney and Manuel Equal Pay Guide at 3. The aim of the Equal Pay Guide is stated at iii of the Guide as follows: "The Guide is aimed at government officials, workers' and employers' organizations, policy-makers, practitioners, trainers, as well as others interested in this dynamic and evolving area. It draws on the ILO's policy work in this domain, the technical assistance provided by the Office to ILO's constituency, and the related comments of the ILO supervisory bodies."

34 Article 14(1)(c) of the EU Recast Directive. Article 9(1)(e) of the EU Recast Directive provides the following example of discrimination relating to the granting of benefits "Provisions contrary to the principle of equal treatment shall include those based on sex, either directly or indirectly, for:… setting different conditions for the granting of benefits or restricting such benefits to workers of one or other of the sexes …".

35 Article 1(a) of the Equal Remuneration Convention provides the following definition of remuneration: "(a) the term *remuneration* includes the ordinary, basic or minimum wage or salary and any additional emoluments whatsoever payable directly or indirectly, whether in cash or in kind, by the employer to the worker and arising out of the worker's employment". Bronstein A *International and Comparative Labour Law: Current challenges* (International Labour Organisation 2009) states the following at 135 with regard to the definition of remuneration in the Equal Remuneration Convention: "The ILO Committee of Experts has further clarified that the term 'any additional emoluments whatsoever' brings within the ambit of the Convention elements as numerous as they are diverse. They include, for example, wage differentials or increments based on seniority or marital status, cost-of-living allowances, housing or residential allowances, and family allowances, paid by the employer, and benefits in kind such as the allotment and laundering of working clothes."

36 The ILO Equal Remuneration General Survey by the Committee of Experts on the Application of Conventions and Recommendations (International Labour Conference, 72nd Session 1986; International Labour Office, Geneva) ("ILO Equal Remuneration General Survey").

as numerous as they are diverse" and will include, *inter alia*; increases based on seniority, marital status benefits, cost of living allowances, housing allowances, family allowances and the provision and cleaning of work clothes. The ILO Equal Remuneration General Survey also states that the phrase "arising out of the worker's employment" in the definition of remuneration will include social security schemes financed by the employer/industry but will not include purely public social security schemes.[37]

The EU Recast Directive[38] contains a similar definition in respect of "pay" as follows:

> "the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his/her employment from his/her employer."[39]

The Equal Pay Guide states that the definition of "remuneration" in the Equal Remuneration Convention is wide enough to include all elements in addition to the basic wage and these should be considered as part of the definition of remuneration for the purposes of the Equal Remuneration Convention if equality is to be achieved in the workplace.[40] It states that the basic wage is usually a small part of the overall payment and benefits that a worker receives and discrimination will be perpetuated if equality is only sought for the basic wage to the exclusion of other work-related payments or benefits. Article 4 of the EU Recast Directive seeks to eliminate pay discrimination relating to all aspects and conditions of remuneration – which goes further than the basic wage. The Equal Pay Guide emphasises the fact that while the definition of remuneration is wide enough to encompass other payments and benefits it can only do so provided that the payments and benefits arise out of the workers' employment.[41] It states that it does not matter whether the term "remuneration" or "pay" is used as long as it includes the wide

---

[37] ILO Equal Remuneration General Survey at paras 14, 15, 17.

[38] Council Directive 2006/54/EC of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation ("EU Recast Directive").

[39] Article 2(1)(e) of the EU Recast Directive. Landau EC & Beigbeder Y *From ILO Standards to EU Law: The Case of Equality between Men and Women at Work* (Martinus Nijhoff Publishers 2008) state the following at 95: "The wide definition of pay under EU law is inspired by the ILO definition of 'remuneration'".

[40] Oelz, Olney and Manuel Equal Pay Guide at 24 and 34.

[41] Oelz, Olney and Manuel Equal Pay Guide at 34-35.

range of elements contemplated in the Equal Remuneration Convention.[42] The Equal Pay Guide sets out the following list of examples of elements that will fall under the term "remuneration":

(a) Basic wage, minimum wage, ordinary wage;
(b) Overtime pay;
(c) Productivity bonus;
(d) Performance payments;
(e) Seniority increment;
(f) Family, child or dependency allowance;
(g) Tips (gratuities);
(h) Laundering provided or an allowance;
(i) Travel allowance or expenses;
(j) Car provided;
(k) Accommodation provided or an allowance;
(l) Clothing provided or an allowance;
(m) Commission;
(n) Life insurance;
(o) Employer or industry social insurance;
(p) Company shares or profits;
(q) Food provided or an allowance.[43]

Before proceeding to discuss the case law of the EU which has dealt with whether or not certain payments fall within the ambit of pay as well as working conditions (terms and conditions of employment) it is necessary, at this point, to set out the guidance that can be taken from the above international instruments and attendant materials in order to assist with the research questions relating to the phrase "terms and conditions of

---

[42] Oelz, Olney and Manuel Equal Pay Guide at 35. Chen CW *Compliance and Compromise: The Jurisprudence of Gender Pay Equity* (Martinus Nijhoff Publishers Leiden, Boston 2011) states the following at 76: "The legislative and policy package towards eliminating the gender wage differentials ought to include those basic elements provided in the Convention: … a broad definition of 'remuneration'."

[43] Oelz, Olney and Manuel Equal Pay Guide at 35.

employment” in section 6(4) of the EEA as called for in paragraph 13.1 of Chapter 2 of this thesis. The guidance sought from international labour law regarding these research questions relates to: (a) Whether submissions can be made regarding the inclusion of payments set out in the lists of payments in the BCEA Schedule under the phrase “terms and conditions of employment” in section 6(4) of the EEA based on international labour law; and (b) Whether international labour law can contribute further towards addressing the issue of what can fall within the phrase “terms and conditions of employment” under section 6(4) of the EEA.

With regard to the guidance sought for in (a) above, the following is apposite. The following list of payments from both the lists of payments in the BCEA Schedule (as set out in paragraph 5.1 of Chapter 2 of this thesis) are listed as falling under the term pay for the purpose of unfair pay discrimination in terms of the above international instruments and materials: (a) a housing or accommodation allowance including housing or accommodation provided as a benefit in kind;[44] (b) a car or travel allowance including a car being provided;[45] (c) employer’s contributions to medical aid, pension, provident fund or similar schemes;[46] (d) employer’s contributions to death benefit schemes (which may include funeral benefits);[47] (e) gratuities (for example, tips received from customers);[48] (f) share incentive schemes;[49] and (g) discretionary payments not related to an employee’s hours of work or performance (for example, a discretionary profit-sharing scheme).[50]

---

[44] This allowance (payment) is set out in item 1(a) of the BCEA Schedule and also falls under pay according to the ILO Equal Remuneration General Survey and the Equal Pay Guide as discussed under paragraph 4.1 above.

[45] This allowance (payment) is set out in item 1(b) read with item 2(a) of the BCEA Schedule and also falls under pay according to the Equal Pay Guide as discussed under paragraph 4.1 above.

[46] This allowance (payment) is set out in item 1(e) of the BCEA Schedule and also falls under pay as an “Employer or industry social insurance” according to the Equal Pay Guide as discussed under paragraph 4.1 above.

[47] This allowance (payment) is set out in item 1(f) of the BCEA Schedule and also falls under pay as “Life insurance” according to the Equal Pay Guide as discussed under paragraph 4.1 above.

[48] This allowance (payment) is set out in item 2(c) of the BCEA Schedule and also falls under pay as “Tips (gratuities)” according to the Equal Pay Guide as discussed under paragraph 4.1 above.

[49] This allowance (payment) is set out in item 2(c) of the BCEA Schedule and also falls under pay as “Company shares or profits” according to the Equal Pay Guide as discussed under paragraph 4.1 above.

[50] This allowance (payment) is set out in item 2(e) of the BCEA Schedule and also falls under pay as “Company shares or profits” according to the Equal Pay Guide as discussed under paragraph 4.1 above.

Based on this, It is submitted that these payments should fall under the phrase "terms and conditions of employment" under section 6(4) of the EEA.

With regard to further guidance that can be extracted from international labour law as sought for in (b) above relating to the issue of what can fall within the phrase "terms and conditions of employment" under section 6(4) of the EEA, the following is important: (a) While international labour law gives a wide definition of remuneration it has a useful test to determine whether a payment falls within the definition of remuneration, which test is, whether the payment arises out of the worker's employment.[51] It is submitted that this test should be used to determine whether terms and conditions (including pay) fall within the phrase "terms and conditions of employment" under section 6(4) of the EEA where there is a dispute regarding this; and (b) It is important to note that whilst the elements of remuneration in the form of the basic wage, minimum wage, ordinary wage and overtime pay as set out in the Equal Pay Guide list above are not found in the lists of payments in the BCEA Schedule,[52] these forms of remuneration are found in the Integration of Employment Equity Code (as discussed under paragraph 5.1 of Chapter 2 of this thesis) as rates of pay and overtime rates and thus strengthens the submission made in Chapter 2 that these forms of remuneration fall within the ambit of the phrase "terms and conditions of employment" under section 6(4) of the EEA.[53]

4.1.1 Case law dealing with what falls within the ambit of "terms and conditions of employment" especially with regards to pay and working conditions

It is prudent to analyse the case law of the EU relating to which elements of pay (and working conditions) have been found to fall within the ambit of pay (and working conditions) for the purpose of equal pay claims (and equal working conditions claims). This can provide guidance to the research questions relating to the phrase "terms and

---

[51] Article 1(a) of the Equal Remuneration Convention; ILO Equal Remuneration General Survey at paras 14, 15, 17; Article 2(1)(e) of the EU Recast Directive; Oelz, Olney and Manuel Equal Pay Guide at 34-35 as discussed under paragraph 4.1 above.

[52] Set out in paragraph 5.1 of Chapter 2 of this thesis.

[53] See paragraphs 5.1 and 13.1 in Chapter 2 of this thesis.

conditions of employment" in section 6(4) of the EEA as called for in paragraph 13.1 of Chapter 2 of this thesis and as stated under paragraph 4.1 above. The guidance sought from international labour law regarding these research questions relates to: (a) Whether submissions can be made regarding the inclusion of payments set out in the lists of payments in the BCEA Schedule under the phrase "terms and conditions of employment" in section 6(4) of the EEA based on international labour law; and (b) Whether international labour law can contribute further towards addressing the issue of what can fall within the phrase "terms and conditions of employment" under section 6(4) of the EEA. The case law will be analysed under separate headings relating to the various elements of pay (including working conditions) and submissions relating to any guidance that can be extracted for the research questions relating to the phrase "terms and conditions of employment" will be made at the end of the discussion of each case and/or all the cases under each heading as deemed appropriate.

4.1.1(a) Overtime pay, pay supplements and sick pay

In *Elsner-Lakeburg v Land Nordrhein-Westfalen*[54] the European Court of Justice (in a matter dealing with pay differentials between full-time and part-time workers)[55] held that pay for additional hours of work fell within the ambit of the term "pay" as set out in Article 141 of the EC Treaty and Article 1 of the Equal Pay Directive. The dispute in this case concerned the plaintiff (Ms Elsner-Lakeberg) not being paid for working 2.5 additional hours in a month because the relevant legislation only allowed for additional work to be remunerated where it exceeded 3 hours in a month.[56] While no guidance can be extracted from this case for the research question as set out in (a) above under paragraph 4.1.1 because payment for additional hours of work (overtime pay) is not listed in the list of payments in the BCEA Schedule[57] it does, however, provide guidance for the research question set out in (b) above in that it strengthens the submission made in Chapter 2 of this thesis that overtime rates (pay) as set out in the Integration of Employment Equity

54 Case C-285/02, [2005] IRLR 209 (ECJ).
55 This case is further discussed under para 7.3.2 of this Chapter below.
56 At paras 6, 7, 16.
57 Set out in paragraph 5.1 of Chapter 2 of this thesis.

Code falls within the ambit of the phrase "terms and conditions of employment" under section 6(4) of the EEA.[58] It should be noted that overtime pay is also listed under the Equal Pay Guide as set out in paragraph 4.1 above as falling within the ambit of remuneration.

In *Brunnhofer v Bank der osterreichischen Postsparkasse*[59] the European Court of Justice held that a monthly salary supplement paid to employees in terms of their employment falls within the ambit of pay as contained in Article 119 of the EEC Treaty and the Equal Pay Directive. The Court further held that equal pay must be ensured in respect of each aspect of pay taken in isolation and not only on the basis of an overall assessment of all the consideration.[60] A monthly salary supplement is not listed as a payment in the lists of payments in the BCEA Schedule nor listed as falling under the list of terms and conditions of employment as set out in the Integration of Employment Equity Code[61] and no guidance can be extracted for the research question in (a) under paragraph 4.1.1 above but it is does provide guidance for the research question in (b) under paragraph 4.1.1 above in that it provides an example of what falls under the term pay for the purposes of an equal pay claim in international labour law. It is submitted that a monthly salary supplement should be listed as an example of what has been found under international labour law to fall within the ambit of pay which can assist with determining whether such payment can fall within the ambit of "terms and conditions of employment" in section 6(4) of the EEA.

In *Jämställdhetsombudsmannen v Örebro läns landsting*[62] the European Court of Justice was faced with the question as to whether, an inconvenient-hours supplement enjoyed by midwives, *inter alia*, formed part of the pay to be compared in a pay discrimination claim. The Court referred to the definition of pay in Article 119 of the EEC Treaty and held that an inconvenient-hours supplement constitutes a form of pay to which a worker is

58 See paragraphs 5.1 and 13.1 in Chapter 2 of this thesis.
59 Case C-381/99, [2001] IRLR 571 (ECJ).
60 At para 80. This case is further discussed in paras 4.4.1, 5.3 and 6.2 of this Chapter below.
61 Set out in paragraph 5.1 of Chapter 2 of this thesis.
62 [2000] IRLR 421 (ECJ).

entitled to by reason of her employment, and which is paid to her for carrying out duties at inconvenient hours.[63] An inconvenient-hours supplement is not listed as a payment in the lists of payments in the BCEA Schedule nor listed as falling under the list of terms and conditions of employment as set out in the Integration of Employment Equity Code[64] and no guidance can be extracted for the research question in (a) under paragraph 4.1.1 above but the following guidance can be extracted for the research question in (b) under paragraph 4.1.1 above: (a) it provides an example of what falls under the term "pay" for the purpose of an equal pay claim in international labour law, and to this end, it is submitted that an inconvenient-hours supplement should be listed as an example of what has been found under international labour law to fall within the ambit of pay which can assist with determining whether such payment can fall within the ambit of "terms and conditions of employment" in section 6(4) of the EEA; and (b) the Court applied the test contained in the international instruments and attendant materials as set out under paragraph 4.1 above which is, whether the payment arises out of the worker's employment, and came to the finding that the inconvenient-hours supplement falls within the ambit of pay as it is paid to the employee by reason of her employment. It is submitted that the use of the test by the court strengthens the submission made under paragraph 4.1 above that this test should be used to determine whether terms and conditions fall within the ambit of "terms and conditions of employment" under section 6(4) of the EEA.

In *Rinner-Kuhn v FWW Spezial-Gebaudereinigung GmbH*[65] the European Court of Justice held that the continued payment of wages of an employee who is ill falls within the meaning of pay as set out in Article 119 of the EEC Treaty. The question before the European Court of Justice was whether Article 119 of the EEC Treaty and the Equal Pay Directive prohibits national legislation which allows employers to exclude those workers whose work do not exceed 10 hours per week or 45 hours per month from continued payment of wages in the event of illness (sick leave pay) in circumstances where this exclusion affects a larger percentage of females than males. The Court held that this type

63 At paras 26-27, 40, 42.
64 Set out in paragraph 5.1 of Chapter 2 of this thesis.
65 Case 171/88, [1989] ECR (ECJ).

of differentiation results in discrimination against female workers and should be regarded as being prohibited by Article 119 of the EEC Treaty unless the differentiation can be justified by objective factors unrelated to discrimination on the grounds of sex.[66] While no guidance can be extracted from this case for the research question as set out in (a) above under paragraph 4.1.1 above because the continued payment of wages in the event of illness (sick leave pay) is not listed in the list of payments in the BCEA Schedule[67] it does, however, provide guidance for the research question set out in (b) above in that it strengthens the submission made in Chapter 2 of this thesis that sick leave (which is normally paid leave) as set out in the Integration of Employment Equity Code falls within the ambit of the phrase "terms and conditions of employment" under section 6(4) of the EEA.[68]

4.1.1(b) Bonus

In *Kruger v Kreiskrankenhaus Ebersberg*[69] the European Court of Justice was faced with the question as to whether Article 119 of the EC Treaty should be interpreted to mean that the exclusion by a collective agreement of employees working less than 15 hours a week and earning pay which exempts them from compulsory social insurance, to a special annual bonus, constitutes indirect discrimination against female employees where it affects a larger percentage of females than males. The Court reiterated that Article 119 of the EC Treaty prohibits discrimination in collective agreements. The European Court of Justice held that an end of year bonus which is paid under a law or collective agreement falls within the meaning of pay in Article 119 of the EC Treaty as it is received in relation to the person's employment. It finally held that Article 119 of the EC Treaty should be interpreted to mean that the exclusion by a collective agreement of employees working less than 15 hours a week and earning pay which exempts them from compulsory social insurance, to a special annual bonus, constitutes indirect discrimination against female

---

66 At paras 5, 7-8, 12.
67 Set out in paragraph 5.1 of Chapter 2 of this thesis.
68 See paragraphs 5.1 and 13.1 in Chapter 2 of this thesis.
69 Case C-281/97, [1999] ECR I-5141 (ECJ).

employees where the exclusion applies independently of the employee's sex but where it in effect affects a larger percentage of females than males.[70]

In *Lewen v Denda*[71] the European Court of Justice was faced with the question as to whether a Christmas bonus falls within the meaning of Article 119 of the EC Treaty even if it is paid by the employer exclusively as an incentive for future work or loyalty or both (voluntarily as an exceptional allowance). The Court then stated that it is well settled in its case law that pay in Article 119 of the EC Treaty includes all consideration in connection with employment paid to a worker whether immediate or future and whether it is paid under a contract of employment, in terms of legislation or on a voluntary basis. The Court held that the reason for the payment is irrelevant for the purposes of Article 119 of the EC Treaty as the decisive factor is whether the benefit has been granted in connection with employment. The Court further held that a Christmas bonus which is paid voluntarily as an exceptional allowance falls within the ambit of pay as contained in Article 119.[72]

An annual bonus (also known as a Christmas bonus) is not listed as a payment in the lists of payments in the BCEA Schedule nor listed as falling under the list of terms and conditions of employment as set out in the Integration of Employment Equity Code[73] and no guidance can be extracted for the research question in (a) under paragraph 4.1.1 above but the following guidance can be extracted for the research question in (b) under paragraph 4.1.1 above: (a) it provides an example of what falls under the term pay for the purposes of an equal pay claim in international labour law, and to this end, it is submitted that an annual bonus (Christmas bonus) should be listed as an example of what has been found under international labour law to fall within the ambit of pay which can assist with determining whether such payment can fall within the ambit of "terms and conditions of employment" in section 6(4) of the EEA; and (b) the Court in both cases applied the test whether the payment has been granted in connection with the employee's employment

70 At paras 12, 17, 20, 30. This case is also discussed under para 6.7 of this Chapter below.
71 Case C-333/97, [1999] ECR I-7266 (ECJ).
72 At paras 16, 17, 19-21, 24.
73 Set out in paragraph 5.1 of Chapter 2 of this thesis.

in order to determine whether the payments in question fell within the ambit of pay and this test is quintessentially the test contained in the international instruments and attendant materials as set out under paragraph 4.1 above which is, whether the payment arises out of the workers employment, and it came to the finding that an annual bonus falls within the ambit of pay as it is paid to the employee by reason of her employment. It is submitted that the use of the test by the court strengthens the submission made under paragraph 4.1 above that this test should be used to determine whether terms and conditions fall within the ambit of "terms and conditions of employment" under section 6(4) of the EEA. It is further submitted that the way in which the court phrased this test should be added to the manner in which the test is phrased under international labour law under paragraph 4.1 above and the result of this will be the phrasing of the test as follows: whether the payment arises out of *or is connected* with the workers employment. It is submitted that this version of the test should be stated as the test to be used to determine whether terms and conditions fall within the ambit of "terms and conditions employment" under section 6(4) of the EEA.

4.1.1(c) Redundancy payment

In *Commission of the European Communities v Kingdom of Belgium*[74] the Commission of the European Communities lodged an application before the European Court of Justice for a declaration that the Kingdom of Belgium had contravened Article 119 of the EEC Treaty by rendering compulsory a collective agreement by Royal Decree that excludes female employees over the age of 60 from being eligible for an additional redundancy payment but does not exclude males over the age of 60. The collective agreement provided for additional payments to be made to workers who are made redundant at a certain age. This additional payment would be paid by the employee's last employer and it was equal to half the difference between the net wage and the unemployment benefit. The Commission argued that the additional payment in this case fell within the ambit of pay in Article 119 of the EEC Treaty and the fact that female employees aged between 60-65 cannot obtain the payment unlike their male counterparts who are in the same age

[74] Case C-173/91, [1993] ECR I-693 (ECJ).

group infringed the principle of equal pay for male and female employees. The Kingdom of Belgium argued that the additional payment cannot be taken to fall within the ambit of pay in Article 119 of the EEC Treaty and the additional payment was not a redundancy payment but was payment which supplemented the unemployment benefit in the event of redundancy. It further argued that the additional payment seen in this light was in the nature of a social security benefit. The European Court of Justice held that the additional payment fell within the ambit of pay in Article 119 of the EEC Treaty because the payment was to be received from the employee's last employer, the payment was connected to the employment relationship, and the agreement to make the payment only applied to persons employment in terms of a contract of employment. The Court further held that the mere fact that the additional payment supplements a social security benefit is not decisive. It rejected the Kingdom of Belgium's arguments and upheld the application.[75]

In *Barber v Guardian Royal Exchange Assurance Group*[76] the European Court of Justice was faced with the question as to whether a redundancy benefit falls within the meaning of pay as contained in Article 119 of the EEC Treaty. The Court restated the definition of pay as contained in Article 119 and the fact that certain benefits are paid post termination of employment does not preclude such benefits from falling within the definition of pay. It then held that a redundancy benefit granted to an employee falls within the ambit of pay as contained in Article 119 of the EEC Treaty. The Court also held that the principle of equal pay must be applied to each element of remuneration and not on the basis of a comprehensive assessment of pay.[77] The EU Memorandum on Equal Pay states that an argument which advances the total package to achieve equal pay seems to be unacceptable. It further states that the impact of Article 119 of the EEC Treaty and the Equal Pay Directive proper is that where work is found to be of equal value then the "favourable elements of terms and conditions apply equally to the female and male jobs".[78]

---

[75] At paras 1-3, 7, 9, 15-16, 18, 20, 23.
[76] Case C-262/88, [1990] ECR I-1944 (ECJ).
[77] At paras 7, 12, 14, 35.
[78] EU Memorandum on Equal Pay for Work of Equal Value (COM (94) 6 final Brussels, 23 June 1994) at 37.

A redundancy payment and additional redundancy payment are not listed as payments in the lists of payments in the BCEA Schedule nor listed as falling under the list of terms and conditions of employment as set out in the Integration of Employment Equity Code[79] and no guidance can be extracted for the research question in (a) under paragraph 4.1.1 above but the following guidance can be extracted for the research question in (b) under paragraph 4.1.1 above:

(a) It provides an example of what falls under the term pay for the purposes of an equal pay claim in international labour law, and to this end, it is submitted that a redundancy payment and additional redundancy payment should be listed as examples of what has been found under international labour law to fall within the ambit of pay which can assist with determining whether such payments can fall within the ambit of "terms and conditions of employment" in section 6(4) of the EEA;

(b) The Court quintessentially applied the test relating to whether pay falls within the ambit of pay for the purposes of equal pay as contained in the international instruments and attendant materials as set out under paragraph 4.1 above as read with the submissions relating to this test made under paragraph 4.1.1(b) above, and came to the finding that both a redundancy payment and additional redundancy payment falls within the ambit of pay as the payment thereof is connected to the employment relationship. It is submitted that the use of the test by the Court strengthens the submission made under paragraph 4.1 above that this test should be used to determine whether terms and conditions fall within the ambit of "terms and conditions of employment" under section 6(4) of the EEA; and

(c) The Court has stated that the principle of equal pay must be applied to each of the elements of remuneration and not on the basis of a comprehensive assessment of pay and this has also been stated in *Brunnhofer* as discussed under paragraph 4.1.1(a) above as well as in the EU Memorandum on Equal Pay as referred to under the discussion of

79 Set out in paragraph 5.1 of Chapter 2 of this thesis.

this case under paragraph 4.1.1(c). It is submitted that this should be applied to equal pay claims under section 6(4) of the EEA.

4.1.1(d) Termination Payments

In *Gruber v Silhouette International Schmied GmbH & Co KG*[80] the European Court of Justice noted that it was not contested before it that termination payments fell within the ambit of pay in Article 119 of the EC Treaty as the dispute related to the calculation of the amount of the termination payment which could be claimed. The Court made this observation in the context of a question being referred to it which entailed whether Article 119 of the EC Treaty precludes national legislation which provides a reduced termination payment to workers who prematurely end their employment relationship to care for their children (because of a lack of child-care facilities to care for them) but does not reduce the termination payment for those workers who give notice of resignation for an important reason. The workers who receive the reduced payment were predominantly women.[81]

In *Hlozek v Roche Austria Gesellschaft mbH*[82] the European Court of Justice was faced with the question as to whether a bridging allowance which was to be paid to employees who have reached a certain age at the time of their dismissal fell within the meaning of pay as contained in Article 141 of the EC Treaty and Article 1 of the Equal Pay Directive. The Court stated that it is well settled in its case law on Article 119 of the Treaty of Rome that the concept of pay within the meaning of Article 141 of the EC Treaty and Article 1 of the Equal Pay Directive is wide enough to include any consideration whether in cash or kind, whether immediate or future, provided that the worker receives it in respect of his employment. It further stated that the fact that a certain benefit is paid after an employment relationship is terminated does not hamper it from being considered pay. The Court held that such pay is considered as deferred pay and an employee is entitled thereto by reason of his employment and the purpose of such payment is to assist the

80 Case C-249/97, [1999] ECR I-5315 (ECJ).
81 At paras 21-22.
82 Case C-19/02, [2004] ECR I-11523 (ECJ).

employee to adjust to the circumstances arising from the employment termination. The Court further held that the mere fact that the deferred payment can be regarded as reflecting social policy considerations does not detract from the fact that such payment falls within the ambit of pay. It then held that the bridging allowance in question fell within the ambit of "pay" as contained in Article 141 of the EC Treaty and Article 1 of the Equal Pay Directive.[83]

In *Kowalska v Freie und Hansestadt Hamburg*[84] the European Court of Justice dealt with the question relating to whether or not a severance grant paid to employees on the termination of their employment fell within the ambit of pay in Article 119 of the EEC Treaty. The Court noted that the term pay has been interpreted to cover any consideration, whether it be cash or in kind and whether or not it be immediate or in future provided that the employee receives it directly or indirectly from his employer arising out of his employment. The Court held that benefits that are paid after the termination of the employment relationship are not prevented from falling within the ambit of pay in Article 119 of the EEC Treaty. It held that this was a form of deferred pay which the employee was entitled to as a result of his employment. The Court then concluded on this point by finding that a severance grant paid to an employee on termination of his employment falls squarely within the meaning of pay as contained in Article 119 of the EEC Treaty.[85]

Termination payments as well as a bridging allowance and a severance grant paid after termination of the employment relationship are not listed as payments in the lists of payments in the BCEA Schedule nor listed as falling under the list of terms and conditions of employment as set out in the Integration of Employment Equity Code[86] and no guidance can be extracted for the research question in (a) under paragraph 4.1.1 above but the following guidance can be extracted for the research question in (b) under paragraph 4.1.1 above:

---

83 At paras 2, 33, 35, 37, 39-40.
84 Case C-33/89, [1990] ECR I-2607 (ECJ).
85 At paras 8-11. This case is further discussed under paras 6.7 and 7.3.2 of this Chapter below.
86 Set out in paragraph 5.1 of Chapter 2 of this thesis.

(a) It provides an example of what falls under the term pay for the purposes of an equal pay claim in international labour law, and to this end, it is submitted that termination payments including a bridging allowance and severance grant paid after the termination of the employment relationship should be listed as examples of what has been found under international labour law to fall within the ambit of pay which can assist with determining whether such payments can fall within the ambit of "terms and conditions of employment" in section 6(4) of the EEA; and

(b) The Court applied the test relating to whether pay falls within the ambit of pay for the purposes of equal pay as contained in the international instruments and attendant materials as set out under paragraph 4.1 above as read with the submissions relating to this test made under paragraph 4.1.1(b) above, and came to the finding that termination payments, a bridging allowance and a severance grant falls within the ambit of pay as the payment thereof is connected to (arises out of) the employment relationship. It is submitted that the use of the test by the court strengthens the submission made under paragraph 4.1 above that this test should be used to determine whether terms and conditions fall within the ambit of "terms and conditions of employment" under section 6(4) of the EEA.

4.1.1(e) Loss of earnings due to attending training courses

In *Kuratorium für Dialyse und Nierentransplantation e.V. v Lewark*[87] the European Court of Justice held that payment received as a result of loss of earnings due to an employee attending training courses which is necessary in order to perform their staff council functions must be regarded as pay falling within the ambit of Article 119 of the EEC Treaty because the payment is connected to the employment relationship.[88]

[87] Case C-457/93, [1996] ECR I-260 (ECJ).
[88] At para 23.

In *Arbeiterwohlfahrt der Stadt Berlin e. V. v Bötel*[89] the European Court of Justice was faced with the question regarding whether compensation in the form of paid leave or overtime pay granted for attending training courses fell within the ambit of pay in Article 119 of the EEC Treaty. This question arose in circumstances where the respondent employee who was a part-time help claimed compensation from her employer for attending training courses. She was required in law to attend the training courses as she chaired a staff council of one of the employer's branches and this was a requirement. She was also under that law to be released from her duties without loss of pay. The European Court of Justice remarked that it has consistently held that the term pay in Article 119 of the EEC Treaty includes any consideration whether in cash or kind which the worker receives in respect of her employment and irrespective of whether she receives it under a contract of employment, in terms of legislative provisions or on a voluntary basis. It held that this definition was applicable to the compensation mentioned *in casu* as it was paid by the employer in terms of legislative provisions.[90]

Payment for loss of earnings, overtime pay and paid leave all received as a result of an employee attending a training course related to his/her employment are not listed as payments in the lists of payments in the BCEA Schedule nor listed as falling under the list of terms and conditions of employment as set out in the Integration of Employment Equity Code[91] and no guidance can be extracted for the research question in (a) under paragraph 4.1.1 above but the following guidance can be extracted for the research question in (b) under paragraph 4.1.1 above:

(a) It provides an example of what falls under the term pay for the purposes of an equal pay claim in international labour law, and to this end, it is submitted that payment for loss of earnings, overtime pay and paid leave all received as a result of an employee attending a training course related to his/her employment should be listed as examples of what has been found under international labour law to fall within the ambit of pay which can assist

---

89 Case C-360/90, [1992] ECR I-3589 (ECJ).
90 At paras 2-4, 11-14.
91 Set out in paragraph 5.1 of Chapter 2 of this thesis.

with determining whether such payments can fall within the ambit of "terms and conditions of employment" in section 6(4) of the EEA; and

(b) The Court applied the test relating to whether pay falls within the ambit of pay for the purposes of equal pay as contained in the international instruments and attendant materials as set out under paragraph 4.1 above as read with the submissions relating to this test made under paragraph 4.1.1(b) above, and came to the finding that payment for loss of earnings, overtime pay and paid leave all received as a result of an employee attending a training course related to his/her employment falls within the ambit of pay as the payment thereof is connected to (arises out of) the employment relationship. It is submitted that the use of the test by the Court strengthens the submission made under paragraph 4.1 above that this test should be used to determine whether terms and conditions fall within the ambit of "terms and conditions of employment" under section 6(4) of the EEA.

4.1.1(f) Maternity leave pay

In *Gillespie v Northern Health and Social Services Boards*[92] the European Court of Justice held that a benefit paid under legislation or a collective agreement to a female employee on maternity leave falls within the ambit of pay as contained in Article 119 of the EEC Treaty because it is made pursuant to the employment relationship. The Court further held that a female employee who is on maternity leave is entitled to receive a pay increase where same is granted because to deny such an increase to the employee discriminates against her on the grounds of her pregnancy as she would have received the increase had she not been pregnant.[93]

In *Abdoulaye v Regie nationale des usines Renault SA*[94] the European Court of Justice was faced with the question as to whether the principle of equal pay as set out in Article

---

[92] Case C-342/93, [1996] ECR I-492 (ECJ).

[93] At paras 14, 21-22. See also the case of *North Western Health Board v Mckenna* Case C-191/03, [2005] IRLR 895 (ECJ).

[94] Case C-218/98, [1999] ECR I-5742 (ECJ).

119 of the EC Treaty prohibits a lump-sum payment made exclusively to female employees who take maternity leave. The European Court of Justice held that a benefit paid to a female employee when she goes on maternity leave falls within the meaning of pay as contained in Article 119 of the EC Treaty because it is based on the employment relationship. The Court held further that the fact that the maternity benefit is not made periodically does not alter its nature of being pay. It finally held that the principle of equal pay as contained in Article 119 of the EC Treaty does not prohibit a lump-sum payment made exclusively to female employees who take maternity leave where it is intended to counterbalance the occupational disadvantages that arises for female workers on maternity leave due to them being away from work.[95]

While no guidance can be extracted from these cases for the research question as set out in (a) under paragraph 4.1.1 above because maternity leave pay is not listed in the list of payments in the BCEA Schedule[96] they do, however, provide the following guidance for the research question set out in (b) under paragraph 4.1.1 above:

(a) The cases strengthen the submission made in Chapter 2 of this thesis that maternity leave (which normally attracts maternity leave pay) as set out in the Integration of Employment Equity Code falls within the ambit of the phrase "terms and conditions of employment" under section 6(4) of the EEA;[97]

(b) The entitlement to a pay increase for an employee who is on maternity leave provides an example of what falls under the term pay for the purposes of an equal pay claim in international labour law, and to this end, it is submitted that the entitlement to a pay increase for an employee who is on maternity leave should be listed as an example of

---

95 At paras 10, 14-15, 22. *Regie nationale des usines Renault SA* mentioned in response to a question by the European Court of Justice, the following occupational disadvantages for female workers on maternity leave due to them being away from work: "First of all, a woman on maternity leave may not be proposed for promotion. On her return, her period of service will be reduced by the length of her absence; second, a pregnant woman may not claim performance-related salary increases; third, a female worker may not take part in training; lastly, since new technology is constantly changing the nature of jobs, the adaptation of a female worker returning from maternity leave becomes complicated." (At para 19 of the case).

96 Set out in paragraph 5.1 of Chapter 2 of this thesis.

97 See paragraphs 5.1 and 13.1 in Chapter 2 of this thesis.

what has been found under international labour law to fall within the ambit of pay which can assist with determining whether such payment can fall within the ambit of “terms and conditions of employment” in section 6(4) of the EEA; and

(c) The Court applied the test relating to whether pay falls within the ambit of pay for the purposes of equal pay as contained in the international instruments and attendant materials as set out under paragraph 4.1 above as read with the submissions relating to this test made under paragraph 4.1.1(b) above, and came to the finding that maternity leave pay and a pay increase whilst on maternity leave falls within the ambit of pay as the payment thereof is connected to (arises out of) the employment relationship. It is submitted that the use of the test by the Court strengthens the submission made under paragraph 4.1 above that this test should be used to determine whether terms and conditions fall within the ambit of “terms and conditions of employment” under section 6(4) of the EEA.

4.1.1(g) Expatriation Allowance (Relocation Allowance)

In *Sabbatini-Bertoni v European Parliament*[98] the European Court of Justice had to decide whether the withdrawal of an expatriation allowance to an employee of the European Parliament in accordance with its Staff Regulations amounted to unfair discrimination in that it contravened the principle of equal pay for male and female workers as set out in Article 119 of the EEC Treaty. The applicant, a female Italian national, joined the European Parliament on 1 January 1960. Upon her appointment she was granted an expatriation allowance in accordance with the Staff Regulations. The purpose of the expatriation allowance was to provide compensation to those employees who are obliged to change their place of residence as a result of entering into the employ of the European Parliament (similar to a relocation allowance). The European Parliament, the defendant, however, withdrew the expatriation allowance once the applicant married her husband who was not an official of the European Communities in terms of their Staff Regulations which provided that an employee who marries someone who at the date of marriage does

[98] Case 20/71, [1972] ECR 345 (ECJ).

not qualify for the allowance shall forfeit the grant of the allowance unless that employee becomes the head of the household. The applicant then applied to have this decision reviewed but was unsuccessful. The European Court of Justice found that the Staff Regulations created an arbitrary difference of treatment between male and female employees because "head of household" which is needed in order to retain the expatriation allowance if an employee marries someone who is not entitled to that allowance automatically regards male employees to be heads of households and women only in exceptional cases. It annulled the decision to withdraw the applicant's expatriation allowance. A narrow point argued by the applicant was that it was incontestable that the expatriation allowance granted to her fell within the ambit of pay within the meaning of Article 119 of the EEC Treaty.[99] No issue was taken with this argument and it seems that the European Court of Justice also found it to be self-evident that the expatriation allowance fell within the ambit of pay as contained in Article 119 of the EEC Treaty as it did not deal with this in its judgment.

The guidance which can be extracted for the research question as set out in (a) under paragraph 4.1.1 above is as follows. It is submitted that a relocation allowance listed under the lists of payments in the BCEA Schedule falls within the ambit of terms and conditions of employment under section 6(4) of the EEA[100] and this submission is based on this case which regards an expatriation allowance as falling within the ambit of pay for the purposes of equal pay. No further guidance can be extracted for the research question as set out in (b) under paragraph 4.1.1 above.

4.1.1(h) Travel Concessions

In *Grant v South West Trains*[101] the European Court of Justice held that travel concessions granted to the spouses/partners of employees as a result of their

---

[99] At pages 346-348, para 8 of page 351, paras 12-13 of page 351, and page 352. See also the case of *Chollet, née Bauduin v Commission of the European Communities* Case 32/71, [1972] ECR 363 (ECJ) where the ECJ dealt with a similar case dealing with the withdrawal of an expatriation allowance to a female employee of the Commission and came to the same conclusion.

[100] See paragraphs 5.1 and 13.1 in Chapter 2 of this thesis.

[101] Case C-249/96, [1998] ECR I-636 (ECJ).

employment contract fell within the ambit of pay as defined in Article 119 of the EC Treaty. This finding by the Court arose in circumstances where it dealt with the question as to whether it is contrary to Article 119 of the EC Treaty and Article 1 of the Equal Pay Directive for an employer to refuse to grant travel concessions to an unmarried cohabiting same-sex partner where these were granted to an unmarried opposite-sex partner of an employee. The European Court of Justice held that EU law as it stood at that time did not cover discrimination based on sexual orientation and it therefore held that the employer did not infringe Article 119 of the EC Treaty and Article 1 of the Equal Pay Directive.[102] It should be noted that this is no longer the position in EU law as it now expressly covers discrimination based on sexual orientation.[103]

In *Garland v British Rail Engineering Ltd*[104] the European Court of Justice dealt with the issue as to whether a special travel facility granted to male employees after their resignation fell within the meaning of pay in Article 119 of the EEC Treaty. The Court noted that the special travel facility was granted to the male employees in "kind" as referred to in the definition of "pay" as contained in Article 119 of the EEC Treaty which provides that pay comprises any consideration, whether cash or kind, immediate or future provided that the employee receives it in relation to his employment. It further found that the special travel facility fell within the meaning of pay in Article 119 of the EEC Treaty and was an extension of the benefit granted during the period of employment. The Court further stated that the fact that the special travel facility did not relate to a contractual obligation was of no moment. The dispute related to female employees, who on retirement, lost the special travel facility for their spouses and dependent children whereas male employees who retired continued to enjoy this special travel facility for their spouses and dependent children. The European Court of Justice held that this difference constituted unfair pay discrimination within the meaning of Article 119 of the EEC Treaty.[105]

---

[102] At paras 11, 14, 47, 50.
[103] See Articles 10 and 19 of the Treaty on the Functioning of the European Union.
[104] Case 12/81, [1982] ECR 360 (ECJ).
[105] At paras 2, 5, 7-9, 10-11.

A travel concession granted to spouses/partners and a special travel facility granted for spouses and dependent children are not listed as payments in the lists of payments in the BCEA Schedule nor listed as falling under the list of terms and conditions of employment as set out in the Integration of Employment Equity Code[106] and no guidance can be extracted for the research question in (a) under paragraph 4.1.1 above but the following guidance can be extracted for the research question in (b) under paragraph 4.1.1 above. It provides an example of what falls under the term pay for the purposes of an equal pay claim in international labour law, and to this end, it is submitted that a travel concession granted to spouses/partners and a special travel facility granted for spouses and dependent children should be listed as examples of what has been found under international labour law to fall within the ambit of pay which can assist with determining whether such payments can fall within the ambit of "terms and conditions of employment" in section 6(4) of the EEA.

4.1.1(i) Pension

In *Bilka-Kaufhaus GmbH v Weber von Hartz*[107] the European Court of Justice had to decide whether an occupational pension scheme which was contractual rather than statutory in nature fell within the ambit of pay as defined in Article 119 of the EEC Treaty. The Court held that the occupational scheme was based on an agreement between the employer and its employees and had the effect of supplementing the social benefits to be paid under national legislation. The Court noted that the scheme formed part of the employment contracts and relationship. It held that the occupational scheme could not be regarded as a social security scheme governed by statute which would take it outside the ambit of Article 119 of the EEC Treaty. The Court held further that the occupational pension scheme fell within the ambit of pay as contained in Article 119 of the EEC Treaty as it amounted to a consideration received by an employee from his employer in respect of his employment.[108]

---

[106] Set out in paragraph 5.1 of Chapter 2 of this thesis.
[107] Case 170/84, [1986] ECR 1620 (ECJ).
[108] At paras 20-22. This case is further discussed under paras 6.5 and 7.3.2 of this Chapter below.

In *Griesmar v Ministre de L'Economie, des Finances et de L'Industrie*[109] the European Court of Justice had to decide whether a pension provided for in terms of a retirement scheme for civil servants fell within the ambit of pay as contained in Article 119 of the Treaty of Rome. The Court found that the pension in question fell within the ambit of pay as contained in Article 119 of the Treaty of Rome because it applied to a particular category of workers, it was determined according to length of service and it was calculated in accordance with the employee's salary. It held that such a pension satisfies the employment criterion.[110]

In *Podesta v CRICA*[111] one of the questions placed before the European Court of Justice was whether a supplementary retirement pension scheme can fall within the meaning of pay as contained in Article 119 of the EC Treaty. The Court stated that according to settled case law, while social security schemes do not fall within the ambit of pay, benefits that were granted under a pension scheme did. The Court further stated that the decisive criterion to answer the question of whether a supplementary retirement pension scheme falls within the meaning of pay is whether it is paid to the employee as a result of the employment relationship. The Court then held that the supplementary retirement pension scheme fell within the ambit of the term pay as referred to in Article 119 of the EC Treaty.[112]

In *Worringham and Humphreys v Lloyds Bank Limited*[113] the European Court of Justice had to determine whether contributions paid by an employer in the name of the employee to a retirement scheme by way of an addition to the gross salary fell within the ambit of pay in Article 119 of the EEC Treaty. This question arose in circumstances where male employees under the age of 25 years old were required to contribute 5% of their salary to their retirement scheme but women who were under the age of 25 were not required

109 Case C-366/99, [2001] ECR I-9413 (ECJ).
110 At paras 25-26, 31, 34-35, 38. See also the case of *Bestuur van het Algemeen Burgerlijk Pensioenfonds v Beune* Case C-7/93, [1994] ECR I-4502 (ECJ) where the European Court of Justice held that the civil service pension scheme in question fell within the ambit of the term pay as contained in Article 119 of the EEC Treaty as it related to the employment of the employee (at paras 14, 43, 45-46).
111 Case C-50/99, [2000] ECR I-4055 (ECJ).
112 At paras 22, 24-26, 41.
113 Case 69/80, [1981] ECR 768 (ECJ).

to do so. The plaintiff female employees alleged unequal pay against them because the employer added an additional 5% to the gross salary paid to those male employees who were required to contribute 5% to their retirement schemes. This was not received by the plaintiff female employees. The European Court of Justice held that payments such as the one in question which are included in the employees gross salary and which determines the calculation of other advantages such as unemployment benefits and redundancy benefits falls within the ambit of pay in Article 119 of the EEC Treaty even if they are immediately deducted by the employer and paid over to a retirement scheme on behalf of an employee. The Court also held that the payment of the additional 5% to male employees under the age of 25 years resulted in inequality between the gross salaries of male and female employees because male employees received benefits which female employees who were engaged in the same work or work of equal value did not receive.[114]

In *Birds Eye Walls Ltd v Roberts*[115] the European Court of Justice, dealing with a dispute relating to the payment of a bridging pension, held that it was common cause that the bridging pension fell within the ambit of the term pay as set out in Article 119 of the EEC Treaty. It held that it is not contrary to Article 119 of the EEC Treaty to take into account the State pension amount that male employees will receive from 65 years old and female employees will receive from 60 years old, when calculating the amount of a bridging pension paid by the employer to male and female employees who have taken early retirement for reasons of ill health and which pension is intended to bridge (compensate) them for the loss of income due to them not having yet reached the required age to obtain the State pension. The European Court of Justice held that this is the case even if the result is that a female employee is entitled to a smaller bridging pension as compared to a male employee and the difference between her bridging pension and the bridging pension of the male employee is equal to the amount of the State pension to which the female employee is entitled to from the age of 60 years old.[116]

---

114 At paras 5, 12-13, 15, 25. See Plender R "Equal Pay for Men and Women: Two Recent Decisions of the European Court" *The American Journal of Comparative Law* 1982 30(4) 627-653 for an extensive discussion of this case.

115 Case C-132/92, [1993] ECR I-5599 (ECJ).

116 At paras 12, 24.

In *Ten Oever v Stichting Bedrijfspensioenfonds voor het Glazenwassers-en Schoonmaakbedrijf*[117] the European Court of Justice held that it is settled law that the meaning of pay in Article 119 of the EEC Treaty includes any consideration, cash or kind, direct or indirect, relating to the employee's employment. The Court further held that where benefits are paid after the end of the employment relationship then this does not preclude it from falling within the ambit of pay within the meaning of Article 119. It then held that a survivor's pension provided for in terms of an occupational pension scheme, which is not a social security scheme, falls within the meaning of pay.[118]

A pension (retirement scheme) is specifically listed as a payment in the lists of payments in the BCEA Schedule[119] and the guidance which can be extracted from this for the research question in (a) under paragraph 4.1.1 above is that a pension (retirement scheme) should be listed as falling under the phrase "terms and conditions of employment" in section 6(4) of the EEA and the submission for its inclusion is made. The following guidance can be extracted (from the case law above) for the research question set out in (b) under paragraph 4.1.1 above:

(a) They strengthen the submission made in Chapter 2 of this thesis that pension (retirement) schemes as set out in the Integration of Employment Equity Code falls within the ambit of the phrase "terms and conditions of employment" under section 6(4) of the EEA;[120]

(b) They provide examples of what falls under the term pay for the purposes of an equal pay claim in international labour law, and to this end, it is submitted that the following aspects relating to a pension (retirement) scheme should be listed as examples of what has been found under international labour law to fall within the ambit of pay which can assist with determining whether such payments can fall within the ambit of "terms and conditions of employment" in section 6(4) of the EEA: (i) a supplementary retirement

117 Case C-109/91, [1993] ECR I-4939 (ECJ).
118 At paras 8-9, 14.
119 Set out in paragraph 5.1 of Chapter 2 of this thesis.
120 See paragraphs 5.1 and 13.1 in Chapter 2 of this thesis.

scheme; (ii) contributions made by an employer to a retirement scheme for the benefit of an employee by way an addition to his/her salary; (iii) a bridging pension (paid to employees who take early retirement due to ill health to compensate them for loss of income until they obtain a (state) pension; and (iv) a survivor's pension; and

(c) The Court applied the test relating to whether pay falls within the ambit of pay for the purposes of equal pay as contained in the international instruments and attendant materials as set out under paragraph 4.1 above as read with the submissions relating to this test made under paragraph 4.1.1(b) above, and came to the finding that pension (retirement) schemes and its variations fall within the ambit of pay as the payment thereof is connected to (arises out of) the employment relationship. It is submitted that the use of the test by the Court strengthens the submission made under paragraph 4.1 above that this test should be used to determine whether terms and conditions fall within the ambit of "terms and conditions of employment" under section 6(4) of the EEA.

4.1.1(j) Nursery scheme

In *Lommers v Minister van Landbouw, Natuurbeheer en Visserij*[121] the European Court of Justice was faced with the question as to whether the Equal Treatment Directive precludes an employer from having rules in terms of which subsidised nursery places are only made available to its female employees and only to a male employee in an emergency situation which would be determined by an employer. The Court held that the Equal Treatment Directive does not preclude an employer from addressing the underrepresentation of female employees by having rules which makes subsidised nursery places available to its female employees with male employees having access to same in emergency situations to be determined by the employer provided that those male employees who take care of their children themselves are allowed to access the nursery scheme on the same conditions as their female counterparts. The Court accepted that the nursery scheme fell within the ambit of a working condition and not within the ambit of pay because the mere fact that the scheme had monetary consequences was not

[121] Case C-476/99, [2002] ECR I-2921 (ECJ).

enough to bring it within the ambit of pay.[122] A nursery scheme which provides subsidised nursery places is not listed as a payment in the lists of payments in the BCEA Schedule nor listed as falling under the list of terms and conditions of employment as set out in the Integration of Employment Equity Code[123] and no guidance can be extracted for the research question in (a) under paragraph 4.1.1 above but the following guidance can be extracted for the research question in (b) under paragraph 4.1.1 above. It provides an example of what falls under the phrase working conditions for the purposes of an equal terms and conditions claim in international labour law, and to this end, it is submitted that a nursery scheme which provides subsidised nursery places should be listed as an example of what has been found under international labour law to fall within the ambit of working conditions which can assist with determining whether such working condition can fall within the ambit of "terms and conditions of employment" in section 6(4) of the EEA.

4.1.1(k) Breastfeeding leave

In *Roca Álvarez v Sesa Start España ETT SA*[124] the European Court of Justice was faced with the question as to whether the Equal Treatment Directive must be interpreted in a manner that precludes a measure which provides that female employees who are mothers are entitled to take breastfeeding leave during the first nine months following the child's birth but male employees who are fathers are not entitled to such leave unless their child's mother is also employed. The breastfeeding leave allowed the employee to be absent during the working day for a certain period or to be entitled to a reduction of the working day. It thus had the effect of changing working hours and as such *affected the working conditions* within the meaning of the Equal Treatment Directive. The Court noted that employed mothers were entitled to breastfeeding leave while employed fathers were only entitled to it if their child's mother was also employed. It further noted that the requirement for females was the status of being an employee but this was not sufficient for a male to be awarded the leave. The Court held that the Equal Treatment Directive

---

[122] At paras 23, 26, 28, 50.
[123] Set out in paragraph 5.1 of Chapter 2 of this thesis.
[124] Case C-104/09, [2010] ECR I-8677 (ECJ).

precludes the measure of the entitlement of breastfeeding leave because there was no justification for differentiating between male and female employees regarding the additional requirement for male employees.[125] Breastfeeding leave is not listed under payments in the lists of payments in the BCEA Schedule nor listed as falling under the list of terms and conditions of employment as set out in the Integration of Employment Equity Code[126] and no guidance can be extracted for the research question in (a) under paragraph 4.1.1 above. It should, however, be mentioned that this type of leave could be connected with maternity leave as found under the Integration of Employment Equity Code but it is a leave that is not common in South African law and can at best provide the following guidance for the research question in (b) under paragraph 4.1.1 above. It provides an example of what falls under the phrase "working conditions" for the purposes of an equal terms and conditions claim in international labour law, and to this end, it is submitted that breastfeeding leave should be listed as an example of what has been found under international labour law to fall within the ambit of working conditions which can assist with determining whether such working condition can fall within the ambit of "terms and conditions of employment" in section 6(4) of the EEA.

4.1.2 Further "terms and conditions of employment" (pay)

The following payments listed under both the lists of payments in the BCEA Schedule[127] have not been mentioned as falling under the ambit of pay (terms and conditions of employment) in either the international instruments and materials discussed under paragraph 4.1 above or the case law discussed under paragraphs 4.1.1(a)-(k) above: (a) any cash payments made to an employee; (b) any other payment in kind received by an employee; (c) any cash payment/payment in kind provided in order to enable the employee to work; (d) an equipment (tool) allowance; (e) an entertainment allowance; and (f) an education allowance.[128] Notwithstanding this, it is submitted that these

---

125 At paras 18, 21, 23, 31, 38-39.
126 Set out in paragraph 5.1 of Chapter 2 of this thesis.
127 Set out in paragraph 5.1 of Chapter 2 of this thesis.
128 Items 1(c)-(d), 2(a), 2(f)-(g) of the BCEA Schedule as set out in paragraph 5.1 of Chapter 2 of this thesis.

payments are still capable of falling within the ambit of “terms and conditions of employment” under section 6(4) of the EEA provided that they arise out of or are connected to the employment relationship because this is the test that is used in international labour law in order to determine whether or not a payment (working conditions) falls within the ambit of pay (or working conditions) for the purpose of equal pay (terms and conditions).[129]

The following elements of what falls within the ambit of pay (working conditions) under the international labour law instruments and materials referred to under paragraph 4.1 above are not mentioned in the lists of payments in the BCEA Schedule, the list of terms and conditions of employment in the Integration of Employment Equity Code[130] or the EU case law discussed under paragraphs 4.1.1(a)-(k) above: (a) increases based on seniority (seniority increment); (b) marital status benefits; (c) cost of living allowance; (d) family allowance; (e) provision of working clothes or an allowance; (f) cleaning of working clothes (laundering) or an allowance; (g) productivity bonus; (h) performance payments; (i) child or dependency allowance; (j) commission; and (k) food provided or an allowance. Notwithstanding this, the following guidance can be extracted for the research question in (b) under paragraph 4.1.1 above. This list of payments (working conditions) provides examples of what falls under the ambit of pay (including working conditions) for the purposes of an equal pay (terms and conditions) claim in international labour law, and to this end, it is submitted that the list of payments (working conditions) should be listed as examples of what has been found under international labour law to fall within the ambit of pay (including working conditions) which can assist with determining whether such pay (working conditions) fall within the ambit of “terms and conditions of employment” in section 6(4) of the EEA.

[129] See reference to this test under paragraphs 4.1, 4.1.1(a)-(f), 4.1.1(i) above.
[130] Set out in paragraph 5.1 of Chapter 2 of this thesis.

4.2 The Same Employer

The preamble to the EU Recast Directive states that the European Court of Justice has recognised that equal pay is not limited to situations where men and women work for the same employer.[131] The Equal Pay Guide similarly states that equal pay for work of equal value can apply where the jobs are performed in different places (enterprises) or for different employers.[132]

In *Lawrence and Others v Regent Office Care Ltd*[133] the European Court of Justice was faced with the question as to whether Article 141(1) of the EC Treaty (which relates to the principle of equal pay for equal work and work of equal value) allows for employees not employed by the Council to compare their pay with employees of the Council who are performing work of equal value. The Court held that there is nothing in Article 141(1) of the EC Treaty which limits the principle of equal pay to situations where males and females work for the same employer. The Court, however, found that the differences identified between the non-council employees and the council employees could not be attributed to a single source because there was no body (single source) which was responsible for the differences (the single source rule) and as such it does not come within the scope of Article 141(1) of the EC Treaty.[134]

In *Allonby v Accrington & Rossendale College*[135] the question before the European Court of Justice was whether Article 141(1) of the EC Treaty is wide enough to include an interpretation which allows a female whose contract of employment with an undertaking has not been renewed and who is thereafter made available to the same undertaking through an intermediary undertaking to provide the same services to the previous undertaking, to rely on the principle of equal pay and use a male employee employed at the previous undertaking as her comparator. The Court reiterated that there is nothing in

131 Para 10 of the Preamble to the EU Equal Treatment Directive.
132 Oelz, Olney and Manuel Equal Pay Guide at 31-32.
133 Case C-320/00, [2002] IRLR 822 (ECJ).
134 At paras 10, 17-19. This case is also briefly discussed in para 6 of this Chapter below.
135 Case C-256/01, [2004] IRLR 224 (ECJ).

the wording of Article 141(1) of the EC Treaty to suggest that the provision is only confined to those situations where male and female employees work for the same employer but this was subject to there being a single source to which the differences in pay of the workers could be attributed to (the single source rule). The Court held that the female employee was not entitled to rely on the principle of equal pay by using a male employee who was employed at her previous employer. It stated that the male employee was employed by the College under conditions determined by the College and the female applicant was paid according to her agreement with the intermediary undertaking. It further stated that the fact that the female applicant's pay was influenced by the amount by which her previous employer paid the intermediary undertaking did not constitute a sufficient basis to conclude that the difference in pay could be attributed to a single source.[136]

Davies states that the rule relating to the pay differences being attributed to a "single source" reduces the opportunities for claimants to seek equal pay (beyond their employer) as is evident in the *Lawrence* and *Allonby* cases but it does show the concern of the European Court of Justice to guard against employers being held liable for another employer who decides to pay its workers at a higher remuneration.[137] Fredman states that the suggestion that the equal pay comparison can extend to a comparator in the same service as the claimant (who is not employed by the same employer as the claimant) was extinguished by the alternative requirement of a single source who/which is responsible for the pay differences (the single source rule).[138] It is difficult to think of a scenario where one employer will be responsible for the difference in pay between its employee (the comparator) and that of another employee (the claimant) of another employer where both employees are performing the same work, substantially the same work or work of equal value but are paid differently. There would simply be no single source responsible for the difference in pay. It is thus submitted that the single source rule developed by the European Court of Justice rings a death knell to an equal pay

[136] At paras 42, 45-48, 50.
[137] Davies ACL *EU Labour Law* (Edward Elgar Publishing 2012) 120.
[138] Fredman S "Reforming Equal Pay Laws" 2008 37(3) *ILJ* 193 at 197-198.

claimant being able to compare herself with a comparator employee of another employer and a claim brought by such employee will not make it out of the starting blocks. It is suggested that a better understanding of international labour law on this point is that an employee is confined to compare her terms and conditions with that of a comparator employee of the same employer.

It is appropriate to set out here the guidance that can be taken from the above international instruments, case law of the European Union and academic writings in order to assist with the research questions relating to the phrase "the same employer" in section 6(4) of the EEA as called for in paragraph 13.2 of Chapter 2 of this thesis. The guidance sought from international labour law regarding these research questions relates to whether international labour law can strengthen the answers given to these research questions in paragraph 13.2 of Chapter 2 of this thesis.

The following guidance can be extracted from international labour law. The single source rule developed by the European Court of Justice is a useful test to use in order to determine whether the employer against whom an equal pay claim is launched falls within the ambit of the phrase "same employer" in section 6(4) of the EEA for the following reasons: (a) the test does not allow another employer who is not connected to the claimant employee's employer to fall within the ambit of the phrase "same employer" as it looks for the body who/which is responsible for the pay difference; and (b) the test has the ability to deal with difficulties which may arise as to who the employer is for the purpose of "the same employer" under section 6(4) of the EEA by only looking for the body who/which is responsible for the pay difference in question. Based on this, it is submitted that the single source rule test should be used in order to determine whether an employer falls within the ambit of the phrase "the same employer" under section 6(4) of the EEA.

4.3 The Comparator (employees of the same employer)

Burrows & Mair state that Article 119 of the Treaty of Rome and Article 1 of the Equal Pay Directive require the implementation of the provision of equal pay for equal work (and work of equal value) and this implies the "need for comparison between two jobs".[139] Davies states that an equal pay claim is largely dependent on the claimant's ability to compare herself with a comparator who is doing the same/similar work or work of equal value.[140] Article 2(1)(a) of the EU Recast Directive provides for the use of a comparator who is contemporaneously employed with the equal pay claimant, *inter alia*, in its definition of direct discrimination by stating that direct discrimination is where one person (the claimant employee) is treated less favourably (unequal pay/terms and conditions) on the grounds of sex as compared to another person (a comparator employee). The use of a contemporaneous comparator only deals with one aspect relating to the issue of choosing a comparator for the purposes of an equal pay/terms and conditions claim and it is the most obvious one. The other issues which arise under international labour law concerning the choosing of a comparator relate to the following: the issue regarding contemporaneous employment of the claimant and comparator which relates to the use of a predecessor or successor comparator; the use of a hypothetical comparator; the use of a comparator who is engaged in work of less value than the equal pay claimant but who receives more pay; and instances where the need for a comparator can be dispensed with.

These issues have relevance to the guidance sought from international labour law for the research questions relating to the phrase "employees of the same employer" in section 6(4) of the EEA (which relates to the choosing of a comparator) as called for in paragraph 13.3 of Chapter 2 of this thesis. The guidance sought from international labour law regarding these research questions relates to: (a) How the issue of contemporaneous employment of the claimant and comparator which relates to the use of a predecessor or

---

[139] Burrows N & Mair J *European Social Law* (John Wiley & Sons Ltd 1996) 31. The EU Memorandum on Equal Pay states the following at 13: "Neither Article 119 of the EC Treaty nor Article 1 of the Equal Pay Directive specify any requirement of an actual comparator of the opposite sex."

[140] Davies ACL *EU Labour Law* (Edward Elgar Publishing 2012) 119.

successor comparator is dealt with under international labour law; (b) Whether the arguments put forth relating to the use of a hypothetical comparator based on South African law can be supported by international labour law; and (c) Whether the argument put forth relating to the use of a subordinate employee, who is engaged in work of lesser value than the equal pay claimant but who earns higher pay, as a comparator based on South African law can be supported by international labour law.

The aspects relating to the choosing of a comparator under international labour law as stated above which are of relevance to the guidance sought from international labour law for the research questions relating to the phrase "employees of the same employer" in section 6(4) of the EEA as called for in paragraph 13.3 of Chapter 2 of this thesis, as stated above, will be analysed under separate headings below with submissions relating to any guidance that can be extracted, as sought for, being made at the end of the discussion of each heading as deemed appropriate.

4.3.1 The issue regarding contemporaneous employment of the claimant and comparator (which relates to the use of a predecessor or successor comparator)

Article 2(1)(a) of the EU Recast Directive provides for the use of a predecessor comparator in its definition of direct discrimination as follows:

> "'direct discrimination': where one person is treated less favourably on grounds of sex than another is, *has been* or would be *treated* in a comparable situation."[141]

It is clear from a reading of Article 2(1)(a) of the EU Recast Directive that it allows a claimant to compare herself with a comparator by relying on different scenarios.[142] The scenario relevant under this heading is that the equal pay claimant is being treated less favourably than a comparator has been treated and this clearly refers to a predecessor comparator. McCrudden states that the equal pay principle under European Community law is not confined to where women and men are contemporaneously doing equal work

---

[141] Emphasis added.
[142] Davies ACL *EU Labour Law* (Edward Elgar Publishing 2012) 119-120.

but also extends to a situation where a woman receives less pay than a male who was employed immediately before her employment and who was engaged in work that she is engaged in (a predecessor comparator).[143]

In *Macarthys Ltd v Smith*[144] the respondent, Mrs Smith, was employed by the applicant, Macarthys Limited, as a warehouse manager at a salary of £50 per week and claimed that she was discriminated against in her pay because her predecessor who was a male received a salary of £60 per week. She took up the post four months after the male left the post. The question before the European Court of Justice was whether the principle of equal pay as set out in Article 119 of the EEC Treaty is only confined to situations where males and females are contemporaneously doing equal work for their employer. In other words, must they be employed at the same time in order to rely on the principle of equal pay in Article 119 of the EEC Treaty. The Court held that the decisive test in Article 119 of the EEC Treaty is whether there is a difference in treatment between males and females performing equal work and this cannot be restricted by the introduction of a requirement of contemporaneity. It thus held that the principle of equal pay in Article 119 of the EEC Treaty that seeks to ensure that male and female employees receive equal pay cannot be confined to only those instances where male and female employees are contemporaneously doing equal work for the same employer.[145] It is clear from this case that there is no requirement of contemporaneity regarding the work of the claimant and the comparator and this allows for the use of a predecessor comparator where such comparison is appropriate. This case, however, does not deal with the issue of whether a successor comparator can be an appropriate comparator in an equal pay claim and this question remains.

---

[143] McCrudden C *Equality in Law between Men and Women in the European Community: United Kingdom* (European Commission, Martinus Nijhoff Publishers 1994) 41-42.

[144] Case 129/79, [1980] ECR 1276 (ECJ).

[145] At paras 2, 7, 11, 13. See also the case of *Coloroll Pension Trustees Limited v Russell & Others* Case C-200/91, [1994] IRLR 586 (ECJ) where the European Court of Justice noted that *Macarthys* case allows a comparison to be made between employees of different sex who perform the same work but at different periods.

The following guidance can be extracted from the above international instruments, case law of the European Union and academic writing in order to assist with the research question relating to the aspect concerning contemporaneous employment of the claimant and comparator which relates to the use of a predecessor or successor comparator as stated in (a) under paragraph 4.3 above. An equal pay claimant is allowed under international labour law to compare her situation with a predecessor comparator who was engaged in the same work/substantially the same work that she is engaged in and such predecessor comparator will be an appropriate comparator. There is no mention in South African law relating to the use of a predecessor comparator in an equal pay claim and it is submitted that international labour law on this score provides invaluable guidance for the South African equal pay legal framework. It is further submitted that the phrase "employees of the same employer" under section 6(4) of the EEA should be interpreted to include the use of a predecessor comparator as such interpretation would be in accordance with international labour law. The inclusion of a predecessor comparator under section 6(4) of the EEA will also provide an equal pay claimant who can only prove unfair pay discrimination (including terms and conditions) by comparing her situation to that of a predecessor employee with the opportunity to do so where she would otherwise be unable to launch an equal pay claim in such circumstances.

4.3.2 Hypothetical Comparator

The Equal Pay Guide states that a hypothetical comparator has been used in female-dominated sectors where there are no male-dominated jobs.[146] Article 2(1)(a) of the EU Recast Directive provides for the use of a hypothetical comparator in its definition of direct discrimination as follows:

> "'direct discrimination': where one person is treated less favourably on grounds of sex than another is, has been or *would be treated* in a comparable situation."[147]

---

[146] At 44.

[147] Emphasis added.

The scenario relevant under this heading is that the equal pay claimant is being treated less favourably than a comparator would be treated and this clearly refers to a hypothetical comparator. Burrows & Robinson state that the definition of direct discrimination in article 2(1)(a) of the EU Recast Directive allows the European Court of Justice the opportunity to extend the equal pay/treatment principle to a scenario wherein a female employee is unable to compare herself with an actual male comparator in the same employ but she is able to produce evidence which can show that if there was a male comparator in the same employ then he would be paid more than her.[148]

The following guidance can be extracted from the above international labour law sources in order to assist with the research question relating to the use of a hypothetical comparator as stated in (b) under paragraph 4.3 above. An equal pay claimant is allowed under international labour law to compare her situation with a hypothetical comparator in circumstances where she is unable to compare herself with an actual male comparator in the same employ but is able to produce evidence to show that if there was a male comparator in the same employ then he would be paid more than her and such comparator will be an appropriate comparator. Based on this, it is submitted that the recognition of the use of a hypothetical comparator under international labour law supports and strengthens the arguments put forth relating to the use of a hypothetical comparator under section 6(4) of the EEA in different scenarios based on South African law.

4.3.3 Subordinate Comparator

In *Murphy v Bord Telecom Eireann*[149] the European Court of Justice was faced with the question as to whether the principle of equal pay extends to an equal pay for work of equal value claim where the work of the claimant has been assessed as being of a higher value than the work of the comparator. This question was raised in the context of

[148] Burrows N & Robinson M "An Assessment of the Recast of Community Equality Laws" *European Law Journal* 2007 13(2) 186 at 199.
[149] [1988] IRLR 267 (ECJ).

proceedings brought by Mary Murphy together with 28 other female employees. They were employed as factory workers engaged in dismantling, cleaning, oiling and reassembling telephones. They sought to be paid the same wages as those paid to a specified male comparator employed in the same factory in the post of a stores labourer engaged in cleaning, collecting and delivering equipment and components and providing general assistance. Their claim was referred to an Equality Officer who found that their work was of a higher value to that of the male comparator and as such it was not necessary to consider whether the difference in pay amounted to discrimination based on sex. The Equality Officer's findings were upheld on appeal to the Labour Court. The female employees then appealed to the High Court which Court decided to stay the proceedings and refer questions to the European Court of Justice for a preliminary ruling. The employer argued that the equal pay for work of equal value principle does not apply where a lower wage is paid for work of higher value. The European Court of Justice held that Article 119 of the EEC Treaty specifically required equal pay for equal work and work of equal value but not equal pay for work of unequal value. It further held that this was not the end of the matter because the equal pay principle which forbids employees of one sex engaged in work of equal value to that of employees of the opposite sex to be remunerated at a lower wage than the latter group of employees on the grounds of sex, equally applies to a situation where the category of employees who are lower paid are engaged in work that is of higher value to that of the comparator group. The European Court of Justice further held that to provide otherwise would render equal pay for work of equal value ineffective and will provide room for employers to easily circumvent it by simply giving more duties to employees of a particular sex (for example females) who are then paid a lower wage. The Court finally held that Article 119 of the EEC Treaty should be interpreted to apply to those situations where an equal pay claimant is engaged in work that is of a higher value than that of the chosen comparator.[150]

The following guidance can be extracted from the above case in order to assist with the research question relating to the use of a subordinate employee, who is engaged in work of lesser value than the equal pay claimant but who earns higher pay, as a comparator

---

[150] At paras 2-4, 6, 8-10, 12.

as stated in (c) under paragraph 4.3 above. An equal pay claimant is allowed under international labour law to compare her situation with a comparator who is engaged in work that is of lesser value as compared to the higher value of work performed by the claimant but who receives a higher salary than the claimant. Based on this, it is submitted that the recognition under international labour law of the use of a comparator who is engaged in work of lesser value than the claimant but who receives higher pay supports and strengthens the argument put forth relating to the use of a subordinate employee, who is engaged in work of lesser value than the equal pay claimant but who earns higher pay, as a comparator under section 6(4) of the EEA based on South African law.

4.3.4 Dispensing with the need for a comparator

In *Defrenne v Sabena*[151] the European Court of Justice had to provide a preliminary ruling on whether Article 119 of the EEC Treaty introduces the principle of equal pay directly into the national law of the member states and whether it can be used independently of domestic legislation to the extent that it allows employees to launch equal pay proceedings before national courts claiming its observance. This question arose in the context of equal pay proceedings between a female air hostess and her employer. She alleged that she suffered discrimination in pay based on sex by comparing her situation with that of a male comparator engaged in the same work as a cabin steward. The parties agreed that the work of an air hostess is identical to the work of a cabin steward and the consequent pay discrimination was not disputed. The Court dealt with several issues in this case before answering the question put forth for the preliminary ruling.[152] It made the

[151] Case 43/75, [1976] ECR 456 (ECJ). Jacobs A & Zeijen H *European Labour Law and Social Policy* (Tilburg University Press 1993) state the following at 87 in relation to the *Defrenne* case: "This judgment helped to shift the emphasis in both the interpretation and the implementation of Article 119, away from merely economic considerations and towards more genuine social objectives."

[152] At paras 2-4. The European Court of Justice answered the question as follows: "The reply to the first question must therefore be that the principle of equal pay contained in Article 119 may be relied upon before the national courts and that these courts have a duty to ensure the protection of the rights which this provision vests in individuals, in particular as regards those types of discrimination arising directly from legislative provisions or collective labour agreements, as well as in cases in which men and women receive unequal pay for equal work which is carried out in the same establishment or service, whether private or public."

following profound statement regarding proving direct pay discrimination which does not mention the need for a comparator in order to prove the claim:

> "Among the forms of direct discrimination which may be identified solely by reference to the criteria laid down by Article 119 must be included in particular those which have their origin in legislative provisions or in collective labour agreements and which may be detected on the basis of a pureley [purely] legal analysis of the situation."[153]

Duggan states that this quotation from *Defrenne v Sabena* seems to do away with the need for a comparator in certain instances.[154] It is submitted that Duggan is correct in his assessment of the quotation which makes it clear that direct pay discrimination can, for example, where it originates in legislative provisions and collective agreements, be identified on the basis of a purely legal analysis. There will thus not be any need for a comparator in such instances.

The issue of dispensing with the need for a comparator in an equal pay claim in certain circumstances has not been dealt with in South African equal pay law. This being the case, the following guidance can be extracted from the above international labour sources. An equal pay claimant is allowed under international labour law to prove her equal pay claim, in the total absence of a comparator, by relying on legislative provisions or collective agreements where the unfair discrimination can be identified on the basis of a purely legal analysis arising from such legislative provisions or collective agreements. Based on this, it is submitted that the phrase "employees of the same employer" under section 6(4) of the EEA should be interpreted to include the allowance of an equal pay claimant to prove her equal pay claim by solely relying on legislative provisions, collective agreements including any other sources, in the total absence of a comparator, where the unfair pay discrimination can be identified on the basis of a purely legal analysis of such legislative provisions, collective agreements or other sources.

---

153 At para 21.
154 Duggan M *Equal Pay Law and Practice* (Jordan Publishing Limited 2009) 10.

4.4 Same work, substantially the same work, work of equal value

4.4.1 The interpretation of "same work and substantially the same work"

Article 4 of the EU Recast Directive prohibits discrimination in pay for the same work as well as work of equal value. The Equal Remuneration Convention does not refer to the term 'equal pay for the same or similar work' but only refers to 'equal pay for work of equal value'.[155] The Equal Remuneration Recommendation[156] ("Equal Remuneration Recommendation") likewise only refers to 'equal pay for work of equal value'. The Discrimination (Employment and Occupation) Recommendation[157] ("Discrimination Recommendation") also only refers to 'equal pay for work of equal value'. The Equal Pay Guide provides guidance in this regard and states that the concept of 'work of equal value' includes equal work but goes beyond this. It further states that equal pay for equal work requires similarly qualified men and women to be paid equally when they perform the same or virtually the same work in equivalent conditions. The Guide elaborates on this and states that if two people are doing work that is the same or similar then they should receive equal pay. The Guide states that equal pay for the same or similar work is limited to comparing like with like.[158] Chen states that the principle of equal pay includes three stages, which are: equal pay for equal (same) work; equal pay for similar work; and equal pay for work of equal value. She further states that these three stages are not interchangeable and are not merely a choice of wording.[159]

---

[155] Article 1(b).

[156] No. 90 of 1951 ("Equal Remuneration Recommendation").

[157] No. 111 of 1958 ("Discrimination Recommendation").

[158] Oelz, Olney and Manuel Equal Pay Guide at 31. Article 4 of the EU Equal Treatment Directive states the following: "For the same work or for work to which equal value is attributed, direct and indirect discrimination on grounds of sex with regard to all aspects and conditions of remuneration shall be eliminated." Chen CW *Compliance and Compromise: The Jurisprudence of Gender Pay Equity* (Martinus Nijhoff Publishers Leiden, Boston 2011) states the following at 82: ""Unequal pay for equal work" is an apparent act of discrimination and violates the basic principle of equality".

[159] Chen CW *Compliance and Compromise: The Jurisprudence of Gender Pay Equity* (Martinus Nijhoff Publishers Leiden, Boston 2011) 63-64. She further states the following at 76: "The legislative and policy package towards eliminating the gender wage differentials ought to include those basic elements provided in the Convention: an explicit expression of the principle of "equal pay for equal work or work of equal value" …"

In *Brunnhofer v Bank der osterreichischen Postsparkasse*[160] the European Court of Justice held that in order to determine whether employees are performing the same work or work of equal value it must be ascertained by taking a number of factors into account such as, the nature of the work, working conditions and training requirements whether the employees are in a comparable situation. It further held that where employees are classified, in terms of a collective agreement, as being in the same job category then this is not on its own sufficient for finding that they perform the same work. It stated that the classification of being in the same job category does not affect other evidence in that regard and the general indications set out in the collective agreement has to be corroborated by factors which are based on the activities which are actually performed by the employees in question. It then concluded by stating that the national Court should assess the particular facts of a case in order to determine, in light of the activities performed by the employees in question, whether they perform the same work.[161]

In *Angestelltenbetriebsrat der Wiener Gebietskrankenkasse v Wiener Gebietskrankenkasse*[162] the European Court of Justice held that when determining whether work performed by different persons is the same it has to be ascertained whether those persons are in a comparable situation taking a number of factors into account such as the nature of the work, the working conditions and the training requirements. The Court stated that professional training is not limited to being a factor that can justify pay differentiation but it can also be a criteria to determine whether the same work is being performed. It held that psychologists and doctors employed as psychotherapists were not in a comparable situation because they have received different professional training and have different qualifications resulting from that training. It concluded by stating that the term 'same work' is not applicable where the same functions are carried out over a considerable length of time by persons who have different qualifications in order to practise their profession.[163]

160 [2001] IRLR 571 (ECJ).
161 At paras 43-45, 47-49.
162 [1999] IRLR 804 (ECJ).
163 At paras 17, 19, 21, 23.

The following guidance can be extracted from the above international labour law sources in order to learn lessons for the same work and substantially the same work under section 6(4) of the EEA as called for in paragraphs 13.4 and 13.5 of Chapter 2 of this thesis: (a) the classification of employees being in the same job category is not sufficient on its own to find that they perform the same work and has to be corroborated by factors which are based on the activities which are actually performed by the employees in question; and (b) a ground of justification may also be a criteria to determine whether the same work is being performed.

4.4.2 The interpretation of "work of equal value"

The Equal Pay Guide states that work of equal value addresses the following situation:

> "When men and women perform work that is different in content, involving different responsibilities, requiring different skills or qualifications, and is performed under different conditions, but is overall of equal value, they should receive equal remuneration. This concept is critical to eliminating discrimination and promoting equality, since women and men often perform different jobs, under different conditions and even in different establishments."[164]

The EU Memorandum on Equal Pay[165] states that the purpose of the principle of equal pay for work of equal value is to address and correct the undervaluing of jobs performed primarily by women, more specifically, where they are engaged in jobs which are found to be just as demanding as other jobs usually performed by men. It further states that the equal pay for work of equal value principle envisages the comparing of radically different

[164] Oelz, Olney and Manuel Equal Pay Guide at 31. Landau EC & Beigbeder Y *From ILO Standards to EU Law: The Case of Equality between Men and Women at Work* (Martinus Nijhoff Publishers 2008) state the following at 95: "The extension of equal pay for equal work to cover work of equal value (The 1975 Directive) was adopted to bring EU law in line with the ILO standard. The implementation of the principle of equal pay for work of equal value was proved, however, to be more complicated than envisaged." Chen CW *Compliance and Compromise: The Jurisprudence of Gender Pay Equity* (Martinus Nijhoff Publishers Leiden, Boston 2011) states the following at 53 with regard to the concept of work of equal value: "The explicit expression "work of equal value" in national legislation is of great significance. In addition to its symbolic value, it serves to raise public awareness. Moreover, the broader comparison is vital in addressing sex-based discrimination with regard to remuneration in situations where the job market is sex segregated. It also helps the public appreciate those historically undervalued lines of work dominated by women."

[165] EU Memorandum on Equal Pay for Work of Equal Value (COM (94) 6 final Brussels, 23 June 1994) ("EU Memorandum on Equal Pay").

jobs.[166] The Equal Pay Guide states that equal value can apply in the following circumstances: (a) where jobs are performed under different conditions; (b) where jobs require different qualifications or skills; (c) where jobs require different levels of efforts; (d) where jobs involve different responsibilities; and (e) where jobs are performed in different places or enterprises, or for different employers.[167] It then provides the following list of jobs that have been compared in the context of equal pay for work of equal value:

- Wardens in accommodation for the elderly (mostly women) with security guards (mostly men);
- School meal supervisors (mostly women) with park supervisors (mostly men);
- Caterers and cleaners (mostly women) with gardeners and drivers (mostly men);
- Social and community service workers (mostly women) with state and local government employees (mostly men);
- Social affairs managers (mostly women) with engineers (mostly men);
- Speech therapists (mostly women) with pharmacists (mostly men);
- Librarians (mostly women) with refuse collectors (mostly men);
- Flight attendants (mostly women) with pilots and mechanics (mostly men);
- Account clerks (mostly women) with letter carriers, mail handlers and sorters (mostly men).[168]

In *Commission of the European Communities v United Kingdom*[169] the United Kingdom argued that the criteria of work of equal value is too abstract to be applied by a court of law. The European Court of Justice rejected this view and stated that an employee is entitled to have their work evaluated in the context of equal value before a court, and to

---

[166] EU Memorandum on Equal Pay at 8.

[167] Oelz, Olney and Manuel Equal Pay Guide at 31-32. Landau EC & Beigbeder Y *From ILO Standards to EU Law: The Case of Equality between Men and Women at Work* (Martinus Nijhoff Publishers 2008) state the following at 91: "The normative formula for the comparison of pay between men and women is based on the same work, similar work, work of equal value…"

[168] Oelz, Olney and Manuel Equal Pay Guide at 32. Landau EC & Beigbeder Y *From ILO Standards to EU Law: The Case of Equality between Men and Women at Work* (Martinus Nijhoff Publishers 2008) state the following at 81: "…[E]qual pay for equal work or work of equal value is a *jus cogens* and constitutes a fundamental right that tolerates no consensual derogation."

[169] Case 61/81, [1982] ECR 2602 (ECJ).

this end, member states must ensure that there is an authority which has the necessary jurisdiction to decide whether work is of equal value.[170]

The purpose of the discussion of work of equal value under international labour law is to place the international legal framework relating to equal pay in context as alluded to in paragraph 1 above with no guidance being sought for South African equal pay law from international labour law on this aspect.

5. ONUS AND ACCESS TO PAY RELATED INFORMATION

The guidance sought from international labour law for the research questions relating to the onus in section 11(1) of the EEA as called for in paragraph 13.7.1 of Chapter 2 of this thesis is as follows: (a) Whether the argument that section 11(1) only requires an equal pay claimant to produce sufficient evidence, which is more than making a bald (mere) allegation and less than establishing a *prima facie* case, in order to raise a credible possibility that unfair pay discrimination has taken place and if she succeeds in doing so then the onus is on the employer to prove its defence on a balance of probabilities as required by section 11(1), can be supported by international labour law; and (b) Whether there are any lessons for the onus provision in section 11(1) of the EEA than can be learnt from how the onus in equal pay is dealt with under international labour law. The guidance sought from international labour law for the research questions relating to access to pay related information as called for in paragraph 13.8 of Chapter 2 of this thesis is as follows: (c) Whether there are any lessons that can be learnt from international labour law on the aspect of access to pay related information for South African equal pay law on this score.

A lack of access to pay related information makes it difficult for an employee to prove a claim. From international labour law, one way to assist employees is to shift the burden of proof where employers make obtaining of information difficult for employees. Two scenarios where this happens are where an employee can prove through statistics that

[170] At paras 12-13.

there are pay discrepancies or where an employer does not have a transparent pay system and an employee brings an equal pay claim.

Onus and access to pay related information will be analysed under various headings below with submissions relating to any guidance that can be extracted, as sought for, being made at the end of the discussion of each heading as deemed appropriate.

5.1 The inter-relationship between the onus and access to pay related information

In *Nikoloudi v Organismos Tilepikoinonion Ellados AE*[171] the European Court of Justice held that according to the Equal Pay Directive read with the case law, the burden of proving an equal pay claim lies with the employee but this burden may shift to the employer where the effective enforcement of the equal pay principle necessitates this. It further held that where an employee claims that the principle of equal treatment has been infringed and establishes facts from which it can be presumed that there has been discrimination then the employer has the burden to prove that the principle of equal treatment has not been breached.[172] Article 19(1) of the EU Recast Directive states that member states must take measures in their judicial systems to ensure that if a claimant alleging a breach of the equal treatment principle (which includes equal pay) is able to establish before a Court facts from which it may be presumed that that there has been discrimination (direct or indirect) then the respondent has to prove that there has been no such breach.[173] The European Commission states that Article 19(1) of the EU Recast

171 Case C-196/02, [2005] ECR I-1812 (ECJ).
172 At paras 69, 75.
173 Landau E and Beigbeder Y *From ILO Standards to EU Law: The Case of Equality between Men and Women at Work* (Leiden Boston 2008) state the following at 212: "…[T]he importance of the shifting of the burden of proof to the stronger party to the dispute recreates a balance and restores the equality of the parties before the law, which is a guarantee of the right to a fair trial." Chen CW *Compliance and Compromise: The Jurisprudence of Gender Pay Equity* (Martinus Nijhoff Publishers Leiden, Boston 2011) states the following at 150: "The reasons for the inactive judiciaries on the equal pay issue are complex. They may include the following reasons: the lack of access to and training on international law, the status of international law in their legal systems, the competence of the courts, and the judges' mindset towards the use of intentional law." Duggan M *Equal Pay Law and Practice* (Jordan Publishing Limited 2009) states the following at 134: "The Article reverses the burden of proof where facts have been established from which it may be presumed that there has been direct or indirect discrimination. The employer must prove that there has been no discrimination."

Directive is important and indispensable because a claimant normally does not have access to the necessary pay related information in order to launch a successful equal pay claim.[174]

The 2013 Report on the Application of the EU Recast Directive states that the limited access to pay related information necessary to bring an equal pay claim prevents the effective application of the shifting of the burden of proof rule in Article 19 which requires the claimant to first establish facts from which it can be presumed that there has been discrimination.[175] Article 21 of the EU Recast Directive states that employers should be encouraged to provide employees with information on equal treatment of male and female employees and this *may* include an overview of the pay of male and female employees at different levels and pay differentials.[176] It is apposite to note that Article 21 of the EU Recast Directive is directory in nature in that it only calls for employers to be encouraged to disclose pay related information and it does not make this peremptory.

The ILO states that where pay related information that may constitute evidence is not disclosed by the employer, then if such employer is faced with an equal pay claim, he may win the case by merely challenging the evidence presented by the claimant without putting up a case of his own. It states that this is regarded as one of the biggest obstacles in practice. The ILO notes that many countries have dealt with this obstacle by shifting the burden of proof away from the claimant. This then only requires a claimant to establish before a court facts from which it may be presumed that there has been discrimination. It

---

[174] Foubert P *The Gender Pay Gap in Europe from a Legal Perspective* (European Commission 2010) 17.

[175] Report on the application of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (European Commission 2013) at 9.

[176] Landau E and Beigbeder Y *From ILO Standards to EU Law: The Case of Equality between Men and Women at Work* (Leiden Boston 2008) state the following at 207: "The general principle with regard to the burden of proof in litigation is that it lies with the plaintiff: *actori incumbit probatio*. However, this principle presents insurmountable problems in discrimination cases. The relevant documents are generally in the possession of the employer, while forms of indirect discrimination are by nature difficult to prove. To solve this problem the European Commission and the European Parliament considered that the burden of proof should be reversed. Under this proposal the plaintiff only has to establish "presumed discrimination". It would then be up to the employer (the defendant) to refute this presumption by proving that the principle of equal treatment has not been violated or that there were objective reasons, unrelated to sex, to justify it."

then behoves the employer to prove that discrimination did not occur. It lastly states that a reversal of the burden of proof makes non-discrimination law effective.[177]

The Global Report of the International Labour Conference of 2003 notes that in cases involving, *inter alia*, equal pay, it is the employer who possesses the relevant pay related information and this makes proving discrimination difficult. It notes that many countries have introduced the shifting burden of proof in discrimination cases while in the United Kingdom job evaluation experts are assigned to equal pay cases in order to provide the employment tribunal with expert reports.[178] The EU has adopted a Recommendation on Pay Transparency to strengthen the principle of equal pay between men and women through transparency[179] and to provide member states with guidance in relation to implementing the equal pay principle to address pay discrimination as well as the gender pay gap. The EU Pay Transparency Recommendation requires member states to put measures in place which will allow employees to request information on pay which includes pay levels according to gender, pay levels for employees performing the same work and those performing work of equal value. This information should also include complementary components which goes beyond the basic wage, for example, bonuses. It further states that member states should ensure that employers with at least 250 employees conduct pay audits. It states that these pay audits should provide an analysis of the proportion of men and women in each category of employment/position, an analysis of the job evaluation method used and provide detailed information on pay differentials. It states that employees can request the pay audit information from the employer who should make it available to them.[180]

---

177 Achieving Equal Employment Opportunities for People with Disabilities through Legislation: Guidelines (ILO 2007) at 33. Jacobs A & Zeijen H *European Labour Law and Social Policy* (Tilburg University Press 1993) state the following at 95 in relation to the principle of equal treatment: "Demonstrating that a certain rule or treatment is in fact discriminatory may not be easy. Therefore in several countries, legislators or judges have already recognised a certain shift in the burden of proof, away from the claimant and wholly or partly to the defendant."

178 Time for Equality at Work: Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work (International Labour Conference 2003) at 63.

179 Of 7 March 2014 (2014/124/EU) ("EU Pay Transparency Recommendation").

180 Recommendations 1, 3 and 5 of the EU Pay Transparency Recommendation.

The following guidance can be extracted from the above international labour law sources in order to assist with the research question relating to the onus in section 11(1) of the EEA as stated in (a) under paragraph 5 above. International labour law allows for a reversal of the burden of proof in equal pay claims which only requires an equal pay claimant to establish before a court facts from it may be presumed that there has been unfair pay discrimination which then requires the employer to prove that the principle of equal pay has not been breached. International labour law states that this reversal of the burden of proof in equal pay claims makes non-discrimination law (equal pay law) effective. Based on this, it is submitted that the argument relating to section 11(1) of the EEA only requiring an equal pay claimant to produce sufficient evidence, which is more than making a bald (mere) allegation and less than establishing a *prima facie* case, in order to raise a credible possibility that unfair pay discrimination has taken place to put the employer on its defence, which is quintessentially a reversal of the normal burden of proof, is not only supported by international labour law but is used in international labour law, *albeit*, in a different form and is regarded as a key aspect which makes unfair pay discrimination law effective.

The following guidance can be extracted from the above international labour law sources in order to assist with the research question relating to the onus in section 11(1) of the EEA as stated in (b) under paragraph 5 above. The reversal of the burden of proof in international labour law relating to equal pay is regarded as indispensable to the success of an equal pay claim because it has the ability to remove the obstacle of a lack of access to pay related information. It is submitted, that the reverse onus in section 11(1) of the EEA as argued for in paragraph 13.7.1 of Chapter 2 of this thesis should be viewed in the same way as it is viewed under international labour law and mention of this should be made in the Equal Pay Code.

The following guidance can be extracted from the above international labour law sources in order to assist with the research question relating to access to pay related information as stated in (c) under paragraph 5 above. International labour law requires member states to put measures in place to allow employees to request pay related information which

includes pay levels according to gender, pay levels for employees performing the same work and those performing work of equal value. Whilst it has been argued in paragraphs 9.2 and 13.8 of Chapter 2 of this thesis that an equal pay claimant can use PAIA in order to access pay related information of a specific comparator there is no provision made in the South African equal pay legal framework for a claimant to request pay levels according to gender, pay levels of employees performing the same work and those performing work of equal value and this information could very well be restricted in terms of section 27(5) read with section 27(6) of the EEA if it falls within the ambit of the statement required from the employer in terms of section 27(1) of the EEA as discussed in paragraphs 9.1 and 10.3 of Chapter 2 of this thesis.

It is submitted that the guidance from international labour law relating to an employee requesting pay related information which includes pay levels according to gender, pay levels for employees performing the same work and those performing work of equal value can be used in the South African equal pay legal framework without interfering with the restrictions imposed under sections 27(5)-(6) of the EEA as follows. A provision should be included under the EEA affording an employee the right to request generic pay related information in the form of pay levels according to gender, pay levels for employees performing the same work and those performing work of equal value. The generic nature of the pay related information sought and provided will not interfere with the restrictions to the pay related information imposed under sections 27(5)-(6) of the EEA.

5.2 Discharging onus by using statistics

Duggan states, with regard to discrimination claims, that it is important to know who bears the burden of proof especially since discrimination is often covert and as far as equal pay claims are concerned the discrimination in pay may be due to historical practices which can be demonstrated by evidence of a statistical nature as opposed to deliberate acts of discrimination.[181] In *Enderby v Frenchay Health Authority and Secretary of State for*

181 Duggan M *Equal Pay Law and Practice* (Jordan Publishing Limited 2009) 131.

Health[182] the European Court of Justice held that where there is significant statistics which discloses a difference in pay between two jobs of equal value where the one is performed exclusively by women whilst the other is predominantly performed by men, then Article 119 of the EEC Treaty requires that the employer proves that the differences in pay is unrelated to discrimination based on sex.[183]

In *Regina v Secretary of State for Employment, ex parte Seymour-Smith & Another*[184] one of the questions referred to the European Court of Justice for a preliminary ruling was what the test is to establish whether a measure implemented by a member state has such a disparate impact between men and women that it amounts to indirect discrimination for the purposes of Article 119 of the EEC Treaty. The European Court of Justice held that in order to ascertain whether a measure implemented by a member state has a disparate impact between men and women to the extent that it amounts to indirect discrimination for the purposes of Article 119 of the EEC Treaty, the national court must ascertain whether the available statistics evidences that a considerably smaller percentage of female employees are able to fulfil the requirement imposed by the measure as opposed to male employees. The Court further held that if the statistics showed this then there is indirect discrimination unless the member state can show that the measure is justified by objective factors which are not related to discrimination based on sex.[185]

The following guidance can be extracted from the above international labour law sources in order to assist with the research question relating to the onus in section 11(1) of the EEA as stated in (b) under paragraph 5 above. Under international labour law, where significant or available statistics discloses a difference in pay (working conditions) between two jobs of equal value where the one job is exclusively (or predominantly) performed by women while the other is predominantly performed by men then this

---

[182] Case C-127/92, [1993] IRLR 591 (ECJ).

[183] At para 19. Duggan M *Equal Pay Law and Practice* (Jordan Publishing Limited 2009) states the following at 153: "The ECJ noted in both *Enderby* and *Seymour-Smith* that it is for the national court to decide whether the statistics are valid, taking into account whether they cover enough individuals, whether they illustrate purely fortuitous or short-term phenomena, and whether, in general, they appear to be significant."

[184] Case C-167/97, [1999] ECR I-666 (ECJ).

[185] At paras 19, 65.

amounts to indirect pay discrimination and the employer has to prove that the differences in pay is unrelated to pay discrimination based on sex. It is submitted that this would also apply to where the work performed is the same or substantially the same as the indirect pay discrimination is proved with statistics. It is further submitted that this can also apply to other grounds of discrimination and is not restricted to unfair pay discrimination based on sex. Based on this, it is submitted that where an equal pay claimant under section 6(4) of the EEA provides statistics which are significant or the only statistics available, which shows that there is a difference in pay (working conditions) between employees engaged in the same work, substantially the same work or work of equal value where the one group who receives the higher pay are for example males or white as opposed to the other group who receives the lower pay who are females or black, then the claimant has produced sufficient evidence (which is more than making a bald (mere) allegation and less than establishing a *prima facie* case) in order to raise a credible possibility that indirect unfair pay discrimination has taken place to put the employer on its defence (within the meaning of section 11 of the EEA). This is not restricted to unfair pay discrimination based on sex or race. It is further submitted that this should be mentioned in the Equal Pay Code.

5.3 Discharging onus where there is a lack of pay transparency

The Report on the Implementation of Commission Recommendation on Strengthening the Principle of Equal Pay between Men and Women through Transparency[186] states that pay transparency is crucial to the effective application of the equal pay principle because it may reveal discrimination in the pay system of a company or industry. It further states that pay transparency provides information which allows employees to challenge pay discrimination.[187] The National Cases and Good Practices on Equal Pay Publication of

[186] Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee: Report on the Implementation of Commission Recommendation on Strengthening the Principle of Equal Pay between Men and Women through Transparency (Brussels 2017).

[187] At 3. It further states the following at 10 "Today, despite the equal pay principle, discrimination is still pervasive at work: a woman may be paid less than a man for exactly the same job, and work typically done by women is paid less than work typically done by men, even when it is of equal value. The secrecy around pay levels makes it difficult to detect discrimination cases."

the European Commission[188] states that lack of pay transparency probably plays a role in the scarcity of equal pay cases. It further states that it is often difficult for employees to obtain pay related information of a comparator as this information is often considered to be confidential and a potential claimant would then have to rely on a fellow employee's goodwill to provide this information.[189]

In *Handels- og Kontorfunktionaerernes Forbund i Danmark v Dansk Arbejdsgiverforening acting on behalf of Danfoss A/S*[190] the European Court of Justice was faced with the question as to whether the Equal Pay Directive can be interpreted to mean that where an employer uses a pay system lacking in transparency, then it has to prove that this pay system is not discriminatory, if a female employee is able to establish having regard to a large number of employees performing the same work (including similar work or work of equal value) that the average pay for female employees is less than the average pay for male employees. The European Court of Justice held that in a situation where the pay system lacks transparency the female employees will only be able to establish differences in the average pay of female and male employees because they will be unable to identify the reasons for the difference in their pay and that of their male colleagues performing the same work, similar work or work of equal value. It further held that the principle of equal pay will be non-existent for female employees if establishing the difference in the average pay of female and male employees is not enough to place the burden on the employer to prove that the pay system in question is not discriminatory. This will force the employer to make the pay system transparent. It stated that the member states should adjust their national rules relating to the burden of proof in circumstances where this is necessary for the effective implementation of the principle of equal pay.[191]

---

188 European Commission, European network of legal experts in gender equality and non-discrimination, *National cases and good practices on equal pay* (Luxembourg: Publications Office of the European Union, 2019).

189 At 38.

190 Case 109/88, [1989] ECR 3220 (ECJ).

191 At paras 10, 11, 13-16. Landau E and Beigbeder Y *From ILO Standards to EU Law: The Case of Equality between Men and Women at Work* (Leiden Boston 2008) make the following comment on this case at 210: "The Court advocated the reversal of the burden of proof to ensure effectiveness in the implementation of the principle of equal pay and to render the system of pay more transparent." The EU Memorandum on Equal Pay states the following at 29: "The concept of transparency articulated in

In *Brunnhofer v Bank der osterreichischen Postsparkasse*[192] the European Court of Justice held that generally the burden of proving an equal pay claim lies with the employee but this burden may shift to the employer where the effective enforcement of the equal pay principle necessitates this. It further held, referring to the case of *Danfoss* discussed in the immediate preceding paragraph, that where an employer has a system of pay in place which lacks transparency then the employer has the burden of proving that there is no discrimination in pay if a female employee establishes with respect to a large number of employees (performing the same work, similar work or work of equal value) that the average pay for female employees is less than the average pay for male employees. It further stated that the claimant employee can discharge her onus by using any form of allowable evidence.[193]

The following guidance can be extracted from the above international labour law sources in order to assist with the research question relating to the onus in section 11(1) of the EEA as stated in (b) under paragraph 5 above. Under international labour law, where an employer uses a pay system lacking in transparency, then it has to prove that this pay system is not discriminatory, if a female employee is able to establish having regard to a large number of employees performing the same work (including similar work or work of equal value) that the average pay for female employees is less than the average pay for male employees. It is submitted that this can also apply to other grounds of discrimination and is not restricted to unfair pay discrimination based on sex. Based on this, it is submitted that where a female employee claimant, under section 6(4) of the EEA, is able to establish having regard to a large number of employees performing the same work (including similar work or work of equal value) that the average pay for female employees is less than the average pay for male employees where the pay system used by the employer is lacking in transparency, then the claimant has (within the meaning of section 11 of the EEA) produced sufficient evidence (which is more than making a bald (mere) allegation and less than establishing a *prima facie* case) in order to raise a credible

Danfoss is applicable to every element of the determination of a pay system, including any form of classification."

192 Case C-381/99, [2001] IRLR 571 (ECJ).

193 At paras 52-54, 58.

possibility that unfair pay discrimination has taken place to put the employer on its defence (to prove that the pay system in question is not discriminatory). This is not restricted to unfair pay discrimination based on sex. It is further submitted that this should be mentioned in the Equal Pay Code.

6. GROUNDS OF JUSTIFICATION

The guidance sought from international labour law for the research questions relating to the grounds of justification to equal pay claims as called for in paragraph 13.9 of Chapter 2 of this thesis is as follows: (a) To test the arguments made based on South African law to the effect that affirmative action and the inherent requirements of the job as contained in section 6(2) of the EEA are not suitable grounds of justification to equal pay claims by analysing the grounds of justification in international labour law; (b) To ascertain what the position is under international labour law regarding the progressive realisation of the right to equal pay for the benefit of the argument made based on South African law to the effect that it will be difficult to refuse to recognise the progressive realisation of the right to equal pay as a ground of justification, falling under regulation 7(1)(g) of the Employment Equity Regulations, where it is genuine and in circumstances where it gives effect to section 27(2) of the EEA; (c) What the position under international labour law is regarding the factor of responsibility operating as a ground of justification to an equal pay claim before a submission can be made as to whether or not this factor should fall under regulation 7(1)(g) of the Employment Equity Regulations as a ground of justification; (d) What the position under international labour law is regarding the factor of different wage setting structures resulting in a pay difference operating as a ground of justification to an equal pay claim before a submission can be made as to whether or not this factor should fall under regulation 7(1)(g) of the Employment Equity Regulations as a ground of justification; and (e) Any further lessons that can be learnt from international labour law for the South African equal pay law relating to the grounds of justification to equal pay claims.

The grounds of justification to equal pay claims will be analysed under various headings below with submissions relating to any guidance that can be extracted, as sought for, being made at the end of the discussion of each heading as deemed appropriate.

It is important to state here that the case law discussed below does not refer to affirmative action and/or the inherent requirements of the job operating as grounds of justification to equal pay claims and this strengthens the arguments made based on South African law as stated in (a) under this heading to the effect that affirmative action and the inherent requirements of the job are not suitable grounds of justification to equal pay claims.

It should also be stated that the case law discussed below does not provide guidance for the research question stated in (c) under this heading as it does not deal with the factor of responsibility operating as a ground of justification to an equal pay claim and the question stated in (c) thus remains.

6.1 Service payments/Length of service

In *Handels- og Kontorfunktionaerernes Forbund i Danmark v Dansk Arbejdsgiverforening acting on behalf of Danfoss A/S*[194] the European Court of Justice remarked that the criterion of length of service may operate in a manner that is less advantageous to female employees as opposed to male employees. Females have entered the job market later than their male counterparts and they often suffer an interruption of their career (generally due to child care/family responsibilities). It further remarked that notwithstanding this, length of service is closely connected with experience which generally enables an employee to perform his/her duties better. An employer is at liberty to reward length of service without the need to prove the importance that length of service has in the performance of their tasks.[195]

[194] Case 109/88, [1989] ECR 3220 (ECJ).
[195] At para 24.

In *Nimz v Freie und Hansestadt Hamburg*[196] the European Court of Justice held that even though experience is closely connected with length of service which allows the worker to improve the performance of their tasks, the objectivity of such criterion is dependent on all the circumstances of a particular case as well as the connection between the nature of the work performed and the experience obtained from the performance of the work.[197]

In *Cadman v Health & Safety Executive*[198] the European Court of Justice held that where seniority is used as a determinant in a pay system and has a disparate impact on female employees then the employer has to prove that the use of seniority is justifiable with reference to the overall pay system. It further held that even though it is permissible for employers to reward length of service it cannot be ignored that although it is ostensibly neutral in application, it can operate to the disadvantage of women. In such situation, the pay system must be subjected to a proportionality test where it must be proven that length of service has a legitimate aim and is proportionate for achieving that aim. The Court stated that it is not sufficient to show that a length of service criterion in general is capable of pursuing a legitimate aim. It stated further that where the criteria of length of service has a disparate impact on female employees then the employer has to show that the criteria is used in a manner that takes into account the business needs and is proportionately applied to minimise any detrimental impact on female employees. Where an employer is unable to justify the structure of its pay system, then it will have to demonstrate specific justification for the pay differentials.[199]

The following guidance can be extracted from the above international labour law sources in order to assist with the research question relating to the grounds of justification as stated in (e) under paragraph 6 above. Under international labour law, length of service is regarded as being closely connected with experience which enables an employee to perform his/her duties better and this allows an employer to reward length of service without the need to prove the importance that length of service has in the performance of

[196] [1991] IRLR 222 (ECJ). See also *Gerster v Bayern* Case C-1/95, [1997] ECR I-5274 (ECJ) at para 39.
[197] At para 14.
[198] [2006] IRLR 969 (ECJ).
[199] At paras 38, 52, 60, 66.

their tasks. Where, however, seniority has a disparate impact on female employees then the employer has to prove that the use of seniority is justifiable with reference to the overall pay system. If the employer is unable to justify the use of seniority with reference to the overall pay system in these circumstances, then the employer will have to demonstrate specific justification for the pay differentials. It is submitted that this can also apply to other grounds of discrimination and is not restricted to indirect unfair pay discrimination based on sex. Based on this, it is submitted that the listing of the factor of seniority operating as a ground of justification to an equal pay claim in regulation 7(1)(a) of the Employment Equity Regulations is strengthened by its use in international labour law. It is further submitted that the approach in South African law to the use of seniority as a ground of justification to an equal pay claim is in accordance with the approach under international labour law because South African law also regards seniority as a ground of justification to an equal pay claim without the need for further justification provided that it does not give rise to indirect unfair pay discrimination as set out in regulation 7(2) of the Employment Equity Regulations.[200]

6.2 Performance

In *Brunnhofer v Bank der osterreichischen Postsparkasse*[201] one of the questions referred to the European Court of Justice was whether a difference between the pay of a female employee and male employee engaged in the same work or work of equal value is capable of being justified on the basis of factors which become apparent only after the employees' have commenced employment and which factors are only capable of being assessed during the performance of their employment such as a difference in the work capacity of the employees or the effectiveness of their work (performance). The European Court of Justice held that circumstances which are relevant to the employee but which are incapable of being objectively determined at the point at which the employee is appointed but which only becomes known during the employee's actual performance, such as work capacity or the effectiveness or quality of the work actually performed

---

[200] See para 10.2 of Chapter 2 of this thesis.
[201] [2001] IRLR 571 (ECJ).

(performance), cannot be used by the employer in order to justify different pay from the start of the employment relationship in respect of two employees from different sexes who perform identical or comparable work. The Court then agreed with the submissions made by the European Commission to the effect that an employer is not allowed to pay unequal pay on the basis of the quality of the work or effectiveness thereof (performance) at the initial stage of employment, but it can do so by assigning different duties to the relevant employees for example by moving the employee whose work is not up to standard to another position.[202]

The European Court of Justice remarked that work performance can only be assessed after an employee is appointed and can therefore not be relied on as a ground which justifies unequal pay right from the start of employment unlike for example the factor of professional training which is objectively known at the time of the employee's appointment.[203] The Court then held the following:

> "In those circumstances, the employer cannot, at the time when the employees concerned are appointed, pay to a specific employee remuneration lower than that paid to a colleague of the other sex and later justify that difference on the ground that the latter's work is superior, or on the ground that the quality of the former's work steadily deteriorated after that employee's recruitment, where it is established that the employees concerned are actually performing the same work or at any rate work of equal value."[204]

The following guidance can be extracted from the above international labour law sources in order to assist with the research question relating to the grounds of justification as stated in (e) under paragraph 6 above:

(a) It is submitted that the listing of the factor of performance (quantity or quality of work) operating as a ground of justification to an equal pay claim in regulation 7(1)(c) of the Employment Equity Regulations is strengthened by its use in international labour law;

[202] At paras 63, 76-77.
[203] At para 78.
[204] At para 79.

(b) International labour law provides guidance for the factor of performance (quantity of quality of work) as a ground of justification under regulation 7(1)(c) of the Employment Equity Regulations by stating that the issue of performance can only be assessed after an employee is appointed and can thus not be relied on as a ground of justification to unequal pay right from the commencement of employment because this is not capable of being objectively determined at the point at which the employee is appointed. It is submitted that this should specifically be mentioned under regulation 7 of the Employment Equity Regulations; and

(c) International labour law provides further guidance to any other grounds of justification to equal pay claims in South African law which are not capable of justifying pay differentials from the commencement of employment but which can only become relevant after an employee is appointed by barring an employer from relying on it as justification to unequal pay from the commencement of employment. It is submitted that this should specifically be mentioned under regulation 7 of the Employment Equity Regulations.

6.3 Market forces

In *Enderby v Frenchay Health Authority and Secretary of State for Health*[205] the European Court of Justice held that market forces which leads an employer to increase the pay of certain positions so as to attract job applicants can amount to an objectively justified economic ground. The Court held that this is to be determined by the national court in the circumstances of the case. The national court must determine whether the role of market forces in establishing rates of pay provides a complete or partial justification for the difference in pay rates. To this end, the national court must apply the principle of proportionality where relevant. It concluded by holding that the national court must determine to what extent the shortage of job applicants and the need to attract them by paying higher salaries, constitutes an objectively justified economic ground for the pay differential.[206]

---

[205] [1993] IRLR 591 (ECJ).
[206] At paras 26-29.

Fredman argues that the European Court of Justice in the *Enderby* case has overlooked the possibility that market forces may itself lead to pay inequalities. She states that an example of this is where low pay for part-time work is allowed to be explained by market forces in terms of which there are many women looking for part-time work but the underlying reason for this is that the oversupply of women is as a result of women being primary care givers coupled with insufficient public provision. She further argues on this point that the European Court of Justice has legitimised female employees' disadvantage in the workplace by allowing pay differentials/discrepancies to be justified by market forces.[207] Duggan states that the market forces factor should not be used to justify different pay for what may be regarded as "women's work" because the factor could be used to perpetuate discrimination. He further states that an example of this is where an employer simply argues that it pays the "market rate" for work in circumstances where the market rate undervalues work performed by women. He lastly states that an employer cannot rely on the market forces factor and avoid its equal pay obligations by relying on the fact that the female employee was prepared to work for a lesser rate.[208]

The following guidance can be extracted from the above international labour law sources in order to assist with the research question relating to the grounds of justification as stated in (e) under paragraph 6 above:

(a) It is submitted that the listing of the factor of market value in a particular job classification including the existence of a shortage of relevant skill operating as a ground of justification to an equal pay claim in regulation 7(1)(f) of the Employment Equity Regulations is strengthened by its use in international labour law;

---

[207] Fredman S "Equal Pay and Justification" 1994 23(1) *ILJ* 37 at 41.

[208] Duggan M *Equal Pay Law and Practice* (Jordan Publishing Limited 2009) 200. McCrudden C *Equality in Law between Men and Women in the European Community: United Kingdom* (European Commission, Martinus Nijhoff Publishers 1994) states the following at 50: "Employers have pointed to market forces as reasons for differences in remuneration. Some employers have argued, for example, that it is necessary to maintain a balance between the internal wage structure and the external wage structure. The employer is, in effect, claiming that external job-for-job comparison should be used to limit the results of internal factor comparison, which otherwise would conclude that two 'different' jobs generally compensated differently should instead be paid equal wages."

(b) International labour law provides guidance for the factor of market value in a particular job classification including the existence of a shortage of relevant skill as a ground of justification under regulation 7(1)(f) of the Employment Equity Regulations by stating that the market forces which leads an employer to increase the pay of certain positions so as to attract job applicants can amount to an objectively justified economic ground;

(c) International labour law provides further guidance by stating that the court must determine whether the role of market forces in establishing rates of pay provides a complete or partial justification for the difference in pay rates, and must to this end, determine to what extent the shortage of job applicants and the need to attract them by paying higher salaries constitutes an objectively justified economic ground for the pay differential. It is submitted that this bears relevance to regulation 7(2) of the Employment Equity Regulations which refers to establishing whether a difference in pay (terms and conditions) based on the grounds listed in regulation 7 including the factor of market value is not biased against employees based on prohibited grounds and is applied in a proportionate manner. This should specifically be mentioned under regulation 7 of the Employment Equity Regulations;

(d) International labour law cautions that market forces should not be used to justify pay differentials arising from discrimination for example where an employer is allowed to argue that it pays the market rate for work in circumstances where the market rate undervalues work performed by women. It is submitted that this is invaluable guidance which should be mentioned in regulation 7 of the Employment Equity Regulations; and

(e) International labour law also states that an employer is not allowed to rely on market forces and avoid its equal pay obligations by relying on the fact that the female employee was prepared to work for a lesser rate. It is submitted that this is important guidance which should be mentioned in regulation 7 of the Employment Equity Regulations.

6.4 Budgetary considerations (increased costs)

In *Jorgenson v Foreningen af Speciallaeger, Sygesikringens Forhandlingsudvalg*[209] the European Court of Justice remarked that while budgetary considerations may underlie and influence social protection measures it does not in itself constitute a measure and as such it cannot in and of itself justify discrimination. The Court held that if budgetary considerations in itself could be used to justify discrimination then this would mean that the application of the principle of equal pay/treatment might vary according to time and place in relation to the public finances of the State. It held further that while budgetary considerations cannot in itself justify discrimination, measures aimed at sound public expenditure may be justified if it meets a legitimate objective and is both appropriate and necessary.[210] Chen states that the ILO has repeatedly stressed that economic considerations should not be allowed to justify exceptions to the principle of equal pay.[211]

In *Steinicke v Bundesanstalt fur Arbeit*[212] the European Court of Justice held that while budgetary considerations may motivate a member state's choice of social policy and attendant measures it does not on its own amount to an aim pursued by that policy and as such it cannot justify discrimination based on sex. The Court further held that to allow budgetary considerations to justify differential treatment which amounts to indirect discrimination based on sex would mean that the fundamental principle of equal treatment espoused in community law is capable of being varied according to time and place dependent on the public finances of the State. It then held that neither a public authority nor an employer can justify discrimination emanating from a part-time work scheme merely because the elimination of such will involve increased costs.[213]

---

[209] Case C-226/98, [2000] ECR I-2467 (ECJ).

[210] At paras 39, 42. See also *Bauer v Hamburg* Case C-187/00, [2003] ECR I-2771 (ECJ) at para 60 which states the following: "Moreover, to concede that budgetary considerations may justify a difference in treatment between men and women which would otherwise constitute indirect discrimination on grounds of sex would mean that the application and scope of a rule of Community law as fundamental as that of equal treatment between men and women might vary in time and place according to the state of the public finances of Member States… ."

[211] Chen CW *Compliance and Compromise: The Jurisprudence of Gender Pay Equity* (Martinus Nijhoff Publishers Leiden, Boston 2011) 28.

[212] Case C-77/02, [2003] ECR I-9044 (ECJ).

[213] At paras 66-68.

In *Hill and Stapleton v Revenue Commissioners*[214] the European Court of Justice held, in the context of justification based on economic grounds, that an employer is not allowed to successfully justify discrimination emanating from a job-sharing scheme solely on the basis that in order for it to avoid discrimination it would attract increased costs.[215]

In *Schonheit v Stadt Frankfurt am Main*[216] the European Court of Justice held that the equal pay principle does not allow the application of measures/provisions not based on sex but which results in differential treatment between male and female employees in circumstances where the differences are not attributable to objective factors unrelated to discrimination based on sex. It is for the national court to assess whether a legislative provision which applies independently of the sex of employees, affects a larger percentage of female employees than male employees. If so, it must determine whether it is justified by objective factors which are not related to discrimination based on sex. It held that the goal of curtailing public expenditure cannot be relied on for justifying a difference in treatment on the grounds of sex. The European Court of Justice stated that it is the responsibility of the member state which has introduced a measure which results in differential treatment between male and female employees to prove that there are objective factors for the differential treatment which are not related to discrimination based on sex. The Court further stated that depending on the circumstances of the case a member state may proffer other reasons than the reasons proffered when the measure effecting the differential treatment was adopted.[217]

The following guidance can be extracted from the above international labour law sources in order to assist with the research question relating to the grounds of justification as stated in (e) under paragraph 6 above. It is submitted that the non-listing of budgetary considerations, increased costs and the curtailing of public expenditure in regulation 7 of the Employment Equity Regulations and its absence in South African case law is

[214] Case C-243/95, [1998] ECR I-3759 (ECJ).
[215] At para 40.
[216] Joined Cases C-4/02 and C-5/02, [2003] ECR I-12607 (ECJ).
[217] At paras 67, 82, 84, 86-87.

strengthened by its rejection as a ground of justification to equal pay claims in international labour law.

6.5 Real business need

In *Bilka-Kaufhaus GmbH v Weber von Hartz*[218] the European Court of Justice held that it is the responsibility of the national court to determine whether the grounds relied on by an employer could amount to objectively justified economic grounds. This refers to the employer's explanation that its pay practice applies independently of an employee's sex while it affects more females than males. The Court further held that if the national court finds that the grounds relied on by the employer corresponds to a real business need and is appropriate and necessary, then the fact that it affects more females than males is not enough to show that it amounts to an infringement of Article 119 of the EEC Treaty. It concluded by stating that a company can justify a pay practice/policy that excludes part-time workers without regard to sex, on the ground that it wants to employ as few part-time employees as necessary, if it is found that the means employed for trying to achieve that objective relates to a real business need which is appropriate and necessary.[219]

It is submitted that while this case allows an employer to rely on a ground which corresponds to a real business need with the condition that it is appropriate and necessary to justify unequal pay, it is not suitable to be used as a ground of justification under regulation 7(1)(g) of the Employment Equity Regulations as another relevant factor which can justify unequal pay. The unsuitability of this ground of justification is also supported by the rejection of the use of budgetary considerations and increased costs as stated in paragraph 6.4 above which can easily fall within the ambit of a real business need.

---

[218] Case 170/84, [1986] IRLR 317 (ECJ).
[219] At paras 36-37.

6.6 Good Industrial Relations

In *Kenny v Minister for Justice, Equality and Law Reform*[220] the European Court of Justice was faced with the question as to whether the interests of good industrial relations can be taken into account when deciding whether the difference in pay can be justified. It held that the interests of good industrial relations is subject to the principle of non-discrimination in pay and as a result it cannot constitute the only basis for justifying discrimination in pay. The Court further held that while the interests of good industrial relations cannot on its own justify pay discrimination it can, however, be taken into account in deciding whether the difference in pay is due to objective factors that are not sex tainted. It finally held that the national court should determine on the facts before it the extent to which the interests of good industrial relations may be taken into account.[221]

The following guidance can be extracted from the above case in order to assist with the research question relating to the grounds of justification as stated in (e) under paragraph 6 above. It is submitted that the non-listing of good industrial relations in regulation 7 of the Employment Equity Regulations and its absence in South African case law is strengthened by this case which states that the interests of good industrial relations cannot constitute the only basis for justifying discrimination in pay.

6.7 Collective agreements

Article 23(b) of the EU Recast Directive provides the following, which is relevant to collective agreements:

> "Member States shall take all necessary measures to ensure that:… provisions contrary to the principle of equal treatment in individual or collective contracts or agreements, internal rules of undertakings or rules governing the independent occupations and professions and workers' and employers' organisations or any other arrangements shall be, or may be, declared null and void or are amended."

[220] [2013] IRLR 463 (ECJ).
[221] At paras 17, 48-51.

In *Nimz v Freie und Hansestadt Hamburg*[222] the European Court of Justice held that the prohibition against unfair discrimination set out in Article 119 of the EEC Treaty is mandatory and it also applies to collective agreements. It further held that a collective agreement which makes a distinction between the overall pay between male and female employees constitutes discrimination against the female employees if a lower percentage of men work on a part-time basis as opposed to female employees. This would be in conflict with Article 119 of the EEC Treaty. The Court stated that it is contrary to Article 119 of the EEC Treaty for a court to be precluded from being in a position to set aside those provisions of a collective agreement which are in conflict with Article 119. It further stated that where there is discrimination in a collective agreement, the court is required to set that provision aside, and to do so without waiting for its removal by collective bargaining or any other procedure.[223] The Human Rights Social Charter Monograph – No.6 on the Conditions of Employment in the European Social Charter[224] states that domestic law should make provision which allows for collective agreements to be nullified where they offend against the equal pay principle. It further states that a court or appropriate authority must have the legal competence to waive the application of any offending provisions in a collective agreement. It also argues that in order for the application of the equal pay principle to be effective, there is a need for more radical remedies which, *inter alia*, can include a specific statutory provision which renders offending provisions null and void and the possibility for a court to declare such offending provisions null and void by relying on a decision applicable *erga omnes*.[225]

In *Defrenne v Sabena*[226] the European Court of Justice held that Article 119 of the EEC Treaty is mandatory and the prohibition against discrimination between males and

[222] Case C-184/89, [1991] ECR I-297 (ECJ).

[223] At paras 11-12, 20-21. In *Amministrazione delle Finanze dello Stato v Simmenthal* (Case 106/77, [1978] ECR 630 (ECJ)) the European Court of Justice held the following at para 21: "It follows from the foregoing that every national court must, in a case within its jurisdiction, apply Community law in its entirety and protect rights which the latter confers on individuals and must accordingly set aside any provision of national law which may conflict with it, whether prior or subsequent to the Community rule."

[224] (Council of Europe Publishing 1999).

[225] At 73-74.

[226] Case 43/75, [1976] ECR 456 (ECJ). Jacobs A & Zeijen H *European Labour Law and Social Policy* (Tilburg University Press 1993) state the following at 87 in relation to the *Defrenne* case: "This judgment

females does not only apply to the actions of the State but it also applies to individual contracts of employment as well as collective agreements.[227] In *Kowalska v Freie und Hansestadt Hamburg*[228] the European Court of Justice held that where there is discrimination in a provision of a collective agreement then those persons disadvantaged by the discriminatory provision must be treated in the same manner, in proportion to the number of hours worked, as other workers.[229]

In *Enderby v Frenchay Health Authority and Secretary of State for Health*[230] the European Court of Justice held that collective agreements like laws or other administrative provisions must adhere to the equal pay principle in Article 119 of the EEC Treaty. It further held that the fact that rates of pay are decided by collective bargaining processes which were conducted separately for two groups of professionals without any discrimination within each, cannot prevent a finding of *prima facie* discrimination if the two groups of the same employer are treated differently. The Court stated that an employer could easily evade the principle of equal pay by using separate bargaining processes if it could merely rely on the absence of discrimination within each of the processes in order to justify pay differentials.[231]

In *Specialarbejderforbundet i Danmark v Dansk Industri, acting for Royal Copenhagen*[232] the European Court of Justice held that the principle of equal pay as set out in Article 119 of the EEC Treaty applies to wages that are determined by collective bargaining or negotiation at local level and both collective bargaining and negotiation at local level can be taken into account to determine whether the pay differentials in a particular case is justified.[233] In *Kruger v Kreiskrankenhaus Ebersberg*[234] the European Court of Justice held that a collective agreement which affords employees a special annual bonus (paid

helped to shift the emphasis in both the interpretation and the implementation of Article 119, away from merely economic considerations and towards more genuine social objectives."

[227] At para 39.
[228] Case C-33/89, [1990] ECR I-2607 (ECJ).
[229] At para 20.
[230] Case C-127/92, [1993] IRLR 591 (ECJ).
[231] At paras 21-22.
[232] [1995] IRLR 648 (ECJ).
[233] At paras 45-47.
[234] Case C-281/97, [1999] ECR I-5141 (ECJ).

at Christmas) independently of the sex of the worker constitutes indirect discrimination where it affects a large percentage of female employees as opposed to male employees.[235]

The following guidance can be extracted from the above international labour law sources in order to assist with the research question relating to the grounds of justification as stated in (e) under paragraph 6 above. It is submitted that the non-listing of collective agreements in regulation 7 of the Employment Equity Regulations is strengthened by its rejection as a ground of justification to pay discrimination in international labour law.

The following guidance can be extracted from the above international labour law sources in order to assist with the research question relating to the grounds of justification as stated in (d) under paragraph 6 above. Under international labour law, the fact that rates of pay are decided by separate collective bargaining processes conducted for two groups of employees without any discrimination within each cannot prevent a finding of *prima facie* discrimination if the two groups of the same employer are treated differently. If an employer were allowed to rely on the absence of discrimination within each of the collective bargaining processes to justify the unequal pay then it could easily evade the principle of equal pay by using separate bargaining processes. Simply put, an employer is not allowed to rely on separate collective bargaining processes as a ground of justification to unequal pay. The international labour law on this point being established, it is prudent to not make submissions now regarding the answer to the research question posed in (d) under paragraph 6 above, but to do so after ascertaining what the position under the United Kingdom equal pay law is.

6.8 Progressive realisation of the right to equal pay

Recommendation 4 of the Equal Remuneration Recommendation states that where it is not deemed feasible to immediately implement the principle of equal pay for work of equal value then appropriate provision should be made for its progressive application such as:

[235] At paras 6, 30.

(a) decreasing the differentials between rates of remuneration for work of equal value; or (b) providing equal increments for work of equal value, where a system of increments is in force.[236] In *Smith v Avdel Systems Ltd*[237] the Court stated that equal pay for men and women is a fundamental principle in EU law and its application must thus be immediate and full.[238] While these two sources might seem to contradict each other at first blush, it is submitted that they do not but rather espouse the following. The general rule is that unequal pay must be corrected immediately but where this is not feasible then it must be corrected on a progressive basis by decreasing the differentials.

The following guidance can be extracted from the above international labour law sources in order to assist with the research question relating to whether an employer can justify the lack of equal pay on the grounds of being busy with progressively realising the right to equal pay.[239] It is submitted that the argument made based on South African law to the effect that it will be difficult to refuse to recognise the progressive realisation of the right to equal pay as a ground of justification, falling under regulation 7(1)(g) of the Employment Equity Regulations, where it is genuine and in circumstances where it gives effect to section 27(2) of the EEA is strengthened by international labour law. The latter recognises the principle of the progressive realisation of the right to equal pay where unequal pay cannot immediately be corrected.

7. EQUAL PAY FOR NON-STANDARD (ATYPICAL) EMPLOYEES

The international labour law relating to agency (temporary service) employees, fixed-term contract employees and part-time employees will be analysed under separate headings below. The guidance sought from international labour law for the research questions relating to these three categories of non-standard employees will be stated under separate headings below with submissions relating to any guidance that can be extracted,

236 Recommendation 4(a)-(b) of the Equal Remuneration Recommendation.
237 [1994] IRLR 616 (ECJ).
238 At para 25.
239 The research question is stated in (b) under para 6 above.

as sought for, being made during or at the end of the discussion of each heading as deemed appropriate.

7.1 Agency employees (temporary service employees)

The guidance sought from international labour law for the research questions relating to temporary service employees as called for in paragraph 13.10.1 of Chapter 2 of this thesis is as follows: (a) Whether international labour law can provide guidance to the two arguments made relating to the interpretation to be accorded to the phrase "must be treated on the whole not less favourably" in section 198A(5) of the LRA which entails on the one hand, that the phrase can be interpreted to mean the *same terms and conditions of employment* and, on the other hand, that the phrase can be interpreted to mean that an employer is allowed to provide the deemed employee with a package on condition that it does not result in treatment that is on the whole not less favourable; (b) Whether guidance can be gained regarding how it approaches the same work or similar work (substantially the same work); and (c) Any further lessons that can be learnt from international labour law for the South African equal pay law relating to temporary service employees under section 198A of the LRA.

The EU Agency Directive[240] applies to workers who have an employment contract/relationship with a temporary work agency and who are assigned to user undertakings to *work temporarily* under their supervision and direction. The purpose of the Directive is to ensure the protection of temporary agency workers and improve the quality of their work by ensuring that the principle of equal treatment is adhered to.[241] Article 6.4 of the Directive states that without prejudice to Article 5.1, temporary workers

---

[240] Directive 2008/104/EC of the European Parliament and of the Council on temporary agency work. See Jones EL "Temporary Agency Labour: Back to Square One?" 2002 31(2) *ILJ* 183-190 for a discussion of the negotiations relating to the EU Agency Directive.

[241] Articles 1.1, 2. Davies ACL *EU Labour Law* (Edward Elgar Publishing 2012) provides the following important history that led to the EU Agency Directive at 194 as follows: "… [T]he social partners did not begin negotiations on temporary agency work until 2000, despite a statement in the fixed-term work agreement that they would pursue this topic. In 2001, the negotiations broke down because the employers' side was unwilling to agree that agency workers should be treated equally with the end user's permanent workers. The Commission again took up the challenge but (in part because of opposition from the UK) no agreement could be reached until 2008."

should be afforded access to the amenities or collective facilities in the user undertaking for instance, a canteen, child-care facilities and transport services as provided to workers employed directly by the user undertaking unless the difference in treatment is justified by objective reasons.[242] Article 5.1 of the EU Agency Directive provides that temporary agency workers are entitled to the same basic working and employment conditions that would apply to them if they had been recruited directly by that undertaking to occupy the *same job*.[243] Countouris and Horton state that the wording used in Article 5.1 of the EU Agency Directive suggests that the comparison relating to the basic working and employment conditions should be undertaken with a hypothetical comparator and where an actual comparator exists who does *broadly similar work* in the end-user then this should be treated as evidence which is useful but not determinative of the issue.[244] It is clear thus far that the EU Agency Directive is restricted to work that is the same or broadly similar.

Member states may establish arrangements, provided that there is no system in law for declaring collective agreements universally applicable or no system for extending their provisions to all similar undertakings in a certain sector, which deviates from the same treatment of agency workers as called for in Article 5.1 and which may include a qualifying period for equal treatment. This deviation is subject to an adequate level of protection being provided to temporary agency workers.[245] Member states may give the option of

---

[242] For further reading on Agency work see Zappala L "The Temporary Agency Workers' Directive: An Impossible Political Agreement?" (2003) 32 *ILJ* 310-317 and Jones EL "Temporary Agency Labour: Back to Square One?" *ILJ* 31(2) (2002) 183-190.

[243] Riesenhuber K *European Union Law: A Systematic Exposition* (Intersentia Cambridge 2012) states the following at 472: "Unlike the initial proposal, the Directive is not concerned with equal treatment on a concrete, individual level but rather on an abstract, general level ("general provisions") with regard to working time and pay." Article 3(1)(f) of the EU Agency Directive states the following: "(f) 'basic working and employment conditions' means working and employment conditions laid down by legislation, regulations, administrative provisions, collective agreements and/or other binding general provisions in force in the user undertaking relating to: (i) the duration of working time, overtime, breaks, rest periods, night work, holidays and public holidays; (ii) pay." Countouris N & Horton R "The Temporary Agency Work Directive: Another Broken Promise?" 2009 38(3) *ILJ* 329 at 334 state that article 3(1)(f) of the EU Agency Directive which defines "basic working and employment conditions" is a step back when it is compared to article 4(1) of the Fixed-term Work Directive which contains more generous provisions.

[244] Countouris N & Horton R "The Temporary Agency Work Directive: Another Broken Promise?" 2009 38(3) *ILJ* 329 at 333.

[245] Articles 5.4 of the EU Agency Directive. Davies ACL *EU Labour Law* (Edward Elgar Publishing 2012) states at 197 that while the EU Agency Directive is an achievement for the European Commission after

upholding or concluding collective agreements which may establish arrangements relating to the working and employment conditions which may differ with those enunciated in Article 5.1 of the Directive while respecting the overall protection of temporary agency workers.[246]

It is submitted that it is clear from the above discussion, that the allowance to deviate from the equal treatment for temporary agency workers as called for in Article 5.1 by providing them with an adequate level of protection is based on the *temporary nature* of the work performed by them. It is further submitted that this type of protection can also be described as treatment that is "on the whole not less favourable" because it constitutes a departure from the same treatment principle whilst still requiring that overall protection of temporary agency workers is maintained. Based on this, the following guidance can be extracted in order to assist with the research question relating to temporary service employees as stated in (a) under this paragraph 7.1 above. The deviation from the principle of equal/same treatment for temporary agency workers subject to them receiving overall protection/adequate protection under international labour law cannot assist the argument that the phrase "must be treated on the whole not less favourably" in section 198A(5) of the LRA can be interpreted to mean that an employer is allowed to provide the deemed employee with a package on condition that it does not result in treatment that is on the whole not less favourable because the deemed employee no longer works temporarily for the client, as is the case under international labour law, but is deemed to be the employee of the client on an indefinite basis and the temporary nature of the work is thus lost. The converse of this is that it supports the other argument put forth that the phrase "must be treated on the whole not less favourably" in section 198A(5) of the LRA can be interpreted to mean the *same terms and conditions of employment.*

---

many failed attempts as well as completing the EU atypical work directives it has come with many possible derogations from worker protection.

[246] Article 5.3 of the EU Agency Directive. Riesenhuber K *European Union Law: A Systematic Exposition* (Intersentia Cambridge 2012) states at 473 that this exception "finds its justification in the collective bargaining process, which leads to a presumption of fairness of the collective agreement."

The following guidance can be extracted in order to assist with the research question relating to temporary service employees as stated in (b) under this paragraph 7.1 above. Whilst the EU Agency Directive is restricted to the same work or broadly similar work and this is the same position under section 198A(5) of the LRA, it is submitted that the guidance regarding how the same work or similar work issue should be approached under section 198A(5) of the LRA can be found in paragraphs 5.4-5.5 in Chapter 2 of this thesis as read with paragraph 4.4.1 above. No guidance can be extracted for the research question relating to temporary service employees as stated in (c) under this paragraph 7.1 above.

7.2 Fixed-term contract employees

The guidance sought from international labour law for the research questions relating to fixed-term contract employees as called for in paragraph 13.10.2 of Chapter 2 of this thesis is as follows: (a) Whether international labour law can provide guidance to the uncertainty regarding whether the phrase "must not be treated less favourably" in section 198B(8)(a) of the LRA must be interpreted to mean treatment that is the same or treatment that is on the whole not less favourably; and whether a fixed-term employee whose contract is deemed to be of an indefinite duration as contemplated in section 198B(5) of the LRA and a fixed-term employee whose contract is for a fixed-term which complies with section 198B must be provided with the same treatment as compared to a comparable permanent employee as contemplated in section 198B(8)(a) of the LRA; (b) Whether guidance can be gained regarding how it approaches the same work or similar work (substantially the same work) issue; and (c) Any further lessons that can be learnt from international labour law for the South African equal pay law relating to fixed-term contract employees under section 198B(8)(a) of the LRA.

The EU Fixed-term Work Directive[247] puts into effect the Framework Agreement on fixed-term contracts.[248] The purpose of the Framework Agreement is to improve the quality of

[247] Council Directive 1999/70/EC.
[248] Article 1 of the EU Fixed-term Work Council Directive 1999/70/EC.

fixed-term work through the application of the principle of non-discrimination and to establish a framework to prevent the abuse of successive fixed-term employment contracts.[249] Clause 3 defines a fixed-term worker as a person having a contract/employment relationship directly with the employer where the end of the contract/employment relationship is determined by objective reasons such as the reaching of a specific date, completing a specific task, or the occurrence of a specific event.[250]

Clause 4(1) states that with regard to employment conditions,[251] fixed-term workers must not be treated in a less favourable manner than comparable permanent workers for the sole reason that the worker is employed on a fixed-term contract unless differential treatment is justified on objective grounds.[252] It is clear from clause 4(1) as read with

---

249 Clause 1(a)-(b) of the Framework Agreement. Davies ACL *EU Labour Law* (Edward Elgar Publishing 2012) states at 191 that the Fixed-term Framework Agreement does not promote or encourage fixed-term work thereby acknowledging its inherently precarious nature. Davies ACL *EU Labour Law (*Edward Elgar Publishing 2012) states the following at 192 "Like the Agreement on Part-time Work, the Agreement on Fixed-Term Work is the result of a set of compromises and does not achieve everything that might have been hoped for from the perspective of worker protection or even flexicurity." Riesenhuber K *European Union Law: A Systematic Exposition* (Intersentia Cambridge 2012) states at 444 that workers in atypical employment relationships like fixed-term contract employment "often experience less favourable treatment than their counterparts in open-ended positions." Corazza L "Hard Times for Hard Bans: Fixed-Term Work and So-Called Non-Regression Clauses in the Era of Flexicurity" *European Law Journal* 2011 17(3) 385 states the following at 386 regarding the Fixed-term Framework Agreement "… the Agreement is focused on the improvement of the quality of Fixed-Term Work by establishing guidelines respective to the nondiscrimination principle and guidelines to prevent abuse arising from the use of successive Fixed-Term employment contracts…"

250 Framework Agreement.

251 Riesenhuber K *European Union Law: A Systematic Exposition* (Intersentia Cambridge 2012) states the following at 447: "… [T]he prohibition of discrimination in Clause 4(1) PTWFA should be interpreted so as to apply to pay as a (central) condition of employment."

252 Riesenhuber K *European Union Law: A Systematic Exposition* (Intersentia Cambridge 2012) states the following at 449: "The justification can be specified by analogy to the established rules of EU anti-discrimination law. In order to justify less favourable treatment solely on grounds of fixed-term work, the employer must establish that the distinction was necessary in order to achieve a legitimate purpose. Determination of a 'legitimate' purpose requires an evaluation with regard to the purposes of the Fixed-Term Work Directive and the EU legal system. The requirement that the distinction must be 'necessary' refers to the principle of proportionality." Riesenhuber K *European Union Law: A Systematic Exposition* (Intersentia Cambridge 2012) states the following at 450 in relation to the burden of proof: "The wording of clause 4(1) FTWA ('unless') already hints at the **burden of proof**: It is for the employer to submit and prove any objective grounds. This is appropriate given that the relevant grounds fall within the employer's sphere of knowledge." Murray J "Normalising Temporary Work: The Proposed Directive on Fixed-Term Work" 1999 28(3) *ILJ* 269 states the following at 274-275 regarding clause 4(1) of the EU Framework Agreement on fixed-term contracts: "It is not clear exactly how the principle will work. If it is restricted in operation to a single workplace, surely any employer would argue that comparability meant that a temporary worker on day one *in that establishment* should only receive what permanent workers

clause 3 of the Framework Agreement that it only deals with the treatment to be accorded to fixed-term workers who are employed for a fixed-term and does not deal with a fixed-term worker who is deemed to be employed on an indefinite basis. This being the case, the discussion under this heading will not be able to provide a direct answer to the part of the research questions as stated in (a) under this paragraph 7.2 above dealing with the treatment to be accorded to a fixed-term employee whose contract is deemed to be of an indefinite duration as contemplated in section 198B(5) of the LRA read with section 198B(8)(a) of the LRA. This question thus remains.

There is no definition provided in the Framework Agreement regarding what would fall within the ambit of employment conditions for the purpose of clause 4(1) but the European Court of Justice has held that the following falls within the ambit of employment conditions (for the purpose of clause 4(1)): (a) a length of service allowance;[253] (b) pay, including all the elements of pay;[254] (c) pensions which depend on the employment relationship (excluding those pensions which are derived from a statutory scheme largely due to considerations of social policy and not the employment relationship);[255] and (d) a continuing education increment.[256] This is by no means a closed list. 'Comparable permanent' worker refers to a worker with an employment contract/relationship of indefinite duration who works in the same establishment and who is engaged in the *same/similar work* with due regard to qualifications and skills. If there is no comparable permanent worker in the same establishment, the comparison should be made by referring to the applicable collective agreement, if there is no applicable collective agreement then in accordance with national law, other collective agreements or

receive on their first day, even if the temporary worker had been engaged in identical work under numerous temporary contracts for different employers. The Agreement's formulation that periods of service qualifications should be 'the same for fixed-term workers as for permanent workers' (cl 4(4)) appears to fall short of a full recognition [of] all relevant prior service."

[253] *Del Cerro Alonso v Osakidetza-Servicio Vasco de Salud* Case C-307/05, [2007] ECR I-7122 (ECJ) at para 48; and *Gavieiro Gavieiro & Toress v Conselleria de Educacion e Ordenacion Universitaria de la Xunta de Galicia* Joined Cases C-444/09 & C-456/09, [2010] ECR I-14035 (ECJ) at para 58.

[254] *Impact v Minister for Agriculture and Food* C-268/06, [2008] ECR I-2533 (ECJ) at para 134.

[255] *Impact v Minister for Agriculture and Food* C-268/06, [2008] ECR I-2533 (ECJ) at para 134.

[256] *Lorenzo Martínez v Junta de Castilla y León* Unpublished decisions, Case C-556/11 at page 2 https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62011CO0556&from=EN (last accessed on 1/11/2022).

practice.[257] Riesenhuber states that this latter type of comparison by referring to collective agreements, national law or practice involves a comparison undertaken in a hypothetical manner.[258] It is clear that the Framework Agreement is restricted to work that is the same or similar. Whilst the Framework Agreement is restricted to the same/similar work and this is the same position under section 198B(8)(a) of the LRA, it is submitted that the guidance regarding how the same work or similar work issue should be approached under section 198B(8)(a) of the LRA, as called for in (b) under this paragraph 7.2 above, can be found in paragraphs 5.4-5.5 in Chapter 2 of this thesis as read with paragraph 4.4.1 above.

The Framework Agreement further states in clause 4(2) that where appropriate, the principle of *pro rata temporis* (calculation of benefits proportionate to working time) shall apply.[259] It is important to note that the Framework Agreement does not state which terms and conditions are subject to the *pro rata temporis* principle. Riesenhuber states that the *pro rata temporis* principle presupposes that the condition of employment to which it applies can be divided accordingly so that it can be granted in respect of time. He further states that the *pro rata temporis* principle as contained in clause 4(2) of the Framework Agreement is *appropriate* (within the meaning of the clause) in the case of divisible benefits which are benefits that can be measured on the basis of time, for example, pay and annual leave. The *pro rata temporis* principle means that fixed-term workers should be entitled to the same treatment as a comparable worker in proportion to the relative working time. The *pro rata temporis* principle does not apply to indivisible benefits, for example, access to the establishment's cafeteria or library (which would mean that these benefits should be granted).[260] It is submitted that the use of the *pro rata temporis* principle in relation to divisible benefits is a manner of ensuring that the fixed-term worker is not treated less favourably than a comparable permanent employee and thus represents equal treatment in this regard. It is further submitted that the *pro rata temporis*

---

[257] Clause 3.1-3.2 of the Framework Agreement.

[258] Riesenhuber K *European Union Law: A Systematic Exposition* (Intersentia Cambridge 2012) 448.

[259] Clause 4.1-4.2 of the Framework Agreement. Riesenhuber K *European Union Law: A Systematic Exposition* (Intersentia Cambridge 2012) states at 452 that the "… principle of pro rata temporis means the calculation of benefits proportionate to (working) time."

[260] Riesenhuber K *European Union Law: A Systematic Exposition* (Intersentia Cambridge 2012) 451-452.

principle does not come into play when objective grounds are sought or put forth for the different treatment between a fixed-term worker and a comparable permanent employee. It is further submitted that both indivisible and divisible benefits including the application of the *pro rata temporis* principle operates under the ambit of clause 4(1) of the Framework Agreement which requires that a fixed-term worker must not be treated in a less favourable manner and the application of the *pro rata temporis* principle in the case of divisible benefits is not considered to be treatment that is less favourable.

Based on the immediate preceding paragraph, the following guidance can be extracted for the part of the research question stated in (a) under this paragraph 7.2 above dealing with whether international labour law can provide guidance to the uncertainty regarding whether the phrase “must not be treated less favourably” in section 198B(8)(a) of the LRA must be interpreted to mean treatment that is the same or treatment that is on the whole not less favourably insofar as fixed-term employees who are employed for a fixed term are concerned. It is submitted that the phrase “must not be treated less favourably” in section 198B(8)(a) of the LRA should be interpreted to refer to treatment that is the same and treatment that is the same subject to the *pro rata temporis* principle. It is further submitted that treatment that is the same will apply in the case of indivisible benefits as it cannot be granted *pro rata temporis* whereas treatment that is the same subject to the *pro rata temporis* principle (which can be seen as treatment that is on the whole not less favourable) will apply to divisible benefits which can be granted *pro rata temporis*. This, should, however, be mentioned and explained in the Equal Pay Code with reference to the Code in this regard being specifically mentioned under section 198B of the LRA.

In *Del Cerro Alonso v Osakidetza-Servicio Vasco de Salud*[261] the European Court of Justice explained that the term “objective grounds” in clause 4(1) of the Framework Agreement requires the difference in treatment between fixed-term employees and permanent employees to be justified by precise and concrete factors which relates to the employment condition in question and it should be based on objective and transparent criteria. The Court held that this will ensure that the difference in treatment is due to a

[261] Case C-307/05, [2007] ECR I-7122 (ECJ).

genuine need and is appropriate for achieving that need as well as being necessary to that end.[262] In *Gavieiro Gavieiro & Toress v Conselleria de Educacion e Ordenacion Universitaria de la Xunta de Galicia*[263] the Court held that the mere reliance on the fact of the temporary nature of the employment is not capable of constituting an objective ground as set out in clause 4(1) of the Framework Agreement. It held that if the temporary nature of the employment was sufficient to justify a difference in treatment then it would negate the very objectives of the Framework Agreement which applies to fixed-term work which is of a temporary nature.[264] Based on this, the following guidance can be extracted for the research question stated in (c) under this paragraph 7.2 above dealing with any further lessons that can be learnt from international labour law for the South African equal pay law relating to fixed-term contract employees under section 198B(8)(a) of the LRA. It should be mentioned, under section 198D of the LRA, that the temporary nature of the employment (fixed-term worker) is not capable of constituting an objective ground because to allow this will render the objectives of section 198B(8)(a) redundant.

7.3 Part-time employees

The guidance sought from international labour law for the research questions relating to part-time employees as called for in paragraph 13.10.3 of Chapter 2 of this thesis is as follows: (a) Whether international labour law can provide guidance relating to what is meant by the phrase “must treat a part-time employee on the whole not less favourably” in section 198C(3)(a) of the LRA, and related to this is, whether international labour law can provide guidance relating to how the working hours of the part-time employee should be taken into account when providing her with treatment that is on the whole not less favourable; (b) Whether guidance can be gained regarding how it approaches the same work or similar work (substantially the same work) issue; and (c) Any further lessons that can be learnt from international labour law for the South African equal pay law relating to part-time employees under section 198C(3)(a) of the LRA.

---

[262] At para 58.
[263] Joined Cases C-444/09 & C-456/09, [2010] ECR I-14035 (ECJ).
[264] At paras 56-57.

7.3.1 ILO Part-time Work Convention and Recommendation

The ILO Part-time Work Convention[265] ("Part-time Convention") recognises that the Equal Pay Convention, *inter alia*, remains relevant to part-time workers but that there is a need to extend specific protection to part-time workers in the area of *working conditions*, amongst others.[266] Article 1(a) of the Part-time Convention defines a part-time worker as an employed person whose normal work hours are less than comparable full-time workers. The less hours worked makes the work part-time and as a consequence the worker a part-time worker. A comparable full-time worker is defined as a full-time worker who: (a) has the same type of employment relationship; (b) is engaged in the same/similar type of work; and (c) is employed in the same establishment as the part-time worker concerned. If there is no comparable full-time worker in the same establishment then the part-time worker should seek a full-time worker in the same enterprise, if there is no comparable full-time worker in the same enterprise then the part-time worker should seek a full-time worker in the same branch of activity.[267] The seeking of a comparator outside the same establishment will not apply to part-time employees in section 198C(3)(a) of the LRA which restricts the comparator to being employed by the same employer.[268] It is clear that the Part-time Convention is restricted to work that is the same or similar. Whilst the Part-time Convention is restricted to the same or similar work and this is the same position under section 198C(3)(a) of the LRA, it is submitted that the guidance regarding how the same work or similar work issue should be approached under section 198C(3)(a) of the LRA, as called for in (b) under paragraph 7.3 above, can be found in paragraphs 5.4-5.5 in Chapter 2 of this thesis as read with paragraph 4.4.1 above.

Article 4 requires that measures must be taken to ensure that part-time workers receive the same protection as that given to comparable full-time workers in respect of

[265] No. 175 of 1994 ("Part-time Convention").

[266] Preamble to Part-time Convention. Duggan M *Equal Pay Law and Practice* (Jordan Publishing Limited 2009) states the following at 241: "The use of part-time workers may satisfy the requirements of employers who want a flexible work force and also enable one partner in a family to work part-time whilst catering for domestic needs or even for both partners to work part-time so that they can spend time with the family."

[267] Article 1(c)(i)-(iii) of the Part-time Convention.

[268] See para 11.3 of Chapter 2 of this thesis.

discrimination in employment and occupation, *inter alia*.[269] Article 5 states that measures must be taken to ensure that part-time workers do not receive a lower basic wage calculated proportionately on an hourly, performance-related or piece-rate basis than the basic wage of comparable full-time workers calculated on the same basis.[270] It is submitted that the proportional calculation of the lower basic wage in relation to time worked refers to the *pro rata temporis* principle. Item 10 of the ILO Part-Time Work Recommendation[271] ("Part-time Recommendation") expands on this and states that part-time workers should be allowed to benefit from financial compensation, in addition to the basic wage, on an equitable basis where such compensation is received by comparable full-time workers. Item 1 of the Part-time Recommendation states that its provisions must be considered together with the provisions of the Part-time Convention. It is submitted that Article 5 of the Part-time Convention read with item 10 of the Part-time Recommendation provides that a part-time worker should receive all forms of payment received by a comparable full-time worker subject to the *pro rata temporis* principle. Based on this paragraph, the following guidance can be extracted for the research question stated in (a) under this paragraph 7.3 above. A part-time employee is entitled to all forms of payment that a comparable permanent employee is entitled to but the payment should be granted to the part-time employee in accordance with the *pro rata temporis* principle which requires the calculation of benefits proportionate to working time. It is submitted that the phrase "must treat a part-time employee on the whole not less favourably" in section 198C(3)(a) of the LRA read with the requirement under section 198C(3)(a) of the LRA to take the working hours of the part-time employee into account when providing her with such treatment should be interpreted to mean that a part-time employee is entitled to all forms of payment *pro rata temporis* to which a comparable permanent full-time employee is entitled to. It is further submitted that section 198C(3)(a) of the LRA should be amended to reflect this clearly and an explanation should be provided in the Equal Pay Code.

---

[269] Part-time Convention.
[270] Part-time Convention.
[271] No. 182 of 1994 ("Part-time Recommendation").

Article 7 requests that measures must be taken to ensure that part-time workers receive comparable conditions to those of comparable full-time workers in relation to the following, *inter alia*: (a) maternity protection; (c) paid annual leave and paid public holidays; and (d) sick leave.[272] The equivalency of the conditions may be determined in proportion to hours of work or earnings.[273] It is submitted that this is nothing other than the *pro rata temporis* principle. Item 13 of the Part-time Recommendation expands on the leave referred to in Article 7 of the Part-time Convention by stating that part-time workers should have access to all forms of leave available to comparable full-time workers on an equitable basis such as paid educational leave, parental leave, leave when one's child is ill or another member of the immediate family.[274] The guidance that can be extracted for the research question stated in (a) under this paragraph 7.3 above is that a part-time employee is entitled to receive the same conditions of employment that are received by a comparable permanent employee but according to the *pro rata temporis* principle and this constitutes treatment that is on the whole not less favourable taking the working hours of the part-time employee into account as required by section 198C(3)(a) of the LRA. The *pro rata temporis* principle should specifically be included in section 198C(3)(a) of the LRA with its explanation.

Item 11 of the Part-time Recommendation states that measures should be taken to ensure that as far as is practicable part-time workers should have access to the welfare facilities and social services of the establishment on an equitable basis. Item 11 further states that where possible these facilities and social services should be adapted to take the needs of part-time workers into account. The guidance that can be extracted for the research question stated in (a) under this paragraph 7.3 above is that a part-time employee is entitled to access the facilities of the establishment (workplace), and this

---

272 Item 8(2) of the ILO Part-Time Work Recommendation No. 182 of 1994 states that the period of service required as a condition to access the protection in Article 7 of the Part-time Convention relating to, *inter alia*, maternity protection, paid annual leave, paid public holidays and sick leave, must not be longer for part-time workers than for comparable full-time workers.

273 Article 7 of the Part-time Convention. In *Zentralbetriebsrat der Landeskrankenhäuser Tirol v Land Tirol* Case C-486/08, [2010] ECR I-3527 (ECJ) the ECJ held at para 33 that it will be appropriate to apply the *pro rata temporis* principle (as contained in clause 4.2 of the Framework Agreement on Part-time Work) to annual leave of a part-time worker.

274 Item 13 of the Part-time Recommendation.

constitutes treatment that is on the whole not less favourable as is required by section 198C(3)(a) of the LRA.

The guidance that can be extracted for the research question stated in (c) under this paragraph 7.3 above relating to any further lessons that can be learnt from international labour law for the South African equal pay law relating to part-time employees under section 198C(3)(a) of the LRA is as follows. The ILO sources discussed under this heading entitles a part-time employee to be provided with the same terms and conditions of employment *in proportion* to their working hours, where this is applicable, and to this extent the reference to treatment that is on the whole not less favourable in section 198C(3)(a) does not reflect the purpose of the section which is to provide a part-time employee with the same terms and conditions of employment as a comparable permanent employee taking the part-time workers hours of work into account (*pro rata temporis*) where this is applicable. It is submitted that section 198C(3)(a) of the LRA should be amended to reflect this and reference to treatment that is on the whole not less favourable should accordingly be removed.

7.3.2 European Council Directive Concerning the Framework Agreement on Part-time Work (EU Part-time Work Directive)

The EU Part-time Work Directive,[275] which annexes the Framework Agreement on part-

[275] Council Directive 97/81/EC. Landau E and Beigbeder Y *From ILO Standards to EU Law: The Case of Equality between Men and Women at Work* (Leiden Boston 2008) state at 181 that "[t]he EU Directive on Part-time Work originated in a Framework Agreement on Part-time Work concluded with the social partners UNICE, CEEP and the ETUC." Landau E and Beigbeder Y *From ILO Standards to EU Law: The Case of Equality between Men and Women at Work* (Leiden Boston 2008) further state at 204 that there is complete harmony between the ILO Part-Time Work Convention and the EU Directive of 1997. They also state the following at 180: "It cannot be a coincidence that several provisions of Council Directive on Part-time Work 97/81/EC of 15 December 1997 echo the provisions of the ILO Convention on Part-time Work 1994. The definition of a part-time worker is identical in the two instruments, and other provisions, such as the scope of protection of part-time workers, the *pro rata temporis* principle, and even the exclusion of certain categories of workers, seem likewise to be inspired by the Convention." See also Jeffrey M "Not Really Going to Work? Of the Directive on Part-Time Work, 'Atypical Work' and Attempts to Regulate It" 1998 27(3) *ILJ* 193-213 for an extensive discussion of the EU Part-time Work Directive and the Framework Agreement on Part-time Work. Jeffrey M in the same article at 200 states the following with regard to the EU Part-time Work Directive (including the Framework Agreement thereon) and the ILO Convention and Recommendation on Part-time Work: "Nonetheless, the Directive is significantly weaker than both the supplementary standards of the

time work, is given effect to in the Framework Agreement.[276] The purpose of the Framework Agreement is to remove discrimination against part-time workers, *inter alia*.[277] A part-time worker is defined as an employee whose normal hours of work, calculated on a weekly basis or over a period of one year, are less than the normal hours of a comparable full-time worker.[278] A comparable full-time worker refers to a full-time worker in the same establishment having the same employment contract/relationship who does the same/similar work, with due regard to other considerations which may include seniority, qualifications and skills. If there is no comparable full-time employee then a comparison must be made having reference to the applicable collective agreement, if there is no collective agreement, then in accordance with national law or practice. Riesenhuber states, in the context of the Framework Agreement, that where there is no comparable full-time worker in the same establishment then the comparison should be carried out on a hypothetical basis. He further states that the hypothetical comparison should be used as applying to hypothetical workers of the same employer and not as applying to workers of different employers.[279] It is worth noting that the discussion in this paragraph relating to the purpose of the Framework Agreement on part-time work, the definition of a part-time worker and a comparable full-time worker is substantially the same as these issues as discussed under the Part-time Convention and Part-time Recommendation as stated in paragraph 7.3.1 above except that a comparable full-time worker under the Framework Agreement is restricted to the same establishment unlike

---

Recommendation and the basic standards of the Convention itself. The ILO requirements are more precise than those of the Directive; they are wider in scope (social security systems are expressly included); and they admit fewer —and more-tightly controlled — exceptions."

[276] Riesenhuber K *European Union Law: A Systematic Exposition* (Intersentia Cambridge 2012) states the following at 425: "The Part-time Work Directive (PTWD) merely serves to implement the Part-time Work Framework Agreement (PTWFA) of the European Social Partners of 6 June 1997, which is annexed to it and which contains the substantive provisions." Davies ACL *EU Labour Law* (Edward Elgar Publishing 2012) states the following at 189: "Ultimately as one would expect from a social dialogue measure, the directive on part-time work is a compromise. It achieves some protection for part-time workers, and promotes the availability of part-time work, but not to the extent that campaigners or unions might have wished. …However, now that the directive is in place, it is difficult to imagine the political will emerging to enact a more worker-protective measure." Davies ACL *EU Labour Law* (Edward Elgar Publishing 2012) further states at 183 that before the EU Part-time Work Directive was enacted, the European Court of Justice was already developing rights for part-time workers through the application of the sex equality law and this case law is not affected by the enactment of the EU Part-time Work Directive.

[277] Clause 1 of the Framework Agreement.

[278] Clause 3.1 of the Framework Agreement.

[279] Riesenhuber K *European Union Law: A Systematic Exposition* (Intersentia Cambridge 2012) 427.

the case under the Part-time Convention. This being the case no submissions relating to these issues are needed here as they have been made under paragraph 7.3.1 above.

The Framework Agreement further states that, with regard to employment conditions, part-time workers must not be treated in a less favourable manner than their comparable full-time workers for the sole reason that they work part-time unless the differential treatment can be justified on objective grounds. It further states that the principle of *pro rata temporis* shall apply where it is appropriate to do so.[280] *Pro rata temporis* means the calculation of benefits proportionate to working time.[281] Riesenhuber states that the application of the *pro rata temporis* principle is "appropriate" within the meaning of clause 4(2) of the Framework Agreement where the benefits are divisible and measured according to time (capable of being divided). He importantly states that divisible benefits often have an element of pay. He further states that benefits that are indivisible (not capable of being divided) for example access to institutions of the establishment (the cafeteria or library) are not capable of being granted *pro rata temporis*.[282] Substantial guidance has been extracted for the research question relating to the treatment of a part-

---

[280] Clauses 3.2, 4.1-4.2 of the Framework Agreement. Clause 4(1)-(2) of the Framework Agreement reads as follows: "1. In respect of employment conditions, part-time workers shall not be treated in a less favourable manner than comparable full-time workers solely because they work part time unless different treatment is justified on objective grounds. 2. Where appropriate, the principle of *pro rata temporis* shall apply." Davies ACL *EU Labour Law* (Edward Elgar Publishing 2012) states at 186 that clause 4 of the Framework Agreement is the "most important worker-protective right." Riesenhuber K *European Union Law: A Systematic Exposition* (Intersentia Cambridge 2012) states the following at 432 in relation to clause 4.1 of the Framework Agreement: "The wording of Clause 4(1) PTWFA ('unless') already hints at the burden of proof: It is for the employer to submit and prove any objective grounds. This is appropriate, given that the relevant grounds fall within the employer's sphere of knowledge." In *Zentralbetriebsrat der Landeskrankenhäuser Tirols v Land Tirol* Case C-486/08, [2010] ECR I-3527 (ECJ) the European Court of Justice held the following at para 25: "In view of the foregoing and the fact that the wording of Clauses 4 of the framework agreements on part-time work and on fixed-term work are, *mutatis mutandis*, identical, it must be concluded that the provisions of European Union law referred to by the national courts are unconditional and sufficiently precise for individuals to be able to rely upon them before a national court."

[281] Riesenhuber K *European Union Law: A Systematic Exposition* (Intersentia Cambridge 2012) states at 433 that the *pro rata temporis* principle means the calculation of benefits proportionate to working time. Thusing G *European Labour Law* (Verlag C.H. Beck oHG 2013) states the following at 85 in relation to the *pro rata temporis* principle: "The rule defines the equality principle in that the employer, as a rule, may only reduce a part-time employee's remuneration or payment in kind in proportion to the time worked (*pro-rata-temporis*)." Riesenhuber K *European Union Law: A Systematic Exposition* (Intersentia Cambridge 2012) states the following at 434: "The principle of pro rata temporis means – positively – that part-time workers should enjoy equal treatment compared to full-time workers, proportionate to the relative working time."

[282] Riesenhuber K *European Union Law: A Systematic Exposition* (Intersentia Cambridge 2012) 433.

time employee that is on the whole not less favourable and how the working hours of the part-time employee should be taken into account when providing her with such treatment as stated in (a) under paragraph 7.3 above from the Part-time Convention and Recommendation under paragraph 7.3.1 above. The following guidance from the Framework Agreement on this score can be added to this. It must be made clear in section 198C(3)(a) of the LRA that the *pro rata temporis* principle only applies to divisible benefits (benefits that are capable of being divided) and does not apply to indivisible benefits (benefits that are not capable of being divided). This means that an employer complies with the equal treatment of a part-time employee where it provides her with divisible benefits on a *pro rata* basis according to the *pro rata temporis* principle and in the case of indivisible benefits provides her with (access to) such benefits.

It is important to analyse below appropriate case law of the EU as it relates to equal treatment for part-time workers in order to extract further guidance for the research questions stated in paragraph 7.3 above. The importance of referring to appropriate case law of the EU is buttressed by the following statement made by Traversa:

> "one of the first commentators of Directive 97/81/EC [the EU Part-time Work Directive] observed that the prohibition of discrimination constituting the only enforceable rule provided in the Framework Agreement on part-time work had, in practice, already become effective well before the Directive came into force owing to the prior long-standing case law of the EC Court of Justice on indirect discrimination on grounds of sex."[283]

In *Deutsche Telekom AG v Schröder*[284] the European Court of Justice was faced with the question as to whether it constitutes indirect discrimination against women within the confines of the EU case law and Article 119 of the EC Treaty in circumstances where, part-time employees who work less than 18 hours per week are excluded from being eligible for a supplementary pension by gender-neutral wording and where approximately 95% of employees affected are female employees. The Court held that the pension

---

[283] Traversa E "Protection of Part-time Workers in the Case Law of the Court of Justice of the European Communities" 2003 19(2) *International Journal of Comparative Labour Law* at 220. See Traversa E "Protection of Part-time Workers in the Case Law of the Court of Justice of the European Communities" 2003 19(2) *International Journal of Comparative Labour Law and Industrial Relations* 219-241 for an extensive discussion of the European Court of Justice case law relating to part-time workers.

[284] Case C-50/96, [2000] ECR I-774 (ECJ).

scheme in question forms part of the pay received by the employees and comes within the scope of Article 119 of the EC Treaty and the exclusion of part-time workers from such a scheme may thus be found to be infringing Article 119 unless it can be justified on objective grounds unrelated to discrimination.[285] In *Rinner-Kuhn v FWW Spezial-Gebaudereinigung GmbH & Co. KG.*[286] the European Court of Justice was faced with the question as to whether Article 119 of the EEC Treaty and the Equal Pay Directive precludes national legislation which allows employers to exclude wages paid in the case of employee illness to those employees whose period of work do not exceed 10 hours a week or 45 hours a month (part-time employees) if that category of workers are predominantly women. The Court held that Article 119 of the EEC Treaty must be interpreted to preclude national legislation which allows employers' to exclude part-time employees from the continued payment of wages for absence due to illness if that measure affects a larger number of female employees than male employees unless the member state can prove that the national legislation is justified by objective factors which are unrelated to sex discrimination.[287] In *Bilka-Kaufhaus GmbH v Weber von Hartz*[288] one of the questions referred to the European Court of Justice was whether a staff policy which excludes part-time employees from participating in a pension scheme amounts to discrimination which is prohibited in Article 119 of the EEC Treaty in circumstances where the exclusion from the pension scheme affects a greater number of women than men. The Court held that Article 119 of the EEC Treaty is infringed where a staff policy excludes part-time employees from participating in its pension scheme in circumstances where the exclusion affects a greater number of women than men unless the exclusion can be explained by objective factors unrelated to discrimination.[289]

The guidance that can be extracted from these three cases for the research question stated in (c) under paragraph 7.3 above relating to any further lessons that can be learnt from international labour law for the South African equal pay law relating to part-time

[285] At paras 18, 27-29.
[286] Case 171/88, [1989] ECR 2757 (ECJ).
[287] At paras 5, 8, 16.
[288] [1986] IRLR 317 (ECJ).
[289] At paras 8, 24, 31.

employees under section 198C(3)(a) of the LRA is as follows. The exclusion of part-time employees from pay/benefits that are received by full-time employees infringes the equal pay principle unless it can be justified on objective grounds unrelated to discrimination. Based on this, it is submitted that it should be mentioned in relation to section 198C(3)(a) of the LRA that an employer is not allowed to exclude a part-time employee from any form of pay/benefits received by a comparable full-time engaged in the same/similar work unless there is a justifiable reason for doing so in accordance with section 198D(2) of the LRA.

In *Elsner-Lakeburg v Land Nordrhein-Westfalen*[290] the question before the European Court of Justice was whether it is incompatible with Article 141 of the EC Treaty and Article 1 of the Equal Pay Directive if both men and women teachers being full-time and part-time, are not granted remuneration for excess hours worked where that additional work does not exceed 3 hours in a calendar month. The Court remarked that part-time workers are entitled to have the same scheme that applies to permanent workers apply to them proportional to their working time. Part-time teachers worked 15 hours per week totalling 60 hours per month and permanent teachers worked 24,5 hours per week totalling 98 hours per month. In order for part-time teachers to be entitled to obtain remuneration for additional hours they had to work the same excess of 3 additional hours per month as their full-time counterparts. This led to the scenario where a full-time teacher had to work additional hours that equals 3% extra in order to be paid for additional working hours whereas a part-time teacher had to work additional hours that equals 5% extra in order to be paid for the additional work. The Court held that it is incompatible with Article 141 of the EC Treaty read with Article 1 of the Equal Pay Directive where national legislation which provides for remuneration for additional working hours in respect of both part-time and full-time teachers sets the same amount of additional working hours for both full-time and part-time teachers where that different treatment affects more women than men and where there is no objective reason which is unrelated to sex.[291] In *Schonheit v*

[290] [2005] IRLR 209 (ECJ).
[291] At paras 6, 9-10, 13, 17, 19.

Stadt Frankfurt am Main[292] the European Court of Justice acknowledged that where a pension has been reduced proportionately in the case of part-time work then the reduction *pro rata temporis* is not a measure which contains indirect discrimination contrary to the principle of equal pay. It stated that this type of reduction can objectively be justified on the basis that the reduced pension is consideration for less work. The Court then referring to the opinion of the Advocate General held that there is nothing in European Union law which prohibits a retirement pension from being proportionately calculated (*pro rata temporis*) in the case of part-time employment.[293]

The guidance that can be extracted from these two cases for the research question stated in (a) under paragraph 7.3 above relating to whether international labour law can provide guidance relating to how the working hours of the part-time employee should be taken into account when providing her with treatment that is on the whole not less favourable is as follows. Part-time employees are entitled to have the same scheme (for example relating to pay/benefits) that applies to comparable full-time employees apply to them proportional to their working time (*pro rata temporis*). Such reduction is objectively justified inherently because the reduced pay/benefit is consideration given for less work. There is nothing in the EU law which prohibits pay/benefits from being proportionately calculated (*pro rata temporis*) in the case of part-time employment. This should specifically be mentioned in relation to section 198C(3)(a) of the LRA.

In *Kowalska v Freie und Hansestadt Hamburg*[294] the European Court of Justice was faced with the question as to whether it is unlawful for a collective agreement to provide that only full-time employees are to receive a severance grant on the termination of their employment but this did not apply to part-time employees and where part-time employees consisted of a larger number of women than men. The Court held that a collective agreement that makes a difference in the total pay between two categories of employees, those who work a specified number of hours per week (full-time employees) and those

---

[292] [2004] IRLR 983 (ECJ).
[293] At paras 89-90.
[294] Case C-33/89, [1990] ECR I-2607 (ECJ).

that work less than the specified number of hours per week (part-time employees), leads to discrimination against female employees where a larger percentage of women than men work part-time. It further held that such an agreement infringed Article 119 of the EEC Treaty unless the difference in treatment of full-time and part-time employees can be justified by objective factors which are not related to discrimination on the grounds of sex.[295] The guidance that can be extracted from this case for the research question stated in (c) under paragraph 7.3 above relating to any further lessons that can be learnt from international labour law for the South African equal pay law relating to part-time employees under section 198C(3)(a) of the LRA is as follows. A collective agreement which excludes part-time employees from pay/benefits provided to comparable full-time employees infringes the equal pay principle unless the difference in treatment can be justified by objective factors which are not related to discrimination. This should specifically be mentioned in relation to section 198C(3)(a) of the LRA.

8. PROACTIVE MEASURES RELATING TO EQUAL PAY

The purpose and role of proactive measures is to place the responsibility of addressing, for example, unfair pay discrimination and/or disproportionate income differentials on public authorities or employers as they are in a position to bring about the change required.[296] The Equal Pay Guide states that the State in promoting the application of equal remuneration cannot be passive but has to take proactive measures, for example, by fulfilling its obligation to promote objective methods for job evaluations.[297] Article 3(1) of the Equal Remuneration Convention requires the State to take measures to promote the objective appraisal of jobs. One of the ways of doing this is to provide for the role of objective job evaluation in legislation and to also expressly prohibit discriminatory job evaluation systems and processes.[298]

---

295 At paras 7, 13.

296 Fredman S *Making Equality Effective: The role of proactive measures* (European Commission Directorate-General for Employment, Social Affairs and Equal Opportunities, 2009) at 3.

297 Oelz, Olney and Manuel Equal Pay Guide at 60-61.

298 Oelz, Olney and Manuel Equal Pay Guide at 82. The ILO Equal Remuneration General Survey states the following at para 151: “From various indications on the impact it has had in particular sectors of employment, however, it appears that the application of evaluation schemes has considerable potential for reducing pay differentials between men and women.” The EU Memorandum on Equal Pay provides

Article 4 of the Equal Remuneration Convention requires member states to co-operate with the employers' organisations for the purpose of giving effect to the Convention. The Discrimination Recommendation then importantly states that there must be continuing co-operation between the competent authorities, employers and workers in order to consider what further positive measures may be necessary in order to give effect to the principle of non-discrimination.[299] The EU Equal Treatment Directive states that member states must encourage employers to promote equal treatment for men and women in a planned and systematic manner and this can include encouraging employers to provide employees at regular intervals with appropriate information on the equal treatment for men and women. This information can include, the proportions of men and women at different levels of the organisation, their pay, pay differentials as well as measures to correct the situation and this should be done in cooperation with the employees' representatives.[300] The Equal Pay Guide states that proactive legislation that requires employers to assess gender pay gaps and to address unequal pay is an important measure to promote equal pay.[301]

The Equal Pay Guide further states that the State and the social partners (employers and unions) should promote equal pay in collective bargaining.[302] It is then no surprise that the Equal Remuneration Convention lists collective bargaining as one of the methods to be used in order to apply the principle of equal pay.[303] The two proactive measures

---

the following at 30: "However, in the courts of some Member States, when considering such schemes as justifications for pay differentials, there appears to be a reluctance to scrutinise to any great degree the operation of job evaluation or classification schemes to determine whether they are discriminatory. This is particularly so where the schemes appear to be analytical. There is also little doubt that applicants, their trade union representatives, lawyers, national labour inspectorates and indeed, in some instances specialist agencies themselves are unable to assist the courts in identifying gender discrimination in schemes owing to their own lack of understanding of the topic."

[299] Item 9 of the Discrimination Recommendation. The ILO Equal Remuneration General Survey states the following at para 152: "Despite the limitations of traditional job evaluation plans, it is evident that the process can do much to promote equal remuneration. By making the criteria of compensation explicit and by applying the criteria consistently, it is probable that pay differentials resulting from traditional stereotypes regarding the value of "women's work" will be reduced. In this regard, it should be stressed that the determination of criteria and their weightings are matters on which the co-operation between employers and workers is particularly important."

[300] Article 21(3)-(4) of the EU Equal Treatment Directive.

[301] Oelz, Olney and Manuel Equal Pay Guide at 85.

[302] Oelz, Olney and Manuel Equal Pay Guide at 61.

[303] Article 2(2)(c) of the Equal Remuneration Convention.

identified under this heading are: (a) job evaluation systems/processes; and (b) collective bargaining. These measures will be discussed in more detail hereunder with guidance being sought for the following research questions relating to proactive measures as called for in paragraph 13.11 of Chapter 2 of this thesis: (a) Which proactive measures relating to equal pay are mentioned under international labour law in order to strengthen the proactive measures listed in section 27(3) of the EEA; (b) What guidance is provided to employers under international labour law regarding the taking and implementing of proactive measures to equal pay in order to learn lessons for section 27(3) of the EEA; (c) Whether an employer is allowed under international labour law to address pay differentials by reducing the pay of employees (downward equalisation); and (d) Whether the progressive realisation of the right to equal pay is capable of featuring in a court order.

8.1 The role of job evaluation systems/processes

The ILO Equal Remuneration General Survey states that job evaluation (systems) is considered, in most countries, to be the most feasible manner of ensuring equal pay for men and women.[304] The Equal Remuneration Recommendation succinctly states the role of job evaluation systems as follows:

> "Where appropriate for the purpose of facilitating the determination of rates or remuneration in accordance with the principle of equal remuneration for men and women workers for work of equal value, each Member should, in agreement with the employers' and workers' organisations concerned, establish or encourage the establishment of methods for objective appraisal of the work to be performed, whether by job analysis or by other procedures, with a view to providing a classification of jobs without regard to sex; such methods should be applied in accordance with the provisions of Article 2 of the Convention."[305]

---

304 ILO Equal Remuneration General Survey at para 138. The ILO Equal Remuneration General Survey states the following at para 139: "Basically, job evaluation is a formal procedure which, through analysing the content of jobs, seeks to hierarchically rank those jobs in terms of their value, usually for the purpose of establishing wage rates. It is concerned with evaluating the job and not the individual worker." The EU Memorandum on Equal Pay states the following at 19: "Job evaluation or classification is a mechanism which can be used to determine the hierarchy or hierachies [hierarchies] of jobs in an organisation or group of undertakings as the basis for explaining a pay system."

305 Item 5 of the Equal Remuneration Recommendation. Chen CW *Compliance and Compromise: The Jurisprudence of Gender Pay Equity* (Martinus Nijhoff Publishers Leiden, Boston 2011) states the following at 76: "The legislative and policy package towards eliminating the gender wage differentials ought to include those basic elements provided in the Convention: … an objective appraisal of jobs based on the work to be performed." The ILO Equal Remuneration Survey states the following at para 150: "The more extensive use of job evaluation to apply the principle of the Convention has been accompanied by a greater concern among countries to eliminate subjective and discriminatory

Article 4 of the EU Recast Directive states that where a job classification system is used in order to determine pay then it must be based on the same criteria for both men and women and must be compiled in a manner that excludes any discrimination on the ground of sex.[306] The EU Pay Transparency Recommendation states that member states must promote the use of gender-neutral job evaluation methods especially in their capacity as employers in the public sector in order for pay discrimination based on pay scales to be addressed. They must encourage private employers to use such methods.[307] Chen states that job evaluation is an important part of determining the "value" of work. She further states that the most important element of a job evaluation method is that it should be gender-neutral and gender pay equity can only be promoted if the value of traditional female jobs are re-evaluated in order to realise that jobs such as, for example, nursing and childcare involves the exercise of valuable and complex skills.[308] In *Rummler v Dato-*

---

elements in the various methods. Thus, attention has been called to the need to ensure that the criteria for the appraisal of jobs do not undervalue the skills normally required for jobs that are in practice performed by women. In comparing the work of men and women, care should therefore be taken to balance the various job components to ensure a fair and just evaluation. It has been pointed out in this connection that even though a very large set of compensable factors may be developed, many systems omit or ignore job content characteristics that are disproportionately found in the work women tend to carry out. These include for example, job stress features such as doing repetitive tasks over a long period of time and working around people who are sick and disabled with no hope of recovery; and skill features such as creating a filing or record-keeping system. In addition, evaluators may confuse the content and responsibilities of a paid job with stereotypic notions about the qualities they consider to be intrinsic to women (especially in jobs relating to child care) and hence do not regard them as job-related skills. The criteria used for the evaluation of jobs must also be explicit; if the criteria are capable of different interpretations, discrimination may enter the process." The EU Memorandum on Equal Pay states the following at 20 with regard to job evaluation systems: "The aim of such schemes is to provide an acceptable rationale for determining the pay of existing hierarchies of jobs. They were and remain a management tool to achieve an acceptable rank order of jobs, implemented unilaterally or with varying degrees of participation by the workforce. Acceptability, consensus and the maintenance of traditional hierarchical structures are essential ingredients of such mechanisms."

306 The EU Memorandum on Equal Pay states the following at 22 with regard to Article 1 of the Equal Pay Directive which is now contained in Article 4 of the EU Recast Directive: "The Directive does not mandate the implementation of job classification by employers to determine pay. However, it prohibits gender discrimination where such systems are used by employers as a basis for determining pay rates."

307 Recommendation 11 of the EU Pay Transparency Recommendation.

308 Chen CW *Compliance and Compromise: The Jurisprudence of Gender Pay Equity* (Martinus Nijhoff Publishers Leiden, Boston 2011) 20. She further states at 20-21 that gender pay equity is closely linked to human dignity and it has the potential to be considered as forming part of customary international law. The ILO Equal Remuneration General Survey states the following at para 145: "From the point of view of promoting equal remuneration, several aspects of the methods generally used in job evaluation plans are considered problematic. Since job evaluation is an inherently subjective method in the final analysis, sex stereotyping can easily enter the process, resulting in an underevaluation of jobs held mainly by women. Factors and factor weights may be biased in that they do not give sufficient consideration to qualities regarded as essentially "feminine". Moreover, where job evaluation plans use market wage rates to establish the relative weights of factors, these weights will tend to reflect any

Druck GmbH[309] the European Court of Justice reiterated that the general rule is that Article 1(2) of the Equal Pay Directive requires that in order for a job classification system to be in accordance with the equal pay principle it has to be based on the same criteria for both men and women and it has to be compiled in such a manner so as to exclude any discrimination on the grounds of sex. It held that if a job classification system is used to determine remuneration then it must not be based on criteria that differs according to whether the work is to be done by a male or a female and must not be organised in a manner that generally discriminates against employees of one sex.[310]

It is interesting to note that the discussion thus far is substantially the same as the discussion of the use of job evaluation as a proactive measure under South African equal pay law in Chapter 2 of this thesis.[311] The following guidance can be extracted from the above international labour law sources in order to assist with the research question as stated in (a) under paragraph 8 above. It is submitted that the mentioning of an objective job evaluation system as a proactive measure to equal pay under international labour law strengthens the argument made in paragraphs 12 and 13.11 of Chapter 2 of this thesis to the effect that an objective job evaluation system should specifically be listed under section 27(3) of the EEA as a measure which can be taken to progressively reduce disproportionate income differentials and/or unfair discrimination in terms of section 6(4) of the EEA.

---

historical discrimination that exists in the labour market. Another difficulty is that many organisations use different job evaluation plans for different categories of workers (e.g., white-collar, blue-collar, clerical, technical and professional employees) thereby restricting comparisons between jobs in those categories. As will be seen in paragraphs 148, et seq., below, greater attention is being paid to overcoming such difficulties in the application of job evaluation. Certain other limitations, however, derive from the very nature of the method itself. Since job evaluation assumes that there are jobs whose individual content is definable and more or less fixed, there may be problems in introducing the method into some sectors which are moving towards making work organisation more flexible, both to avoid monotony and to be more readily adaptable to changes in production and technology. Furthermore, because job evaluation provides a basis for determining the rate for the job and not the amount actually earned by the worker, it may be said that the proclaimed equity concerns only part of the wage in many cases. In so far as any additional payments making up the individual worker's actual earnings are dependent on some appraisal of his performance or other factors unrelated to the evaluation of the job, the criteria used in these regards should also be chosen or re-examined in the light of the Convention, so as to eliminate any discrimination based on sex."

[309] Case 237/85, [1986] ECR 2110 (ECJ).

[310] At paras 12-13.

[311] See paragraph 12 of Chapter 2 of this thesis.

The ILO has published a Job Evaluation Guide which sets out how the process of job evaluation should be undertaken. It is important to analyse this guide in order to ascertain what would constitute an objective job evaluation process that is free from unfair discrimination. The Job Evaluation Guide states that pay equity[312] (equal pay for the same/similar work and work of equal value) must be achieved through a planned and structured process called a pay equity programme which should involve the following steps:

(a) Identifying female-dominated jobs and male-dominated jobs to be compared;
(b) Choosing a job evaluation method;
(c) Developing tools for data collection and gathering data on the jobs;
(d) Analysing the questionnaire results;
(e) Determining the value of jobs;
(f) Estimating wage gaps between jobs of equal value;
(g) Making pay adjustments so as to achieve pay equity.[313]

The steps listed in (a)-(f) represents a diagnosis as to whether or not a pay gap exists between jobs of equal value. If it is apparent that there is such a pay gap then the last step in (g) must be followed. These steps will briefly be discussed hereunder. It is clear from this that the choosing of an appropriate job evaluation method is but one of the factors in the pay equity programme. It should further be noted that a Pay Equity Committee must be established in the workplace in order to carry out the list of steps of the pay equity programme as discussed under paragraph 8.1.1 below.

It should be stated here that while an objective job evaluation system is recognised as a proactive measure under South African equal pay law in Chapter 2 of this thesis[314] to deal

---

[312] Chen CW *Compliance and Compromise: The Jurisprudence of Gender Pay Equity* (Martinus Nijhoff Publishers Leiden, Boston 2011) states the following at 19 with regard to what pay equity is: “Pay equity specifically refers to equal pay between men and women for equal work and work of equal value or comparable worth. It consists of two parts: equal pay for equal work or identical work, and equal pay for work of equal value or comparable worth.”

[313] Chicha M-T, Promoting Equity: Gender – Neutral Job Evaluation for Equal Pay: A Step by Step Guide (Geneva, International Labour Office 2008) at 5 (“Chicha Job Evaluation Guide”).

[314] Paragraphs 12 and 13.11 of Chapter 2 of this thesis.

with unequal pay, it does not mention the use of a pay equity programme which is a planned and structured process in order to address unequal pay and neither does it mention the establishment of a Pay Equity Committee in order to carry out such programme as is the case under international labour law. The following guidance can be extracted from the above international labour law as read with the discussion below under this heading in order to assist with the research question as stated in (b) under paragraph 8 above. It is submitted that a pay equity programme with all its steps as well as the establishment of a Pay Equity Committee as discussed here is a comprehensive manner of ensuring equal pay in a proactive manner and to this end, it should be used in South African equal pay law and accordingly be mentioned in the Equal Pay Code where it deals with objective job evaluation systems as is discussed under paragraphs 12 and 13.11 of Chapter 2 of this thesis.

8.1.1 The establishment of a Pay Equity Committee

The Job Evaluation Guide suggests that a Pay Equity Committee be established in the workplace in order to carry out the list of steps of the pay equity programme. In a large organisation the Committee can be highly structured involving clearly defined responsibilities and procedures. In the case of a smaller organisation a small Committee can be established for example, one employer representative and two employee representatives. The work of Pay Equity Committees will be made easier if government can provide them with information documents relating to how they should go about their work.[315] The Pay Equity Committee should be composed of members who have direct knowledge of the main jobs to be evaluated, those who are willing to eliminate gender bias and employees should make up at least half of the Committee. It is essential that the Committee members receive basic training which should include the dynamics of wage discrimination as well as the methodological aspects related to implementing pay

[315] Chicha Job Evaluation Guide at 9.

equity.[316] They should also be provided with complete and relevant information in order for them to be in a position to properly do the required work.[317]

8.1.2 Identifying female-dominated jobs and male-dominated jobs to be compared

It is important that the job comparison is linked to the ground of discrimination that is sought to be addressed. If the ground of discrimination in question is sex in the context of correcting wage gaps due to discrimination on the basis of sex then the pay levels of female-dominated jobs should be compared with the pay levels of male-dominated jobs. If, for example, the ground of discrimination in question involves ethnic origin, then the jobs performed by ethnic persons must be compared with those persons who are not ethnic.[318] The job comparison can thus be adapted to address any ground of discrimination provided that it compares the jobs of employees with the certain characteristics to those employees who do not have those characteristics. The Job Evaluation Guide states that the sequence for comparing the jobs should be as follows:

---

[316] Chicha Job Evaluation Guide at 10-11. The Job Evaluation Guide at 11 states what should be dealt with under these two components as follows: "The purpose of the first component is to help identify the prejudices and stereotypes which can appear in different steps of the programme and should deal with the following points: the factors which account for wage discrimination; the influence of prejudices and stereotypes on job perception; the influence of prejudices and stereotypes on evaluation methods; the influence of prejudices and stereotypes on the compensation systems. The purpose of the second component is to help the representatives carry out the process in a rigorous manner and understand the proposals made by internal or external experts. In particular it should cover: the evaluation method; the data collection procedures; the evaluation procedures; the components of total compensation; the values and the mission of the enterprise."

[317] Chicha Job Evaluation Guide at 12. The Job Evaluation Guide at 12 states the types of information as follows: "Information intended for members of Committees: In order for Committee members to perform their tasks, the employer must provide them with the information they need, in particular that related to staff, their status, the components of their total compensation schemes, any changes that take place in the enterprise once pay equity has been introduced, etc. Given the sensitive nature of certain information, those in charge of implementing the process must undertake in writing to guarantee its confidentiality. This information should only be used in the context of pay equity processes. Information intended for employees: It is essential that employees be periodically informed of the main steps achieved, for example: The establishment and composition of the Committee; The work plan schedule; The jobs to be evaluated; Data collection on the jobs to be evaluated; The results of the evaluation; The pay adjustments. Whether pertaining to the value assigned to jobs or to pay adjustments, none of this information should be personal: the data should be communicated in terms of jobs and not in terms of employee." The EU A Code of Practice on the implementation of equal pay for work of equal value for men and women of 1996 states the following at 8: "… negotiators at all levels, whether on the side of the employers or the unions, who are involved in the determination of pay systems, should carry out an analysis of the remuneration system and evaluate the data required to detect sexual discrimination in the pay structures so that remedies can be found."

[318] Chicha Job Evaluation Guide at 17.

(a) compile a list of jobs in the enterprise; (b) ascertain whether the jobs are male or female dominated; (c) make sure that the criteria utilised to determine predominance is rigorous; (d) make sure that there is no gender bias; and (e) if there are no male comparators then determine which strategy to use.[319]

8.1.3 Choosing a job evaluation method

The aim of a job evaluation method is to evaluate the characteristics of the jobs in an organisation based on common criteria in order to establish the value of the jobs. Job evaluation methods ensure that female-dominated and male-dominated jobs which are of equal value attract the same pay and this then achieves the goal of pay equity. A job evaluation should be explained in the sense of the factors and sub-factors used in the method as well as how the factors should be interpreted. The most appropriate job evaluation method for achieving pay equity is the point method. This method includes the following four basic factors with which to evaluate the value of the work: (a) qualifications; (b) effort; (c) responsibility; and (d) the conditions under which the work is performed. These factors are considered sufficient to evaluate all the jobs in an organisation regardless of the sector.[320]

---

[319] Chicha Job Evaluation Guide at 17.

[320] Chicha Job Evaluation Guide at 25-27. Equality at work: Tackling the challenges: Global Report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work, Report of the Director-General, International Labour Conference, 96th Session (ILO Geneva 2007) states the following at para 283: "Achieving pay equity requires comparing and establishing the relative value of two jobs that differ in content, by breaking jobs down into components or "factors" and "sub-factors" and assigning points to them. According to analytical job evaluation methods, such factors generally include skills/qualifications, responsibility, effort and working conditions. Two jobs that are found to have the same numerical value are entitled to equal remuneration. Job evaluation is concerned with the content of the job and not with the characteristics or the performance of the persons doing the job." The ILO Equal Remuneration General Survey states the following at para 141 regarding the point rating method of job evaluation: "The point rating method has certain advantages over the two non-analytical methods mentioned above: it permits a systematic comparison of jobs by employing explicit and clearly defined factors, thereby reducing the latitude for subjective decisions. In point rating systems, a set of factors is selected, generally based on an examination of bench-mark jobs. The factors are commonly variants of skill, effort, responsibility and working conditions, though the available choice of factors is very wide. For this reason the technique may be adapted to suit the target population (e.g. manual or clerical posts). A total point value or weight is assigned to each factor; and the jobs are evaluated on each factor to obtain a hierarchy. This method is particularly suitable for a large organisation which seeks to harmonise wages and working conditions in its various departments or establishments. It is, in fact, the most frequently used method in the majority of countries. It should be noted that, in this method, the selection and definition of factors is a critical step and care should be taken so that selected

The four factors should be broken down into subfactors. The subfactors for "qualifications" (a above) are: (i) academic or vocational training certified by a diploma; (ii) paid work experience in the labour market; (iii) informal training; and (iv) volunteer work. The subfactors for "effort" (b above) are: (i) physical effort; (ii) emotional effort; and (iii) mental effort. The subfactors for "responsibility" (c above) are: (i) responsibility for people; (ii) responsibility for human resources; (iii) responsibility for confidentiality; (iv) financial responsibility; and (v) responsibility for material resources. The subfactors for "the conditions under which the work is performed" (d above) are: (i) physical environment; and (ii) psychological environment.[321] It should be noted that the conversion of the value (level) of the subfactors into points is dealt with under paragraphs 8.1.5 and 8.1.6 below.

8.1.4 Developing tools for data collection and gathering data on the jobs

The next step after choosing an appropriate job evaluation method is to collect information on the content of each of the jobs in an organisation based on the factors selected. A structured questionnaire is an example of a good data collection tool. The first part of the questionnaire must state what the objective of the questionnaire is as well as instructions on completing the questionnaire. The second part of the questionnaire should require the employees to identify their positions and describe their tasks. The third part of the questionnaire should deal with the requirements of the job.[322] It is important to ensure that questionnaires are designed to be rigorous in the sense that it should comply with the following conditions: (a) the questions should relate to the requirements of the job instead of the characteristics of the employee; (b) questions relating to the perceptions of the employee should be avoided; (c) questions should not involve more than one component so as to avoid difficulties with interpreting the answer; and (d) questions which are unclear should be avoided.[323]

---

factors are free from sex bias or other forms of implicit discrimination." The EU Memorandum on Equal Pay states the following at 20: "The more formal types of schemes, particularly analytical schemes, may be more objective than non-analytical classification of jobs."

[321] Chicha Job Evaluation Guide at 31, 33 and 35.

[322] Chicha Job Evaluation Guide at 43-46.

[323] Chicha Job Evaluation Guide at 50-51. The EU Memorandum on Equal Pay states the following at 21: "… analytical schemes can be used to improve the mechanisms by which work is assessed in that they require the collection and analysis of data about the content of work to be consistent. The articulation

8.1.5 Analysing the questionnaire results

The questionnaire results should then be analysed to establish the following for each of the jobs: (a) an identification record; (b) a description of the tasks; (c) a profile indicating the level assigned to that job for each evaluated sub-factor. Once the job profile is established then the level allocated to each of the sub-factors should be converted into points using a weighting grid. The total number of points for a job will then represent its value.[324]

8.1.6 Determining the value of jobs

Under this step, a weighting grid must be constructed and jobs must be assigned points. Once this has been completed then the compensation for jobs of equal value can be compared.[325]

8.1.7 Estimating wage gaps between jobs of equal value

The aim of this step is to ensure that jobs of equal value receive equal pay. Where an employer finds discriminatory wage gaps then it should take steps to correct this. It is prudent to set out the sequence of this step as follows: (a) establish the basic salary of the jobs to be compared; (b) establish flexible pay; (c) make sure that there is no discrimination bias in the flexible pay between jobs of equal value; (d) determine cash value benefits; (e) make sure that there is no discriminatory bias in the cash value benefits between jobs of equal value; (f) estimate the pay gaps; (g) harmonise the pay structures for jobs of equal value; and (h) provide for the payment of wage adjustments.[326]

---

of criteria and factors means that evaluators may have to justify decisions about the ranking of jobs in a more objective way rather than relying on subjective opinion."

[324] Chicha Job Evaluation Guide at 57.

[325] Chicha Job Evaluation Guide at 69.

[326] Chicha Job Evaluation Guide at 83.

8.1.8 Making pay adjustments so as to achieve pay equity

It is important to note that pay equity is not achieved by decreasing the pay for male-dominated jobs to bring it in line with the pay for female-dominated jobs which are of the same value. Pay equity is rather achieved by increasing the pay for the female-dominated jobs to the level of pay for the male-dominated jobs.[327] The pay for the female-dominated jobs must be increased to the same level as that of the male-dominated jobs. A pay increase which brings the pay of females closer to that of males is not sufficient because pay discrimination cannot be eliminated if a wage gap continues to exist and persist. The Guide recognises that there might be hardship on employers to implement the increase immediately and in this regard it allows the employer to gradually increase the pay of the female-dominated jobs to the point where pay equity is reached.[328] It is submitted that this recognition of the Job Evaluation Guide that there might be instances where an employer will not be able to correct unequal pay immediately and should then be allowed to correct same over a period of time strengthens the submission made in paragraphs 12 and 13.11 of Chapter 2 of this thesis that the progressive realisation of the right to equal pay is capable of featuring in a court order in relation to the guidance sought for the research question as stated in (d) under paragraph 8 above.

8.1.8.1 Can equal pay be achieved by reducing pay?

The following materials, although, not contained in the Job Evaluation Guide under the heading of paragraph 8.1.8, is connected therewith and deals with the issue relating to whether an employer, in progressively reducing pay differentials, is allowed to reduce the pay of the higher paid employees to that of the lower paid employees in order to achieve equal pay or whether it is confined to increasing the pay of the lower paid employees in order to bring it in line with the pay of the higher paid employees.

---

[327] Chicha Job Evaluation Guide at 87.
[328] Chicha Job Evaluation Guide at 89.

In *Smith v Avdel Systems Ltd*[329] one of the questions referred to the European Court of Justice for a preliminary ruling was whether it is compatible with Article 119 of the ECC Treaty for an occupational scheme, which contains different retirement ages for male and female employees (60 years for females and 65 years for males), to eliminate this discrimination by the employer adopting a uniform pension age of 65 to be applied to both male and female employees. The occupational scheme instead of granting male employees the same advantage as that enjoyed by female employees by lowering their retirement age to 60 years decided to rather raise the retirement age of female employees to 65 and this resulted in a less favourable position for female employees. The point, which arose from this, was whether it is allowed when seeking to achieve equality, to take advantages away from the favoured class (female employees). The European Court of Justice held that where a court finds that there is discrimination in pay, and where the occupational scheme has not adopted measures for bringing about equal treatment, then the only manner of complying with Article 119 of the EEC Treaty is to provide the persons in the disadvantaged class with the same advantages that are enjoyed by those persons in the favoured class. It further held that it is, however, not contrary to Article 119 of the EEC Treaty to introduce measures which reduces the advantages of the persons previously favoured in order to achieve equal treatment. Article 119 only requires equal pay for equal work (work of equal value) without setting the specific level of pay.[330]

[329] [1994] IRLR 616 (ECJ).

[330] At paras 9, 13-14, 17, 21. The EU Memorandum on Equal Pay states the following at 31: "The principle of "levelling-up" (extension of the more favourable provision to the disadvantaged group in cases where discrimination has been determined) has been enunciated in a number of cases before the Court. In general terms, the Court considers that in the face of a discrimination contrary to Community law, the group set at a disadvantage by that discrimination is entitled to be treated in the same manner, and to have the same rules applied to it, as the others [other] recipients, since those rules remain the only valid point of reference." In *Ruzius-Wilbrink v Bedrijfsvereniging Voor Overheidsdiensten* Case C-102/88, [1989] ECR 4311 (ECJ) the European Court of Justice held that following at para 20: "It is apparent from the judgment of 4 December 1986 in Case 71/85 *Netherlands v Federatie Nederlandse Vakbeweging* [1986] ECR 3855 that, in a case of direct discrimination, women are entitled to be treated in the same manner, and to have the same rules applied to them, as men who are in the same situation, since, where the directive has not been correctly implemented, those rules remain the only valid point of reference. By analogy, in a case of indirect discrimination such as that in the main proceedings, the members of the group placed at a disadvantage, be they men or women, are entitled to have the same rules applied to them as are applied to the other recipients of the allowance."

The finding by the European Court of Justice in *Smith* that it is not contrary to the principle of equal pay for an employer to introduce a measure which reduces the advantages of employees in the favoured class in order to achieve equal pay, is not shared by the ILO. The ILO Job Evaluation Guide states that pay equity (equal pay for the same/similar work and work of equal value) cannot be achieved by reducing the pay for male-dominated jobs to bring it in line with the pay for female-dominated jobs. It further states that pay equity is achieved by increasing the pay for the female-dominated jobs to the level of pay of the male dominated jobs.[331] The South African Equal Pay Code, likewise, does not align with the finding of pay reduction in order to achieve equal pay as stated in *Smith*. The Equal Pay Code states that unequal pay must be corrected without reducing the pay of employees in order to bring about equal pay.[332] It is submitted that the finding by *Smith* allowing for the reduction of pay in order to achieve equal pay will not assist the equal pay legal framework in South Africa. This view is strengthened by the fact that the finding is contrary to the view expressed against pay reduction by the ILO. Furthermore, it is submitted that to allow pay reduction in order to achieve equal pay is actually to allow an employer to escape its equal pay obligations and results in those employees that were paid less to continue being paid less and those who were paid more to suffer a reduction in salary. This type of equal pay achievement actually does the opposite of achieving equal pay – it allows an employer to benefit from unequal pay. Simply put, it is submitted that this reduction measure is the antithesis of achieving equal pay.

The following guidance can be extracted from the discussion of international labour law in paragraphs 8.1.8 and 8.1.8.1 hereof in order to assist with the research question as stated in (c) under paragraph 8 above. An employer is not allowed under international labour law to address pay differentials by reducing the pay of employees (downward equalisation). Based on this, it is submitted that an employer is not allowed under section 27 of the EEA to progressively reduce pay differentials by reducing the pay of employees (downward equalisation) and is confined to reduce same by progressively increasing the

---

[331] See para 12.1.8 of this Chapter.
[332] Item 8.1.8 of the Equal Pay Code. See para 12.1 of Chapter 2 of this thesis.

pay of the underpaid employees to a point where equal pay is reached (upward equalisation). This should specifically be mentioned in section 27 of the EEA.

8.2 The role of collective bargaining

Collective bargaining has an important role to play in addressing unequal pay. The EU Transparency Recommendation states that member states should ensure that the principle of equal pay is addressed in the collective bargaining process.[333] The Report on the EU Transparency Recommendation states that an important way of realising wage transparency and addressing the gender pay gap is through encouraging or mandating discussions on equal pay in the collective bargaining process.[334] Article 2(c) of the Equal Remuneration Convention recognises the importance of collective bargaining in addressing unequal pay by stating that the principle of equal pay can be applied by means of collective agreements between the employer and employees. The ILO Equal Remuneration General Survey states that the respect shown for collective bargaining in the Equal Remuneration Convention carries with it a shared responsibility in the application of the equal pay principle for both the employers' and workers' organisations concerned.[335] It further states that significant progress in implementing the principle of equal pay cannot be achieved without the active participation of both employers and workers.[336] The Discrimination Recommendation also states that each member state must pursue a national policy to prevent discrimination in employment and one of the means of doing so is by concluding collective agreements between employers and employees. The Recommendation further states that parties must respect the principle of equality of treatment in employment and occupation during collective negotiations and they must ensure that collective agreements which are concluded do not contain provisions which are discriminatory in respect of terms and conditions of employment.[337]

---

333 Recommendation 6.

334 Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee: Report on the Implementation of Commission Recommendation on Strengthening the Principle of Equal Pay between Men and Women through Transparency (Brussels 2017) at 6.

335 ILO Equal Remuneration General Survey at para 31.

336 ILO Equal Remuneration General Survey at para 132.

337 Item 2(e) of the Discrimination Recommendation.

The Equal Pay Guide notes that collective bargaining is one of the main ways of settling terms and conditions of employment which includes pay. Collective bargaining is thus vital in promoting equal pay. It has also been identified as a means to reduce the gender pay gap. Even where the principle of equal pay is given effect to in legislation, collective agreements can provide better monitoring and enforcement as well as directly addressing pay inequalities through the adjustment of pay levels.[338] The Guide goes on to mention that the State can promote equal pay through collective bargaining by, *inter alia*, providing training on equal pay issues including job evaluation methods.[339]

The following guidance can be extracted from the above international labour law sources in order to assist with the research question as stated in (b) under paragraph 8 above insofar as guidance is sought for collective bargaining as a measure to address unequal pay: (a) the principle of equal pay must be addressed/discussed in the collective bargaining process; (b) employers and trade unions must respect the principle of equal treatment (equal pay) during collective negotiations; (c) both employers and unions are responsible (have a shared responsibility) for the application of the equal pay principle; (d) significant progress in implementing the principle of equal pay cannot be achieved without the active participation of both employers and employees (trade unions); (e) employers should provide training on equal pay issues including job evaluation methods (to those involved in the collective bargaining process); (f) collective agreements can directly address pay inequalities through the adjustment of pay levels and this provides better monitoring and enforcement of the equal pay principle; and (g) employers and trade unions must ensure that collective agreements do not contain provisions which are discriminatory in respect of terms and conditions of employment.

[338] Oelz, Olney and Manuel Equal Pay Guide at 54. Chen CW *Compliance and Compromise: The Jurisprudence of Gender Pay Equity* (Martinus Nijhoff Publishers Leiden, Boston 2011) states the following at 55 with regard to the Equal Remuneration Convention: "Article 2 of the Convention provides that collective agreements are instrumental in implementing gender pay equity. These agreements usually cover a large number of female workers represented by unions and therefore directly affect the interest of women workers."

[339] Oelz, Olney and Manuel Equal Pay Guide at 56-57.

Based on this, it is submitted that the factors listed in (a)-(g) provide valuable guidance on how to use collective bargaining as a means to progressively reduce disproportionate income differentials and/or unfair discrimination as contemplated in section 27(3)(a) of the EEA. It is submitted that it is better placed for the factors listed in (a)-(g) to be included in the Code of Good Practice: Collective Bargaining, Industrial Action and Picketing[340] under Part B thereof which deals with collective bargaining and for section 27(3) of the EEA to refer to this Code of Good Practice in relation to the factors listed in (a)-(g) in order to provide guidance on how to go about progressively reducing disproportionate income differentials and/or unfair discrimination by using collective bargaining as a measure to do so. It is further submitted that the factor listed in (g) to the effect that collective agreements must not contain provisions which are discriminatory in respect of terms and conditions of employment must specifically be mentioned in section 23 of the LRA which deals with the legal effect of collective agreements. In order to give this provision teeth in section 23 of the LRA, it should be stated that any provision in a collective agreement which is unfairly discriminatory in respect of terms and conditions of employment shall be null and void (of no force and effect).[341]

9. CONCLUSION

This Chapter has involved a lengthy discussion and analysis of the international legal framework regulating equal pay with the focus being on seeking to assist with answering the research questions to the extent called for in paragraphs 13.1-13.11 of Chapter 2 of this thesis. It is necessary to hereunder summarise the guidance extracted from international labour law as sought for in relation to the research questions.

---

340 The Code of Good Practice: Collective Bargaining, Industrial Action and Picketing *GG* No 42121 of 19 December 2018.

341 See the discussion regarding the prohibition of pay discriminatory provisions in collective agreements in para 6.7 above.

9.1 Terms and conditions of employment

The guidance sought for the research questions as stated in paragraph 13.1 of Chapter 2 of this thesis and repeated under paragraphs 4.1 and 4.1.1 above relating to the phrase "terms and conditions of employment" in section 6(4) of the EEA is as follows: (a) Whether submissions can be made regarding the inclusion of payments set out in the lists of payments in the BCEA Schedule under the phrase "terms and conditions of employment" in section 6(4) of the EEA based on international labour law; and (b) Whether international labour law can contribute further towards addressing the issue of what can fall within the phrase "terms and conditions of employment" under section 6(4) of the EEA.

The following guidance has been extracted in relation to (a) above:

(a) It is submitted that the following payments in the lists of payments in the BCEA Schedule fall under the phrase "terms and conditions of employment" in section 6(4) of the EEA based on international labour law: (i) a housing or accommodation allowance including housing or accommodation provided as a benefit in kind; (ii) a car or travel allowance including a car being provided; (iii) employer's contributions to medical aid, pension,[342] provident fund or similar schemes; (iv) employer's contributions to death benefit schemes (which may include funeral benefits); (v) gratuities (for example, tips received from customers); (vi) share incentive schemes; and (vii) discretionary payments not related to an employee's hours of work or performance (for example, a discretionary profit-sharing scheme);[343] and (viii) a relocation allowance;[344] and

---

342 See also para 4.1.1(i) above. See para 4.1.1(i) above where it is argued that the following aspects relating to a pension (retirement) scheme should be listed as examples of what has been found under international labour law to fall within the ambit of pay which can assist with determining whether such payments can fall within the ambit of "terms and conditions of employment" in section 6(4) of the EEA: (i) a supplementary retirement scheme; (ii) contributions made by an employer to a retirement scheme for the benefit of an employee by way of an addition to his/her salary; (iii) a bridging pension (paid to employees who take early retirement due to ill health to compensate them for loss of income until they obtain a (state) pension; and (iv) a survivor's pension.

343 See para 4.1 above.

344 See para 4.1.1(g) above.

(b) It is submitted that the following lists of payments in the BCEA Schedule whilst not mentioned under the ambit of pay (terms and conditions of employment) under international labour law are still capable of falling within the ambit of "terms and conditions of employment" under section 6(4) of the EEA provided that they arise out of or are connected to the employment relationship which is the test used in international labour law to determine whether or not a payment (working conditions) falls within the ambit of pay (or working conditions) for the purpose of equal pay (terms and conditions): (i) any cash payments made to an employee; (ii) any other payment in kind received by an employee; (iii) any cash payment/payment in kind provided in order to enable the employee to work; (iv) an equipment (tool) allowance; (v) an entertainment allowance; and (vi) an education allowance.[345]

<u>The following guidance has been extracted in relation to (b) above:</u>

(a) It is submitted that the test used in international labour law to determine whether a payment falls within the definition of remuneration, which test is, whether the payment arises out of or is connected with the worker's employment should be used to determine whether terms and conditions (including pay) fall within the phrase "terms and conditions of employment" under section 6(4) of the EEA where there is a dispute regarding this;[346]

(b) It is submitted that whilst the elements of remuneration in the form of the basic wage, minimum wage, ordinary wage, overtime pay,[347] sick leave pay and maternity leave pay as contained under international labour law are not found in the lists of payments in the BCEA Schedule, these forms of remuneration are found in the Integration of Employment Equity Code as rates of pay, overtime rates, sick leave (which is normally paid leave) and maternity leave (which normally attracts maternity leave pay) and thus strengthens the submission made in Chapter 2 of this thesis that these forms of remuneration fall within

[345] See para 4.1.2 above.
[346] See para 4.1 above; See the discussion of *Jämställdhetsombudsmannen v Örebro läns landsting* under para 4.1.1(a) above; See paras 4.1.1(b), 4.1.1(c), 4.1.1(d), 4.1.1(e), 4.1.1(f) and 4.1.1(i) above.
[347] See also the discussion of *Elsner-Lakeburg v Land Nordrhein-Westfalen* under para 4.1.1(a) above.

the ambit of the phrase "terms and conditions of employment" under section 6(4) of the EEA;[348]

(c) It is submitted that the following list of payments under international labour law serves as an example of what has been found to fall within the ambit of pay (and working conditions) which can assist with determining whether such payments can fall within the ambit of "terms and conditions of employment" in section 6(4) of the EEA (and it should be listed as such): (i) a monthly salary supplement;[349] (ii) inconvenient-hours supplement;[350] (iii) annual bonus (Christmas bonus);[351] (iv) redundancy payment;[352] (v) additional redundancy payment;[353] (vi) termination payments (such as a bridging allowance and severance grant);[354] (vii) loss of earnings, overtime pay and paid leave all received as a result of an employee attending a training course related to his/her employment;[355] (viii) entitlement to a pay increase for an employee who is on maternity leave;[356] (ix) a travel concession granted to spouses/partners and a special travel facility granted for spouses and dependent children;[357] (x) a subsidised nursery scheme;[358] and (xi) breastfeeding leave;[359] and

(d) It is submitted that the requirement under international labour law to the effect that equal pay must be applied to each of the elements of remuneration and not on the basis of a comprehensive assessment of pay should be applied to equal pay (terms and conditions) claims under section 6(4) of the EEA.[360]

---

348 See para 4.1 above; See the discussion of *Rinner-Kuhn v FWW Spezial-Gebaudereinigung GmbH* under para 4.1.1(a) above; See para 4.1.1(f) above.
349 See the discussion of *Brunnhofer v Bank der osterreichischen Postsparkasse* under para 4.1.1(a) above.
350 See the discussion of *Jämställdhetsombudsmannen v Örebro läns landsting* under para 4.1.1(a) above.
351 See para 4.1.1(b) above.
352 See para 4.1.1(c) above.
353 See para 4.1.1(c) above.
354 See para 4.1.1(d) above.
355 See para 4.1.1(e) above.
356 See para 4.1.1(f) above.
357 See para 4.1.1(h) above.
358 See para 4.1.1(j) above.
359 See para 4.1.1(k) above.
360 See para 4.1.1(c) above.

9.2 The Same Employer

The following guidance sought from international labour law regarding the strengthening of the answers given relating to the phrase "the same employer" in section 6(4) of the EEA in paragraph 13.2 of Chapter 2 of this thesis has been extracted:

(a) It is submitted that a better understanding of international labour law is that an employee is confined to compare her terms and conditions with that of a comparator employee of the *same employer*;[361] and

(b) The single source rule developed by the European Court of Justice is a useful test to use in order to determine whether the employer against whom an equal pay claim is launched falls within the ambit of the phrase "the same employer" in section 6(4) of the EEA for the following reasons: (i) the test does not allow another employer who is not connected to the claimant employee's employer to fall within the ambit of the phrase "same employer" as it looks for the body who/which is responsible for the pay difference; and (ii) the test has the ability to deal with difficulties which may arise as to who the employer is for the purpose of "the same employer" under section 6(4) of the EEA by only looking for the body who/which is responsible for the pay difference in question. Based on this, it is submitted that the single source rule test should be used in order to determine whether an employer falls within the ambit of the phrase "the same employer" under section 6(4) of the EEA.[362]

9.3 The Comparator (employees of the same employer)

The guidance sought from international labour law for the research questions relating to the phrase "employees of the same employer" in section 6(4) of the EEA (which relates to the choosing of a comparator) as called for in paragraph 13.3 of Chapter 2 of this thesis is as follows: (a) How the issue of contemporaneous employment of the claimant and

[361] See para 4.2 above.
[362] See para 4.2 above.

comparator which relates to the use of a predecessor or successor comparator is dealt with under international labour law; (b) Whether the arguments put forth relating to the use of a hypothetical comparator based on South African law can be supported by international labour law; and (c) Whether the argument put forth relating to the use of a subordinate employee, who is engaged in work of lesser value than the equal pay claimant but who earns higher pay, as a comparator based on South African law can be supported by international labour law.

The following guidance has been extracted in relation to (a) above:

(a) International labour law does not deal with the issue of whether a successor comparator can be an appropriate comparator in an equal pay claim and this question thus remains;[363] and

(b) It is submitted that the phrase "employees of the same employer" under section 6(4) of the EEA should be interpreted to include the use of a predecessor comparator as such interpretation would be in accordance with international labour law. The inclusion of a predecessor comparator under section 6(4) of the EEA will also provide an equal pay claimant who can only prove unfair pay discrimination (including terms and conditions) by comparing her situation to that of a predecessor employee with the opportunity to do so where she would otherwise be unable to launch an equal pay claim in such circumstances.[364]

The following guidance has been extracted in relation to (b) above:

It is submitted that the recognition of the use of a hypothetical comparator under international labour law supports and strengthens the arguments put forth relating to the

[363] See para 4.3.1 above.
[364] See para 4.3.1 above.

use of a hypothetical comparator under section 6(4) of the EEA in different scenarios based on South African law.[365]

The following guidance has been extracted in relation to (c) above:

It is submitted that the recognition under international labour law regarding the use of a comparator who is engaged in work of lesser value than the claimant but who receives higher pay supports and strengthens the argument put forth relating to the use of a subordinate employee, who is engaged in work of lesser value than the equal pay claimant but who earns higher pay, as a comparator under section 6(4) of the EEA based on South African law.[366]

The following further guidance has been extracted:

The issue of dispensing with the need for a comparator in an equal pay claim in certain circumstances has not been dealt with in South African equal pay law. An equal pay claimant is allowed under international labour law to prove her equal pay claim, in the total absence of a comparator, by relying on legislative provisions or collective agreements where the unfair discrimination can be identified on the basis of a purely legal analysis arising from such legislative provisions or collective agreements. Based on this, it is submitted that the phrase “employees of the same employer” under section 6(4) of the EEA should be interpreted to include the allowance of an equal pay claimant to prove her equal pay claim by solely relying on legislative provisions, collective agreements including any other sources, in the total absence of a comparator, where the unfair pay discrimination can be identified on the basis of a purely legal analysis of such legislative provisions, collective agreements or other sources.[367]

365 See para 4.3.2 above.
366 See para 4.3.3 above.
367 See para 4.3.4 above.

9.4 Same work, substantially the same work, work of equal value

The following guidance can be extracted from international labour law in order to learn lessons for the same work and substantially the same work under section 6(4) of the EEA as called for in paragraphs 13.4 and 13.5 of Chapter 2 of this thesis:

(a) The classification of employees being in the same job category is not sufficient on its own to find that they perform the same work and has to be corroborated by factors which are based on the activities which are actually performed by the employees in question; and

(b) A ground of justification may also be a criteria to determine whether the same work is being performed.[368]

9.5 Onus and access to pay related information

The guidance sought from international labour law for the research questions relating to the onus in section 11(1) of the EEA as called for in paragraph 13.7.1 of Chapter 2 of this thesis is as follows: (a) Whether the argument that section 11(1) only requires an equal pay claimant to produce sufficient evidence, which is more than making a bald (mere) allegation and less than establishing a *prima facie* case, in order to raise a credible possibility that unfair pay discrimination has taken place and if she succeeds in doing so then the onus is on the employer to prove its defence on a balance of probabilities as required by section 11(1) can be supported by international labour law; and (b) Whether there are any lessons for the onus provision in section 11(1) of the EEA than can be learnt from how the onus in equal pay is dealt with under international labour law. The guidance sought from international labour law for the research questions relating to access to pay related information as called for in paragraph 13.8 of Chapter 2 of this thesis is as follows: (c) Whether there are any lessons that can be learnt from international labour law on the aspect of access to pay related information for South African equal pay law on this score.

[368] See para 4.4.1 above.

The following guidance has been extracted in relation to (a) above:

It is submitted that the argument relating to section 11(1) of the EEA only requiring an equal pay claimant to produce sufficient evidence, which is more than making a bald (mere) allegation and less than establishing a *prima facie* case, in order to raise a credible possibility that unfair pay discrimination has taken place to put the employer on its defence, which is quintessentially a reversal of the normal burden of proof, is not only supported by international labour law but is also used in international labour law, *albeit*, in a different form and is regarded as a key aspect which makes unfair pay discrimination law effective.[369]

The following guidance has been extracted in relation to (b) above:

(a) The reversal of the burden of proof in international labour law relating to equal pay is regarded as indispensable to the success of an equal pay claim because it has the ability to remove the obstacle of a lack of access to pay related information. It is submitted that the reverse onus in section 11(1) of the EEA as argued for in paragraph 13.7.1 of Chapter 2 of this thesis should be viewed in the same way as it is viewed under international labour law and mention of this should be made in the Equal Pay Code;[370]

(b) Based on international labour law, it is submitted that where an equal pay claimant under section 6(4) of the EEA provides statistics which are significant or the only ones available, which shows that there is a difference in pay (working conditions) between employees engaged in the same work, substantially the same work or work of equal value where the one group who receives the higher pay are for example males or white as opposed to the other group who receives the lower pay who are females or black, then the claimant has produced sufficient evidence (which is more than making a bald (mere) allegation and less than establishing a *prima facie* case) in order to raise a credible possibility that indirect unfair pay discrimination has taken place to put the employer on

[369] See para 5.1 above.
[370] See para 5.1 above.

its defence. This is not restricted to unfair pay discrimination based on sex or race. It is further submitted that this should be mentioned in the Equal Pay Code;[371] and

(c) Based on international labour law, it is submitted that where a female employee claimant under section 6(4) of the EEA is able to establish, having regard to a large number of employees performing the same work (including similar work or work of equal value), that the average pay for female employees is less than the average pay for male employees where the pay system used by the employer is lacking in transparency, then the claimant has (within the meaning of section 11 of the EEA) produced sufficient evidence (which is more than making a bald (mere) allegation and less than establishing a *prima facie* case) in order to raise a credible possibility that unfair pay discrimination has taken place to put the employer on its defence (to prove that the pay system in question is not discriminatory). This is not restricted to unfair pay discrimination based on sex. It is further submitted that this should be mentioned in the Equal Pay Code.[372]

<u>The following guidance has been extracted in relation to (c) above:</u>

It is submitted that the guidance from international labour law relating to an employee requesting pay related information which includes pay levels according to gender, pay levels for employees performing the same work and those performing work of equal value can be used in the South African equal pay legal framework without interfering with the restrictions imposed under sections 27(5)-(6) of the EEA, as follows. A provision should be included under the EEA affording an employee the right to request generic pay related information in the form of pay levels according to gender, pay levels for employees performing the same work and those performing work of equal value. The generic nature of the pay related information sought and provided will not interfere with the restrictions relating to pay related information as imposed under sections 27(5)-(6) of the EEA.[373]

---

[371] See para 5.2 above.
[372] See para 5.3 above.
[373] See para 5.1 above.

9.6 Grounds of Justification

The guidance sought from international labour law for the research questions relating to the grounds of justification to equal pay claims as called for in paragraph 13.9 of Chapter 2 of this thesis is as follows: (a) To test the arguments made based on South African law to the effect that affirmative action and the inherent requirements of the job as contained in section 6(2) of the EEA are not suitable grounds of justification to equal pay claims by analysing the grounds of justification in international labour law; (b) To ascertain what the position is under international labour law regarding the progressive realisation of the right to equal pay for the benefit of the argument made based on South African law to the effect that it will be difficult to refuse to recognise the progressive realisation of the right to equal pay as a ground of justification, falling under regulation 7(1)(g) of the Employment Equity Regulations, where it is genuine and in circumstances where it gives effect to section 27(2) of the EEA; (c) What the position under international labour law is regarding the factor of responsibility operating as a ground of justification to an equal pay claim before a submission can be made as to whether or not this factor should fall under regulation 7(1)(g) of the Employment Equity Regulations as a ground of justification; (d) What the position under international labour law is regarding the factor of different wage setting structures resulting in a pay difference operating as a ground of justification to an equal pay claim before a submission can be made as to whether or not this factor should fall under regulation 7(1)(g) of the Employment Equity Regulations as a ground of justification; and (e) Any further lessons that can be learnt from international labour law for the South African equal pay law relating to the grounds of justification to equal pay claims.

The following guidance has been extracted in relation to (a) above:

International labour law does not mention affirmative action and/or the inherent requirements of the job operating as grounds of justification to equal pay claims and this strengthens the arguments made based on South African law to the effect that affirmative

action and the inherent requirements of the job are not suitable grounds of justification to equal pay claims.[374]

The following guidance has been extracted in relation to (b) above:

(a) It is submitted that the general rule is that unequal pay must be corrected immediately but where this is not feasible then it must be corrected on a progressive basis by decreasing the differentials.[375]

(b) It is further submitted that the argument made based on South African law to the effect that it will be difficult to refuse to recognise the progressive realisation of the right to equal pay as a ground of justification, falling under regulation 7(1)(g) of the Employment Equity Regulations, where it is genuine and in circumstances where it gives effect to section 27(2) of the EEA is strengthened by international labour law which recognises the principle of the progressive realisation of the right to equal pay where unequal pay cannot immediately be corrected.[376]

The following is stated regarding (c) above:

International labour law does not deal with the factor of responsibility operating as a ground of justification to an equal pay claim and the question stated in (c) thus remains.[377]

The following guidance has been extracted in relation to (d) above:

International labour law does not allow an employer to rely on separate collective bargaining processes as a ground of justification to unequal pay. This being established, it is prudent to not make submissions now regarding the final answer to the research

374 See para 6 above.
375 See para 6.8 above.
376 See para 6.8 above.
377 See para 6 above.

question posed in (d) above, but to do so after ascertaining what the position under the United Kingdom equal pay law is.[378]

The following guidance has been extracted in relation to (e) above:

(a) It is submitted that the listing of the factor of seniority operating as a ground of justification to an equal pay claim in regulation 7(1)(a) of the Employment Equity Regulations is strengthened by its use in international labour law. It is further submitted that the approach in South African law to the use of seniority as a ground of justification to an equal pay claim is in accordance with the approach under international labour law because South African law also regards seniority as a ground of justification to an equal pay claim without the need for further justification provided that it does not give rise to indirect unfair pay discrimination as set out in regulation 7(2) of the Employment Equity Regulations;[379]

(b) It is submitted that the listing of the factor of performance (quantity or quality of work) operating as a ground of justification to an equal pay claim in regulation 7(1)(c) of the Employment Equity Regulations is strengthened by its use in international labour law. International labour law provides guidance for the factor of performance (quantity or quality of work) as a ground of justification under regulation 7(1)(c) of the Employment Equity Regulations by stating that the issue of performance can only be assessed after an employee is appointed and can thus not be relied on as a ground of justification to unequal pay right from the commencement of employment because this is not capable of being objectively determined at the point at which the employee is appointed. It is submitted that this should specifically be mentioned under regulation 7 of the Employment Equity Regulations;[380]

378 See para 6.7 above.
379 See para 6.1 above.
380 See para 6.2 above.

(c) International labour law provides guidance to any other grounds of justification to equal pay claims in South African law which are not capable of justifying pay differentials from the commencement of employment but which can only become relevant after an employee is appointed by barring an employer from relying on it as justification to unequal pay from the commencement of employment. It is submitted that this should specifically be mentioned under regulation 7 of the Employment Equity Regulations;[381]

(d) It is submitted that the listing of the factor of market value in a particular job classification including the existence of a shortage of relevant skill operating as a ground of justification to an equal pay claim in regulation 7(1)(f) of the Employment Equity Regulations is strengthened by its use in international labour law. International labour law provides guidance for the factor of market value in a particular job classification including the existence of a shortage of relevant skill as a ground of justification under regulation 7(1)(f) of the Employment Equity Regulations by stating that the market forces which leads an employer to increase the pay of certain positions so as to attract job applicants can amount to an objectively justified economic ground.[382] International labour law provides further guidance by stating that the court must determine whether the role of market forces in establishing rates of pay provides a complete or partial justification for the difference in pay rates, and must to this end, determine to what extent the shortage of job applicants and the need to attract them by paying higher salaries constitutes an objectively justified economic ground for the pay differential. It is submitted that this bears relevance to regulation 7(2) of the Employment Equity Regulations which refers to establishing whether a difference in pay (terms and conditions) based on the grounds listed in regulation 7 including the factor of market value is not biased against employees based on prohibited grounds and is applied in a proportionate manner. This should specifically be mentioned under regulation 7 of the Employment Equity Regulations. International labour law cautions that market forces should not be used to justify pay differentials arising from discrimination, for example, where an employer is allowed to argue that it pays the market rate for work in circumstances where the market rate

[381] See para 6.2 above.
[382] See para 6.3 above.

undervalues work performed by women. It is submitted that this is invaluable guidance which should be mentioned in regulation 7 of the Employment Equity Regulations. International labour law also states that an employer is not allowed to rely on market forces and avoid its equal pay obligations by relying on the fact that the female employee was prepared to work for a lesser rate. It is submitted that this is important guidance which should be mentioned in regulation 7 of the Employment Equity Regulations;[383]

(e) It is submitted that the non-listing of budgetary considerations, increased costs, and the curtailing of public expenditure in regulation 7 of the Employment Equity Regulations and its absence in South African case law is strengthened by its rejection as a ground of justification to equal pay claims in international labour law;[384]

(f) It is submitted that while international labour law allows an employer to rely on a ground which corresponds to a real business need with the condition that it is appropriate and necessary to justify unequal pay, it is not suitable to be used as a ground of justification under regulation 7(1)(g) of the Employment Equity Regulations as another relevant factor which can justify unequal pay. The unsuitability of this ground of justification is also supported by the rejection of the use of budgetary considerations and increased costs as stated in paragraph 6.4 above which can easily fall within the ambit of a real business need;[385]

(g) It is submitted that the non-listing of good industrial relations in regulation 7 of the Employment Equity Regulations and its absence in South African case law is strengthened by international labour law which states that the interests of good industrial relations cannot constitute the only basis for justifying discrimination in pay;[386] and

383 See para 6.3 above.
384 See para 6.4 above.
385 See para 6.5 above.
386 See para 6.6 above.

(h) It is submitted that the non-listing of collective agreements in regulation 7 of the Employment Equity Regulations is strengthened by its rejection as a sole ground of justification to pay discrimination in international labour law.[387]

9.7 Equal pay for non-standard (atypical) employees

9.7.1 Agency employees (temporary service employees)

The guidance sought from international labour law for the research questions relating to temporary service employees as called for in paragraph 13.10.1 of Chapter 2 of this thesis is as follows: (a) Whether international labour law can provide guidance to the two arguments made relating to the interpretation to be accorded to the phrase "must be treated on the whole not less favourably" in section 198A(5) of the LRA which entails on the one hand, that the phrase can be interpreted to mean the *same terms and conditions of employment* and, on the other hand, that the phrase can be interpreted to mean that an employer is allowed to provide the deemed employee with a package on condition that it does not result in treatment that is on the whole not less favourable; (b) Whether guidance can be gained regarding how it approaches the same work or similar work (substantially the same work); and (c) Any further lessons that can be learnt from international labour law for the South African equal pay law relating to temporary service employees under section 198A of the LRA.

<u>The following guidance has been extracted in relation to (a) above:</u>

The deviation from the principle of equal/same treatment for temporary agency workers subject to them receiving overall protection/adequate protection under international labour law cannot assist the argument that the phrase "must be treated on the whole not less favourably" in section 198A(5) of the LRA can be interpreted to mean that an employer is allowed to provide the deemed employee with a package on condition that it does not result in treatment that is on the whole not less favourable because the deemed

[387] See para 6.7 above.

employee no longer works temporarily for the client, as is the case under international labour law, but is deemed to be the employee of the client on an indefinite basis and the temporary nature of the work is thus lost. The converse of this is that it supports the other argument put forth that the phrase "must be treated on the whole not less favourably" in section 198A(5) of the LRA can be interpreted to mean the *same terms and conditions of employment.*[388]

The following guidance has been extracted in relation to (b) above:

Whilst the EU Agency Directive is restricted to the same work or broadly similar work and this is the same position under section 198A(5) of the LRA, it is submitted that the guidance regarding how the same work or similar work issue should be approached under section 198A(5) of the LRA can be found in paragraphs 5.4-5.5 in Chapter 2 of this thesis as read with paragraph 4.4.1 above.[389]

The following is stated with regard to (c) above:

No guidance can be extracted for the research question stated in (c) above.[390]

9.7.2 Fixed-term contract employees

The guidance sought from international labour law for the research questions relating to fixed-term contract employees as called for in paragraph 13.10.2 of Chapter 2 of this thesis is as follows: (a) Whether international labour law can provide guidance to the uncertainty regarding whether the phrase "must not be treated less favourably" in section 198B(8)(a) of the LRA must be interpreted to mean treatment that is the same or treatment that is on the whole not less favourably; and whether a fixed-term employee whose contract is deemed to be of an indefinite duration as contemplated in section

---

388 See para 7.1 above.
389 See para 7.1 above.
390 See para 7.1 above.

198B(5) of the LRA and a fixed-term employee whose contract is for a fixed-term which complies with section 198B must be provided with the same treatment as compared to a comparable permanent employee as contemplated in section 198B(8)(a) of the LRA; (b) Whether guidance can be gained regarding how it approaches the same work or similar work (substantially the same work) issue; and (c) Any further lessons that can be learnt from international labour law for the South African equal pay law relating to fixed-term contract employees under section 198B(8)(a) of the LRA.

The following guidance has been extracted in relation to (a) above:

(a) The Framework Agreement will not be able to provide a direct answer to the part of the research questions as stated in (a) dealing with the treatment to be accorded to a fixed-term employee whose contract is deemed to be of an indefinite duration as contemplated in section 198B(5) of the LRA read with section 198B(8)(a) of the LRA because it only deals with the treatment to be accorded to fixed-term workers who are employed for a fixed-term and does not deal with a fixed-term worker who is deemed to be employed on an indefinite basis. This question thus remains;[391] and

(b) It is submitted that the phrase "must not be treated less favourably" in section 198B(8)(a) of the LRA should be interpreted to refer to treatment that is the same and treatment that is the same subject to the *pro rata temporis* principle insofar as fixed-term employees who are employed for a fixed term are concerned. It is further submitted that treatment that is the same will apply in the case of indivisible benefits where it cannot be granted *pro rata temporis* whereas treatment that is the same subject to the *pro rata temporis* principle will apply to divisible benefits which can be granted *pro rata temporis*. This, should, however, be mentioned and explained in the Equal Pay Code with reference to the Code in this regard being specifically mentioned under section 198B of the LRA.[392]

[391] See para 7.2 above.
[392] See para 7.2 above.

The following guidance has been extracted in relation to (b) above:

Whilst the Framework Agreement is restricted to the same/similar work and this is the same position under section 198B(8)(a) of the LRA, it is submitted that the guidance regarding how the same work or similar work issue should be approached under section 198B(8)(a) of the LRA can be found in paragraphs 5.4-5.5 in Chapter 2 of this thesis as read with paragraph 4.4.1 above.[393]

The following guidance has been extracted in relation to (c) above:

It should be mentioned, under section 198D of the LRA, that the temporary nature of the employment (fixed-term work) is not capable of constituting an objective ground because to allow this will render the objectives of section 198B(8)(a) redundant.[394]

9.7.3 Part-time employees

The guidance sought from international labour law for the research questions relating to part-time employees as called for in paragraph 13.10.3 of Chapter 2 of this thesis is as follows: (a) Whether international labour law can provide guidance relating to what is meant by the phrase "must treat a part-time employee on the whole not less favourably" in section 198C(3)(a) of the LRA, and related to this is, whether international labour law can provide guidance relating to how the working hours of the part-time employee should be taken into account when providing her with treatment that is on the whole not less favourable; (b) Whether guidance can be gained regarding how it approaches the same work or similar work (substantially the same work) issue; and (c) Any further lessons that can be learnt from international labour law for the South African equal pay law relating to part-time employees under section 198C(3)(a) of the LRA.

[393] See para 7.2 above.
[394] See para 7.2 above.

The following guidance has been extracted in relation to (a) above:

(a) A part-time employee is entitled to all forms of payment that a comparable permanent employee is entitled to but the payment should be granted to the part-time employee in accordance with the *pro rata temporis* principle which requires the calculation of benefits proportionate to working time. It is submitted that the phrase "must treat a part-time employee on the whole not less favourably" in section 198C(3)(a) of the LRA read with the requirement under section 198C(3)(a) of the LRA to take the working hours of the part-time employee into account when providing her with such treatment should be interpreted to mean that a part-time employee is entitled to all forms of payment *pro rata temporis* to which a comparable permanent full-time employee is entitled to. It is further submitted that section 198C(3)(a) of the LRA should be amended to reflect this clearly and an explanation should be provided in the Equal Pay Code;[395]

(b) It must be made clear in section 198C(3)(a) of the LRA that the *pro rata temporis* principle only applies to divisible benefits (benefits that are capable of being divided) and does not apply to indivisible benefits (benefits that are not capable of being divided). This means that an employer complies with the equal treatment of a part-time employee where it provides her with divisible benefits on a *pro rata* basis according to the *pro rata temporis* principle and in the case of indivisible benefits provides her with (access to) such benefits.[396] A part-time employee is thus entitled to access the facilities of the establishment (workplace), and this constitutes treatment that is on the whole not less favourable as is required by section 198C(3)(a) of the LRA;[397] and

(c) Part-time employees are entitled to have the same scheme (for example relating to pay/benefits) that applies to comparable full-time employees apply to them proportional to their working time (*pro rata temporis*). Such reduction is objectively justified inherently because the reduced pay/benefit is consideration given for less work. There is nothing in

395 See para 7.3.1 above.
396 See para 7.3.2 above.
397 See para 7.3.1 above.

the EU law which prohibits pay/benefits from being proportionately calculated (*pro rata temporis*) in the case of part-time employment. This should specifically be mentioned in relation to section 198C(3)(a) of the LRA.[398]

The following guidance has been extracted in relation to (b) above:

Whilst the Part-time Convention is restricted to the same or similar work and this is the same position under section 198C(3)(a) of the LRA, it is submitted that the guidance regarding how the same work or similar work issue should be approached under section 198C(3)(a) of the LRA can be found in paragraphs 5.4-5.5 in Chapter 2 of this thesis as read with paragraph 4.4.1 above.[399]

The following guidance has been extracted in relation to (c) above:

(a) International labour law entitles a part-time employee to be provided with the same terms and conditions of employment *in proportion* to their working hours, where this is applicable, and to this extent the reference to treatment that is on the whole not less favourable in section 198C(3)(a) does not reflect the purpose of the section which is to provide a part-time employee with the same terms and conditions of employment as a comparable permanent employee taking the part-time worker's hours of work into account (*pro rata temporis*) where this is applicable. It is submitted that section 198C(3)(a) of the LRA should be amended to reflect this and reference to treatment that is on the whole not less favourable should accordingly be removed;[400]

(b) The exclusion of part-time employees from pay/benefits that are received by full-time employees infringes the equal pay principle unless it can be justified on objective grounds unrelated to discrimination. Based on this, It is submitted that it should be mentioned in relation to section 198C(3)(a) of the LRA that an employer is not allowed to exclude a

---

398 See para 7.3.2 above.
399 See para 7.3.1 above.
400 See para 7.3.1 above.

part-time employee from any form of pay/benefits received by a comparable full-time employee engaged in the same/similar work unless there is a justifiable reason for doing so in accordance with section 198D(2) of the LRA;[401] and

(c) A collective agreement which excludes part-time employees from pay/benefits provided to comparable full-time employees infringes the equal pay principle unless the difference in treatment can be justified by objective factors which are not related to discrimination. This should specifically be mentioned in relation to section 198C(3)(a) of the LRA.[402]

9.8 Proactive measures relating to equal pay

The guidance sought from international labour law for the research questions relating to proactive measures as called for in paragraph 13.11 of Chapter 2 of this thesis is as follows: (a) Which proactive measures relating to equal pay are mentioned under international labour law in order to strengthen the proactive measures listed in section 27(3) of the EEA; (b) What guidance is provided to employers under international labour law regarding the taking and implementing of proactive measures to equal pay in order to learn lessons for section 27(3) of the EEA; (c) Whether an employer is allowed under international labour law to address pay differentials by reducing the pay of employees (downward equalisation); and (d) Whether the progressive realisation of the right to equal pay is capable of featuring in a court order.

<u>The following guidance has been extracted in relation to (a) above:</u>

It is submitted that the mentioning of an objective job evaluation system as a proactive measure to equal pay under international labour law strengthens the argument made in paragraphs 12 and 13.11 of Chapter 2 of this thesis to the effect that an objective job evaluation system should specifically be listed under section 27(3) of the EEA as a

---

401 See para 7.3.2 above.
402 See para 7.3.2 above.

measure which can be taken to progressively reduce disproportionate income differentials and/or unfair discrimination in terms of section 6(4) of the EEA;[403]

The following guidance has been extracted in relation to (b) above:

(a) It is submitted that a pay equity programme with all its steps as well as the establishment of a Pay Equity Committee is a comprehensive manner of ensuring equal pay in a proactive manner and to this end, it should be used in South African equal pay law and accordingly be mentioned in the Equal Pay Code where it deals with objective job evaluation systems as is discussed under paragraphs 12 and 13.11 of Chapter 2 of this thesis;[404] and

(b) The following guidance can be extracted from international labour law insofar as guidance is sought for collective bargaining as a measure to address unequal pay: (i) the principle of equal pay must be addressed/discussed in the collective bargaining process; (ii) employers and trade unions must respect the principle of equal treatment (equal pay) during collective negotiations; (iii) both employers and unions are responsible (have a shared responsibility) for the application of the equal pay principle; (iv) significant progress in implementing the principle of equal pay cannot be achieved without the active participation of both employers and employees (trade unions); (v) employers should provide training on equal pay issues including job evaluation methods (to those involved in the collective bargaining process); (vi) collective agreements can directly address pay inequalities through the adjustment of pay levels and this provides better monitoring and enforcement of the equal pay principle; and (vii) employers and trade unions must ensure that collective agreements do not contain provisions which are discriminatory in respect of terms and conditions of employment. It is submitted that this list provides valuable guidance on how to use collective bargaining as a means to progressively reduce disproportionate income differentials and/or unfair discrimination as contemplated in section 27(3)(a) of the EEA. It is further submitted that it is better placed for this list to be

[403] See para 8.1 above.
[404] See para 8.1 above.

included in the Code of Good Practice: Collective Bargaining, Industrial Action and Picketing[405] under Part B thereof which deals with collective bargaining and for section 27(3) of the EEA to refer to this Code of Good Practice in relation to the list in order to provide guidance to employers on how to go about progressively reducing disproportionate income differentials and/or unfair discrimination by using collective bargaining as a measure to do so. It is further submitted that the last factor prohibiting collective agreements from containing provisions which are unfairly discriminatory in respect of terms and conditions of employment must specifically be mentioned in section 23 of the LRA which deals with the legal effect of collective agreements. In order to give this provision teeth in section 23 of the LRA, it should be stated that any provision in a collective agreement which is unfairly discriminatory in respect of terms and conditions of employment shall be null and void (of no force and effect).[406]

The following guidance has been extracted in relation to (c) above:

An employer is not allowed under international labour law to address pay differentials by reducing the pay of employees (downward equalisation). Based on this, it is submitted that an employer is not allowed under section 27 of the EEA to progressively reduce pay differentials by reducing the pay of employees (downward equalisation) and is confined to reduce same by progressively increasing the pay of the underpaid employees to a point where equal pay is reached (upward equalisation). This should specifically be mentioned in section 27 of the EEA.[407]

The following guidance has been extracted in relation to (d) above:

It is submitted that the recognition under international labour law that there might be instances where an employer will not be able to correct unequal pay immediately and should then be allowed to correct same over a period of time strengthens the submission

[405] The Code of Good Practice: Collective Bargaining, Industrial Action and Picketing *GG* No 42121 of 19 December 2018.
[406] See para 8.2 above.
[407] See para 8.1.8.1 above.

made in paragraphs 12 and 13.11 of Chapter 2 of this thesis that the progressive realisation of the right to equal pay is capable of featuring in a court order.[408]

[408] See para 8.1.8 above.

CHAPTER 4 – UNITED KINGDOM LEGAL FRAMEWORK REGULATING EQUAL PAY

> "Although the law on equal pay may seem complicated its purpose is simple – to ensure that where women and men are doing equal work they should receive the same rewards for it."[*]

1. INTRODUCTION

This Chapter deals exclusively with the United Kingdom legal framework relating to equal pay. It starts with a brief discussion of the use of foreign law and the need for using the United Kingdom equal pay law. It then provides a brief overview of the law regulating equal pay in the United Kingdom. It proceeds to discuss and analyse the United Kingdom legal framework relating to equal pay with the focus being on seeking to assist with answering the research questions to the extent and breadth called for in paragraphs 13.1-13.11 of Chapter 2 of this thesis as follows.

How does the United Kingdom law interpret "terms and conditions of employment including pay" (research question 1, paragraph 13.1: Chapter 2). Who is the employer for the purpose of bringing an equal pay claim against and how is the phrase "the same employer" interpreted? (research question 2, paragraph 13.2: Chapter 2). Research question 3 deals with the need for a comparator and who is a suitable comparator for where "employees of the same employer" are compared for purposes of equal pay claims (paragraph 13.3: Chapter 2). The discussion will then turn to research questions 4 and 5 (paragraphs 13.4; 13.5: Chapter 2) to see how the United Kingdom interprets provisions dealing with equal pay for like work (same work, substantially the same work). How does the onus provisions in the United Kingdom work? (research question 6, paragraph 13.7: Chapter 2). Guidance will also be sought as to how United Kingdom law deals with access to pay related information (research question 7, paragraph 13.8: Chapter 2).

[*] The Equal Pay Statutory Code of Practice to the Equality Act of 2010 at page 4.

Also important will be to determine what grounds of justification have been acknowledged by United Kingdom law (research question 8, paragraph 13.9: Chapter 2). Research question 9 will examine the special provisions existing in the United Kingdom with regards to equal pay for non-standard employees (paragraph 13.10: Chapter 2). Finally, the Chapter will look at the United Kingdom law provisions for proactive measures relating to equal pay (Equal Pay Statutory Code of Practice to the Equality Act of 2010 (Equal Pay Audit), Equality Act 2010 (Equal Pay Audits) Regulations 2014 and the Equality Act 2010 (Gender Pay Gap Information) Regulations 2017) (research question 10, paragraph 13.11: Chapter 2).

The Chapter will conclude by summarising the guidance extracted from the United Kingdom legal framework relating to equal pay as sought for in relation to the research questions.

2. THE USE OF FOREIGN LAW AND THE NEED FOR USING THE UNITED KINGDOM EQUAL PAY LAW

While the Constitution makes it mandatory for a court to consider international law when interpreting the Bill of Rights it does not mandate the use of foreign law to this end. Section 39(1) of the Constitution, however, states that the court may consider foreign law when interpreting the rights in the Bill of Rights.[1] The use of foreign law in this context is thus directory and not peremptory.[2] Rautenbach states, with regard to the directory nature of considering foreign law in section 39 of the Constitution, that foreign law can never have more than persuasive force.[3] The Constitutional Court in *S v Makwanyane*[4] has provided guidance as to the level of persuasiveness (the value) to be attached to the foreign law in question when it stated that the foreign authorities in question were of value to the

[1] Section 39(1) of the Constitution provides the following: “(1) When interpreting the Bill of Rights, a court, tribunal or forum-(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law.”

[2] Currie I and de Waal J *The Bill of Rights Handbook* 5th ed (Juta 2010) 160.

[3] Rautenbach C “The South African Constitutional Court's use of Foreign Precedent in matters of Religion: Without Fear or Favour?” *PER* 2015(18) 1546 at 1548.

[4] (CCT3/94) [1995] ZACC 3.

Court because they analysed the arguments for and against the death sentence and illustrated how the foreign courts have dealt with this complex issue.[5] It is clear from this that the reason/s for the use of the foreign law is important in deciding its level of persuasiveness (value) relating to which its use is sought. Kriegler J stated in *Sanderson v Attorney-General, Eastern Cape*[6] that comparative research is valuable, generally, but it is more valuable when dealing with new problems in the South African jurisprudence which is well developed in mature constitutional democracies.[7] Here again the reasons for wanting to use the foreign law determines its (value) level of persuasiveness.

Concerns have been raised regarding the proper use of foreign law in the same Constitutional Court cases that promote the use of foreign law. In *S v Makwanyane*[8] Chaskalson P cautioned that when dealing with comparative law one must keep in mind that the required task is to construe the South African Constitution and not the Constitution of a foreign country.[9] In *Sanderson v Attorney-General Eastern Cape*[10] Kriegler J stated that the use of foreign law requires caution and an appreciation that transplants require careful managing.[11] In *Bernstein v Bester NO*[12] Kriegler J stated that he wished to discourage the common and often superficial resort to foreign authorities.[13] Kahn-Freund states that using comparative law only becomes an abuse where its use is informed by a legal spirit which disregards the context of the law.[14] Blanpain states that comparative law is without a doubt an excellent tool of education which often leads one to discover, by analysing foreign systems, that a similar domestic problem is resolved in another country in a different way altogether which enriches the analysis of evaluating the domestic

5 At para 34.
6 (CCT10/97) [1997] ZACC 18.
7 At para 26.
8 (CCT3/94) [1995] ZACC 3.
9 At para 39.
10 (CCT10/97) [1997] ZACC 18.
11 At para 26.
12 (CCT23/95) [1996] ZACC 2.
13 At para 133.
14 Kahn-Freund O "On Uses and Misuses of Comparative Law" *The Modern Law Review* 1974 37(1) 1 at 27. Kahn-Freund in the same article states the following at 27 with regard to the use of comparative law: "… All I have wanted to suggest is that its use requires a knowledge not only of the foreign law, but also of its social, and above all its political, context. The use of comparative law for practical purposes becomes an abuse only if it is informed by a legalistic spirit which ignores this context of the law."

problem.[15] Hage states that a big motivation for engaging in comparative legal research is the goal of finding the best possible law.[16] He further states the following:

> "There are many ways of conducting proper comparative law research, but the method for doing so depends strongly on the purpose for which the comparative law research is performed (whether it is a method itself or as a heuristic tool), on the view one has of the particular domain on which the comparative research is performed and on the research question one aims to answer. The conclusion must be that there is no such thing as the single proper way of conducting comparative law research."[17]

It should be noted that section 39(2) of the Constitution and the case law referred to above refers to the use of foreign law when interpreting the rights in the Bill of Rights. Whilst it does not refer to the use of foreign law when interpreting domestic legislation, it is submitted that foreign law should be used in order to interpret those portions of the EEA and the LRA which refer to equal pay law as these portions give effect to section 9 of the Constitution and because the foreign equal pay law is well developed in the United Kingdom as opposed to the equal pay law in South Africa which is still in its infancy.

With this brief background in mind, it is apposite to set out the reasons for using the foreign law in the United Kingdom relating to equal pay as the reasons will determine the value of using it as well as the eventual lessons that will be learnt from it for the research questions. The reasons for choosing and using the equal pay law of the United Kingdom are as follows:

---

15 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. The learned author expresses this as follows at 4: "Comparative law is undoubtedly an excellent tool of education. It has thereby often been stressed that the analysis of foreign systems entails the enormous benefit of putting one's own national experience into perspective; that when studying other systems one often experiences a (cultural) shock in discovering 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."

16 Hage J "Comparative Law as Method and the Method of Comparative Law" 37 at 47 in Adams M & Heirbaut D (eds) *The Method and Culture of Comparative Law: Essays in Honour of Mark Van Hoeke* (Hart Publishing 2014).

17 Hage J "Comparative Law as Method and the Method of Comparative Law" 37 at 52 in Adams M & Heirbaut D (eds) *The Method and Culture of Comparative Law: Essays in Honour of Mark Van Hoeke* (Hart Publishing 2014).

- The United Kingdom has ratified the Equal Remuneration Convention on 15 June 1971.[18] South Africa has ratified the Equal Remuneration Convention on 30 March 2000.[19] 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 approximately 29 years earlier than South Africa;

- The United Kingdom's Equality Act of 2010 has specific provisions relating to equal pay. It provides for three causes of action relating to equal pay as follows: equal pay for like work, equal pay for work rated as equivalent and equal pay for work of equal value.[20] The Equality Act furthermore contains a section dealing with the material factor defence to an equal pay claim and a section dealing with comparators.[21] There is, in addition to the Act, a large body of case law dealing with equal pay discrimination that have come before the tribunals and the courts;[22]

- The United Kingdom, furthermore, has enacted specific regulations to deal with equal pay for non-standard employees in the form of the: (a) Agency Workers Regulations Statutory Instrument No 93 of 2010; (b) Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations Statutory Instrument No

---

[18] https://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:102651 (last accessed on 4/11/2022).

[19] https://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:102888 (last accessed on 4/11/2022).

[20] Section 65 of the Equality Act of 2010.

[21] Sections 69 and 79 of the Equality Act of 2010.

[22] See for example, *Albion Shipping Agency v Arnold* [1981] IRLR 525 (EAT); *Benveniste v University of Southampton* [1989] IRLR 123 (CA); *British Coal Corporation v Smith; North Yorkshire County Council v Rattcliffe* [1994] IRLR 342 (CA); *Bromley v H & J Quick Ltd* [1988] IRLR 249 (CA); *Bury Metropolitan Council v Hamilton* [2011] IRLR 358 (EAT); *Council of the City of Sunderland v Brennan* [2012] IRLR 507 (EWCA); *Coventry City Council v Nicholls* [2009] IRLR 345 (EAT); *Cumbria County Council v Dow* (No. 1) [2008] IRLR 91 (EAT); *Davies v McCartneys* [1989] IRLR 43 (EAT); *Dibro Ltd v Hore* [1989] IRLR 129 (EAT); *Glasgow City Council v Marshall* [2000] IRLR 272 (HL); *Hovell v Ashford & St Peter's Hospital NHS Trust* [2009] IRLR 734 (CA); *Leverton v Clwyd County Council* [1989] IRLR 28 (HL); *National Coal Board v Sherwin* [1978] IRLR 122 (EAT); *Potter v North Cumbria Acute Hospitals NHS Trust* [2009] IRLR 22 (EAT); *Rainey v Greater Glasgow Health Board* [1987] IRLR 26 (HL); *Ratcliffe v North Yorkshire County Council* [1995] IRLR 439 (HL); *Redcar & Cleveland Borough Council v Bainbridge* (No. 2) [2008] IRLR 776 (EWCA); *Secretary of State for Justice v Bowling* [2012] IRLR 382 (EAT); *Skills Development Scotland v Buchanan* [2011] EqLR 955 (EAT); *Snoxell v Vauxhall Motors Ltd* [1977] IRLR 123 (EAT); *United Biscuits Ltd v Young* [1978] IRLR 15 (EAT); and *Wilson v Health & Safety Executive* [2010] IRLR 59 (EWCA).

2034 of 2002; and (c) Part-time Workers (Prevention of Less Favourable Treatment) Regulations Statutory Instrument No 1551 of 2000;

- The equal pay law in the United Kingdom has developed in accordance with the guidance given to the United Kingdom courts by the European Court of Justice through its case law and when the courts have referred preliminary questions relating equal pay law to the European Court of Justice seeking guidance on a particular issue/s;[23]

- The United Kingdom has left the European Union in terms of the European Union (Withdrawal) Act 2018 ("EU Withdrawal Act"). Section 6(1)(b) of the EU Withdrawal Act provides that the United Kingdom courts and tribunals can no longer refer any matter to the European Court of Justice for guidance on or after the Implementation Period completion day.[24] The Implementation Period completion day is defined in the European Union (Withdrawal Agreement) Act 2020 as being 31 December 2020.[25] While the United Kingdom courts and tribunals are not bound by the case law of the European Court of Justice on or after the Implementation Period completion day, they may however, still have regard to the case law of the European Court of Justice on or after the Implementation Period completion day

[23] Romney D *Equal Pay: Law and Practice* (Oxford University Press 2018) states the following at 10 regarding the influence of the European Court of Justice case law on the United Kingdom right to equal pay: "Many of the most significant steps in the expansion of the domestic right to equal pay progress emerge from the progressive jurisprudence of the CJEU, which has recognized that the right forms part of the foundation of the EU's social policy." Benson E "European Union: Impact on UK Law" in *Tolley's Employment Law Service* (loose-leaf) states the following at E8011-E8017 in relation to Article 267 of the TFEU which provided a Court or tribunal with an option to refer a matter to the European Court of Justice to obtain clarification regarding a matter before it: "It is this provision which has allowed UK courts and tribunals in numerous cases to make references to the Court of Justice for guidance on issues related to UK legislation enacted in order to implement the UK's obligations under EU Directives." Bowers J *A Practical Approach to Employment Law* 7ed (Oxford University Press 2005) states the following at 116: "The English courts have on several occasions referred cases to the European Court of Justice for interpretation of the principle in the European legislation." The Equal Pay Statutory Code of Practice to the Equality Act of 2010 states that equal pay law in the United Kingdom has also developed in accordance with its case law and the law and case law of the European Union (at paras 23-24).

[24] Benson E "European Union: Impact on UK Law" in *Tolley's Employment Law Service* (loose-leaf) states the following at E8001: "UK courts and tribunals have now, however, lost the option of referring questions to the European Court of Justice."

[25] Section 39(1) of the European Union (Withdrawal Agreement) Act 2020 provides the following: "IP completion day" means 31 December 2020 at 11.00 p.m… ."

provided that the case law is relevant to a matter before it.[26] Romney states that it is difficult to think of European Union equal pay law that would not be relevant as a result of the fusion between the United Kingdom equal pay law and the European Union equal pay law (prior to the EU Withdrawal Act).[27] Benson referring to section 6(4) of the EU Withdrawal Act and the Relevant Court Retained EU Case Law Regulations[28] states that the United Kingdom courts are still obliged to apply previous decisions of the United Kingdom courts and the case law of the European Court of Justice but this does not apply to the Supreme Court insofar as it has the power to leave its previous decisions.[29] Romney states that it is probable that the case law of the European Court of Justice will continue to be relevant for the interpretation and development of equal pay law in the United Kingdom.[30] She further states that whilst it is difficult to predict the impact on equal pay law in the

[26] Section 6(1)(a) read with section 6(2) of the European Union Withdrawal Act.

[27] Romney D *Equal Pay: Law and Practice* (Oxford University Press 2018) 4. Romney D *Equal Pay: Law and Practice* (Oxford University Press 2018) states the following at 15: "…[W]e find ourselves in a curious position. We have a law of equal pay based almost entirely on the European concepts of fairness and equality; with that European Framework about to be removed or adjusted it makes it hard to predict the future. At this point, it suffices to say that we should continue to bear the EU jurisprudence in mind when interpreting the UK legislation, and to read it according to those principles until such time as we are told not to."

[28] European Union (Withdrawal) Act 2018 (Relevant Court) (Retained EU Case Law) Regulations 2020 (SI 2020/1525).

[29] Benson E "European Union: Impact on UK Law" in *Tolley's Employment Law Service* (loose-leaf) E8001. Section 6(4)(a) of the European Union Withdrawal Act states that: "… the Supreme Court is not bound by any retained EU case law…" Regulation 4 of the European Union (Withdrawal) Act 2018 (Relevant Court) (Retained EU Case Law) Regulations 2020 (SI 2020/1525) provides the following relating to the extent to which a relevant Court is not bound by retained European Union case law: "(1) A relevant court is not bound by any retained EU case law except as provided in paragraph (2). (2) A relevant court is bound by retained EU case law so far as there is post-transition case law which modifies or applies that retained EU case law and which is binding on the relevant court." Regulation 5 of the European Union (Withdrawal) Act 2018 (Relevant Court) (Retained EU Case Law) Regulations 2020 (SI 2020/1525) provides the following relating to the test to be applied in order to depart from retained European Union case law: "In deciding whether to depart from any retained EU case law by virtue of section 6(4)(ba) of the 2018 Act and these Regulations, a relevant court must apply the same test as the Supreme Court would apply in deciding whether to depart from the case law of the Supreme Court."

[30] Romney D *Equal Pay: Law and Practice* (Oxford University Press 2018) 12. Romney states that some of the most important equal pay case law from the European Court of Justice shows that the European Court of Justice has been persuasive in broadening the equal pay principle in the United Kingdom (Romney D *Equal Pay: Law and Practice* (Oxford University Press 2018) 12). Benson states that despite the United Kingdom's exit from the European Union the case law of the European Court of Justice and its legislative developments may continue to provide stimulus for the development of laws in the United Kingdom (Benson E "European Union: Impact on UK Law" in *Tolley's Employment Law Service* (loose-leaf) E8001).

United Kingdom as a result of the United Kingdom leaving the European Union, the withdrawal from the European Union, at least in the short term, will not likely lead to the deconstruction of the equal pay provisions contained in the Equality Act of 2010;[31] and

- This means that the equal pay laws of the United Kingdom are laws that give effect to the Equal Pay Convention and Recommendations as well as laws that have developed under the guidance of the European Union Court of Justice relating to equal pay law during the long period prior to its withdrawal from the European Union. This further means that the equal pay laws of the United Kingdom are laws that give effect to international labour law relating to equal pay. It is thus submitted that the United Kingdom laws relating to equal pay should not be viewed as foreign law *simpliciter* but should be viewed as foreign law which gives effect to international labour law relating to equal pay and should thus attract a higher value of persuasive force for South African law relating to equal pay.

3. BRIEF OVERVIEW OF THE LAW REGULATING EQUAL PAY IN THE UNITED KINGDOM

Before dealing with the equal pay law of the United Kingdom in terms of the various topics which can assist with the answering of the research questions to the extent sought for in paragraphs 13.1-13.11 of Chapter 2 of this thesis, it is important to provide a brief overview of the law regulating equal pay in the United Kingdom which covers the history thereof as well as the present equal pay law.

3.1 The Equal Pay Act and the Sex Discrimination Act

The equal pay principle is traced back to the Equal Pay Act of 1970[32] ("Equal Pay Act")

---

[31] Romney D *Equal Pay: Law and Practice* (Oxford University Press 2018) 13.

[32] Hepple B *Equality: The Legal Framework* 2ed (Hart Publishing 2014) states the following at 118: "The main objective of the Equal Pay Act was to equalise *rates* of pay, not earnings as such, given that women generally have fewer opportunities for overtime or seniority or long-service payments." Hepple B *Equality: The Legal Framework* 2ed (Hart Publishing 2014) states the following at 119-120: "The

which came into effect during December 1975.[33] It should be noted from the outset that the Equal Pay Act only covered equality of treatment as it related to contractual matters whereas a complaint of differential treatment relating to non-contractual matters had to be brought under the Sex Discrimination Act of 1975.[34] Section 1(1) of the Equal Pay Act provided that if a contractual term of the woman's employment contract was or became less favourable to her than a similar contractual term of the man's employment contract then the woman's contractual term was treated as being modified so as not to be less favourable. If a woman's employment contract did not include a contractual term which corresponded to a beneficial contractual term in the man's employment contract then the woman's employment contract was to be treated as including such a term.[35]

Cambridge Review undertook a detailed analysis of the failings of the Equal Pay Act, and proposed three main strategies: placing positive legal duties on employers to review their pay structures and take active steps towards pay equity; extending the basis of comparison and improving the methods of assessing the relative value of jobs; and establishing new and improved tribunal procedures. Similar proposals were later made by the EOC and by many of the organisations that responded to the government's Discrimination Law Review. Apart from some relatively minor changes in tribunal procedures for determining equal value introduced in 2004, none of these proposals was accepted. …"

33 *Bainbridge v Redcar & Cleveland Borough Council (No 1)* [2008] EWCA Civ 885, [2008] IRLR 776 (CA) at para 35. *Bainbridge v Redcar & Cleveland Borough Council (No 1)* [2008] EWCA Civ 885, [2008] IRLR 776 (CA) states at para 39 that the Equal Pay Act was the domestic implementation of Article 119 of the Treaty of Rome." Romney D *Equal Pay: Law and Practice* (Oxford University Press 2018) states the following at 18: "The [Equal Pay] Act received Royal Assent in 29 May 1970, but was not brought into force until 29 December 1975, in tandem with the Sex Discrimination Act 1975. The purpose of the delay was to allow employers to adjust their pay structures."

34 *Bainbridge v Redcar & Cleveland Borough Council (No 1)* [2008] EWCA Civ 885, [2008] IRLR 776 (CA) at para 37. Honeyball S *Honeyball & Bowers' Textbook on Employment Law* 11ed (Oxford University Press 2010) states the following at 277: "Some matters relating to discrimination during employment, such as promotion, transfer and non-contractual benefits, as we have seen, come within the SDA 1975 while the Equal Pay Act 1970 relates solely to what is gained by way of contract (and, as such, is a claim in contract rather than a statutory tort …), although this extends beyond pay mentioned in its title to such elements as bonuses, concessionary coal and mortgage repayment allowances …" Pitt G *Employment Law* 6ed (Sweet & Maxwell Limited 2007) states the following at 180: "One reason that it took over five years to bring the Equal Pay Act into force is that on its own it would have probably had a bad effect on women's job prospects. In the absence of any law prohibiting discrimination at the point of job entry, a law which required terms offered to be the same for men and women could simply have made it more difficult for women to get jobs. Thus the Equal Pay Act had to wait for the Sex Discrimination Act 1975 and both were brought into force together. It was always intended that there should be a lengthy period before the Equal Pay Act was brought into force so that employers would have plenty of notice of what was expected of them and would have time to clean up their act without the need for wholesale disruption of established pay and grading systems."

35 Section 1(2)(a)(i)-(ii) of the Equal Pay Act.

This protection related to the following instances:

(a) Where a woman was employed on like work with a male in the same employment:

- If a contractual term of the woman's employment contract was or became less favourable to her than a similar contractual term of the man's employment contract then the woman's contractual term was treated as being modified so as not to be less favourable;

- If a woman's employment contract did not include a contractual term which corresponded to a beneficial contractual term in the man's employment contract then the woman's employment contract was to be treated as including such a term;[36] and

- Section 1(4) of the Equal Pay Act provided that a woman was to be regarded as employed on like work with males if her work and their work was the same or broadly similar and if there were differences then these differences were not of practical importance as it related to the terms and conditions of employment. The section went further by stating that in comparing her work and the male's work regard had to be paid to the frequency or otherwise "with which any such differences occur in practice as well as to the nature and extent of the differences."[37]

(b) Where a woman was employed on work rated as equivalent with a male in the same employment:

- If a contractual term of the woman's contract determined according to the rating of the work was or became less favourable to the woman than a similar contractual

36 Section 1(2)(a)(i)-(ii) of the Equal Pay Act.
37 Section 1(4) of the Equal Pay Act.

term of the man's employment contract then the woman's contractual term was treated as being modified so as not to be less favourable;

- If a woman's employment contract did not include a contractual term which corresponded to a beneficial contractual term in the man's employment contract then the woman's employment contract was to be treated as including such a term;[38] and

- Section 1(5) of the Equal Pay Act provided that a woman was regarded as being employed on work rated as equivalent with that of a man if both their work had been afforded equal value in terms of the demands made on the worker under various headings (including effort, skill, decision) based on a study undertaken which evaluated these terms or their work would have been given an equal value "but for the evaluation being made on a system setting different values for men and women on the same demand under any heading."[39]

(c) Where a woman was employed on work which was not like work or work rated as equivalent but which in terms of the demands made on her under various headings such as effort, skill and decision was of equal value to that of a male in the same employment:

- If a contractual term of the woman's employment contract was or became less favourable to her than a similar contractual term of the man's employment contract then the woman's contractual term was treated as being modified so as not to be less favourable; and

- If a woman's employment contract did not include a contractual term which corresponded to a beneficial contractual term in the man's employment contract then the woman's employment contract was to be treated as including such a term.[40]

---

38 Section 1(2)(b)(i)-(ii) of the Equal Pay Act.
39 Section 1(5) of the Equal Pay Act.
40 Section 1(2)(c)(i)-(ii) of the Equal Pay Act.

It is clear from the above that the Equal Pay Act provided for three equal pay (contractual terms and conditions) claims which were: (a) equal pay (contractual terms and conditions of employment) for like work; (b) equal pay (contractual terms and conditions of employment) for work rated as equivalent; and (c) equal pay (contractual terms and conditions of employment) for work of equal value. It is important to note that, in addition to these three causes of action, section 1(2)(d)-(f) of the Equal Pay Act also provided for the protection of a woman's pay relating to her statutory maternity leave.[41] Section 1(3) of the Equal Pay Act contained the material factor defence in terms of which the equality clause would not operate in terms of the three equal pay causes of action if the employer was able to prove that the variation was genuinely due to a material factor which was unrelated to the difference of sex (not sex tainted).

The Sex Discrimination Act of 1975[42] ("Sex Discrimination Act") related to non-contractual complaints and applied to both direct and indirect discrimination. Section 1(1)(a) of the

---

[41] Section 1(2)(d)-(f) of the Equal Pay Act provided as follows: "(2) An equality clause is a provision which relates to terms (whether concerned with pay or not) of a contract under which a woman is employed (the "woman's contract"), and has the effect that— … [(d) where—(i) any term of the woman's contract regulating maternity-related pay provides for any of her maternity-related pay to be calculated by reference to her pay at a particular time, (ii) after that time (but before the end of the statutory maternity leave period) her pay is increased, or would have increased had she not been on statutory maternity leave, and (iii) the maternity-related pay is neither what her pay would have been had she not been on statutory maternity leave nor the difference between what her pay would have been had she not been on statutory maternity leave and any statutory maternity pay to which she is entitled, if (apart from the equality clause) the terms of the woman's contract do not provide for the increase to be taken into account for the purpose of calculating the maternity-related pay, the term mentioned in sub-paragraph (i) above shall be treated as so modified as to provide for the increase to be taken into account for that purpose; (e) if (apart from the equality clause) the terms of the woman's contract as to—(i) pay (including pay by way of bonus) in respect of times before she begins to be on statutory maternity leave, (ii) pay by way of bonus in respect of times when she is absent from work in consequence of the prohibition in section 72(1) of the Employment Rights Act 1996 (compulsory maternity leave), or (iii) pay by way of bonus in respect of times after she returns to work following her having been on statutory maternity leave, do not provide for such pay to be paid when it would be paid but for her having time off on statutory maternity leave, the woman's contract shall be treated as including a term providing for such pay to be paid when ordinarily it would be paid; (f) if (apart from the equality clause) the terms of the woman's contract regulating her pay after returning to work following her having been on statutory maternity leave provide for any of that pay to be calculated without taking into account any amount by which her pay would have increased had she not been on statutory maternity leave, the woman's contract shall be treated as including a term providing for the increase to be taken into account in calculating that pay].]"

[42] Hepple B *Equality: The Legal Framework* 2ed (Hart Publishing 2014) states the following at 118 regarding the Sex Discrimination Act: "The SDA was supposed to complement the Equal Pay Act by opening up chances for promotion, training, continuity of employment, and other opportunities that affect the level of earnings."

Sex Discrimination Act referred to direct discrimination and stated that a person discriminated against a woman if he treated her less favourably than he treated or would have treated a man because of her sex. Section 1(1)(b)[43] referred to indirect discrimination and provided that a person discriminated against a woman if he applied a condition or requirement which he applied to a man, but in relation to which a smaller proportion of women than men could comply with, and he was not able to show that this was justifiable irrespective of sex and which was to the women's detriment due to her not being able to comply with it.[44]

3.2 The Equality Act

Both the Equal Pay Act and the Sex Discrimination Act have been replaced by the Equality Act of 2010 ("Equality Act").[45] It should be noted from the outset that the Equality

---

43 Sex Discrimination Act.

44 Section 1(1)(b)(i)-(iii) of the Sex Discrimination Act. It is apposite to note that section 1(2)(a)-(b)(i)-(iii) of the Sex Discrimination Act also sets out the following provisions which dealt with direct and indirect discrimination which would not apply when section 1(1)(a)-(b)(i)-(iii) applied and *vice versa*:
"(2) In any circumstances relevant for the purposes of a provision to which this subsection applies, a person discriminates against a woman if—
(a) on the ground of her sex, he treats her less favourably than he treats or would treat a man, or
[(b) he applies to her a provision, criterion or practice which he applies or would apply equally to a man, but—
(i) which puts or would put women at a particular disadvantage when compared with men,
(ii) which puts her at that disadvantage, and
(iii) which he cannot show to be a proportionate means of achieving a legitimate aim]."
In *Redcar & Cleveland Borough Council v Bainbridge & Others* [2008] IRLR 776 (CA) the Court of Appeal commented on section 1(2)(b) of the Sex Discrimination Act as follows: "This means of demonstrating indirect discrimination is known as showing 'disparate adverse impact'. On the face of it, the provision, criterion or practice applies in the same way to men and women. The employer may well not intend to discriminate against one sex or the other. But the contention of the claimant (usually a woman) is that the application of the provision, criterion or practice in fact has a disparate adverse impact on women. In a claim brought under s.1(2)(b) of the SDA 1975, the claimant usually has to produce statistical evidence of the disparate adverse effect of the practice upon women. If that is shown, there will be unlawful indirect discrimination, unless the employer can justify it by complying with (iii). The provision in (iii) is generally known as the requirement for 'objective justification'."

45 Para 1 of the Equal Pay Statutory Code of Practice to the Equality Act of 2010. IDS Employment Law Guide: The Equality Act 2010 (Income Data Services Limited 2010) states the following at 146: "Before the Equality Act 2010 came into force, the right to equal treatment in employment as between men and women was given effect [to] by two separate Act of Parliament – the Equal Pay Act 1970 and the Sex Discrimination Act 1975 (SDA)." Romney D *Equal Pay: Law and Practice* (Oxford University Press 2018) states the following at 20: "The EPA [Equal Pay Act] was replaced by the EqA [Equality Act] in October 2010. This largely replicates the provisions of the EPA, albeit with some changes and additions. Some of the changes made reflect the importance of previous European decisions…"

Act will only be dealt with insofar as it relates to equal pay (terms and conditions). The relevant provisions of the Equality Act which deals with equal pay (terms and conditions) are as follows: the sex equality clause in section 66; the three equal pay causes of action in section 65; the material factor defence in section 69; sex discrimination relating to non-contractual pay in section 70; direct sex discrimination in terms of section 71; the sex equality rule in section 67 which relates to occupational schemes; and the equality clause and equality rule relating specifically to maternity in sections 73-75. These sections will briefly be discussed hereunder in order to place them in context.

Section 66(1)-(2) of the Equality Act which contains the sex equality clause provides the following:

> "(1) If the terms of A's work do not (by whatever means) include a sex equality clause, they are to be treated as including one.
>
> (2) A sex equality clause is a provision that has the following effect—
>
> (a) if 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;
>
> (b) if 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."[46]

The sex equality clause has the following two effects as stated in section 66(2)(a)-(b) of the Equality Act. Firstly, it has the effect of amending a term of the claimant's contract so that it is equal to her comparator's term, for example, where the claimant's pay is less than the pay enjoyed by her comparator then the sex equality clause has the effect of amending her pay to equalise it to that of her comparator's pay. Secondly, it has the effect of amending the claimant's terms by inserting a term that is enjoyed by her comparator but which she does not enjoy, for example, where the comparator enjoys a bonus which

[46] Section 66(1)-(2) of the Equality Act. Hepple B *Equality: The Legal Framework* 2ed (Hart Publishing 2014) states the following at 121-122 in relation to the sex equality clause: "If the comparator benefits from a term that is not included in the employee's contract, the effect of the sex equality clause is to include that term in the employee's contract. For example, if a male employee's contract enables him to use his employer's car for private purposes, his female comparator doing equal work is entitled to the same benefit." Kelly D, Hammer R, Hendy J & Denoncourt J *Business Law* 3ed (Routledge 2018) states the following at 480: "In theory, the equality clause should operate automatically, without recourse to the employment tribunal system, although, in reality, many complainants have had to resort to the tribunals."

the claimant is not entitled to then the sex equality clause has the effect of amending her contract to insert a term which gives her the right to the bonus.[47] It must be kept in mind that the claimant will have to prove the requirements of an equal pay claim as contained in section 65 of the Equality Act depending on the cause of action chosen in order to trigger the sex equality clause in section 66 of the Equality Act.[48]

Section 65 of the Equality Act sets out the three causes of action relating to equal contractual terms (pay) for like work, equal contractual terms (pay) for work rated as equivalent and equal contractual terms (pay) for work of equal value as follows:

> "(1) For the purposes of this Chapter, A's work is equal to that of B if it is—
> (a) like B's work,
> (b) rated as equivalent to B's work, or
> (c) of equal value to B's work.
>
> (2) A's work is like B's work if—
> (a) A's work and B's work are the same or broadly similar, and
> (b) such differences as there are between their work are not of practical importance in relation to the terms of their work.
> ….
> (4) A's work is rated as equivalent to B's work 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.
> ….
> (6) 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."

47 IDS Employment Law Guide: The Equality Act 2010 (Income Data Services Limited 2010) 150. Honeyball S *Honeyball & Bowers' Textbook on Employment Law* 11ed (Oxford University Press 2010) states the following at 278 with regard to the effect of the equality clause under the Equal Pay Act: "Thus, if men have a right to four weeks' holiday and women to three, and the women are found to be engaged on like work, their entitlement must be increased to four. If women have no right to holidays at all, a term to that effect must be inserted."

48 Lockton DJ *Employment Law* 9ed (Palgrave Macmillan 2014) states the following at 166: "If a complainant proves her right to equal pay, the clause will be activated. This means that on a term-by-term comparison between her contract and a man's, any term in her contract which is less favourable than the terms in his becomes as favourable, and any term in his contract which is not included in hers will become incorporated (s66(2)). The tribunal does not look at the employee's pay package as a whole but at each individual term – this is the principle derived from *Hayward v Cammell Laird Shipbuilders* [1988] AC 894."

The Equal Pay Statutory Code of Practice to the Equality Act of 2010 ("Equal Pay Statutory Code of Practice") states that section 66 of the Equality Act as read with section 65 thereof has the following effect. Where the work performed by the claimant and the comparator is like work (same work/substantially the same work), work rated as equivalent or work of equal value then the Equality Act implies a sex equality clause automatically into the woman's contract of employment which modifies it, where necessary, in order to ensure that her pay and all other contractual terms are no less favourable than the man's. It should be noted that the equal pay provisions in the Equality Act applies to both men and women even though a female is normally referred to as the equal pay claimant and a male is normally referred to as the comparator.[49] It is also important to note that the three equal pay causes of action as set out in section 65 of the Equality Act as read with section 66 thereof replicates the three equal pay causes of action that were set out in the Equal Pay Act (as discussed under paragraph 3.1 above) and as a result thereof the case law decided under the Equal Pay Act relating to the three causes of action is relevant to the three causes of action as set out in the Equality Act.[50]

Section 69 of the Equality Act provides a defence to a difference in the terms of the claimant and the comparator who perform like work, work rated as equivalent or work of equal value which is known as the material factor defence. It provides that the sex equality clause will not operate if the employer can show that the difference is due to a material factor which does not involve treating the claimant less favourably than the comparator

[49] Para 20 of the Equal Pay Statutory Code of Practice to the Equality Act of 2010 ("Equal Pay Statutory Code of Practice"). Romney D *Equal Pay: Law and Practice* (Oxford University Press 2018) states the following at 20 "Equal pay applies as much to men comparing themselves with women as to women comparing themselves with men. … The law requires the comparison of a claimant with a person of the opposite sex, ('the comparator')… A woman cannot compare herself with another woman or a man with another man."

[50] IDS Employment Law Guide: The Equality Act 2010 (Income Data Services Limited 2010) 151. Kelly D, Hammer R, Hendy J & Denoncourt J *Business Law* 3ed (Routledge 2018) states at 479 that section 65 of the Equality Act relating to the three equal pay causes of action "contains several important concepts that have rolled over from the Equal Pay Act so previous case law is still relevant." Lockton DJ *Employment Law* 9ed (Palgrave Macmillan 2014) states the following at 165: "The Equality Act 2010 repealed the Equal Pay Act (EPA) 1970. In respect of the equal pay provisions, very little has changed, and thus it is likely that existing case law is applicable under the 2010 provisions." Lewis D, Sargeant M & Schwab B *Employment Law: The Essentials* 11ed (Chartered Institute of Personnel and Development 2011) states the following at 130 relating to the Equal Pay Act: "As with other discrimination claims … much of the case law under the previous statute is thought to be still relevant …"

because of her sex and where the factor places the claimant and persons of the same sex at a particular disadvantage as compared to persons of the opposite sex then such factor must be a proportionate means of achieving a legitimate aim.[51]

Section 70 of the Equality Act read with section 39(1) thereof provides for a sex discrimination provision which applies to, *inter alia*, non-contractual terms of employment (including pay) and benefits.[52] This would, for example, include a discretionary bonus which will amount to a non-contractual claim.[53] The Equal Pay Statutory Code of Practice gives the following example to illustrate the application of section 70 of the Equality Act as follows:

> "A female sales manager is entitled under her contract of employment to an annual bonus calculated by reference to a specified number of sales. She discovers that a male sales manager working for the same employer and in the same office receives a higher bonus under his contract for the same number of sales. She would bring her claim under the equality of terms (equal pay) provisions.
>
> However, if the female sales manager is not paid a discretionary Christmas bonus that the male manager is paid, she could bring a claim under the sex discrimination at work provisions rather than an equal pay claim because it is not about a contractual term."[54]

Section 71 of the Equality Act relates to sex discrimination in relation to contractual pay as is evident from the heading of the section and it only applies to a term of a person's work that relates to pay and where the sex equality clause has no effect.[55] The Equal Pay Statutory Code of Practice elaborates on the application of section 71 of the Equality Act by stating that where the sex equality clause cannot operate for example as a result of a claimant not being able to choose a suitable comparator for an equal pay claim but has

---

[51] Section 69(1)-(2) of the Equality Act.

[52] Romney D *Equal Pay: Law and Practice* (Oxford University Press 2018) states the following at 23: "Under domestic law, a discretionary bonus is not contractual and claims must be brought for sex discrimination and not equal pay. Section 70 of the EqA (previously section 6(6) of the Sex Discrimination Act 1975 (SDA)) expressly provides that discrimination claims cannot be brought concerning contractual terms."

[53] Para 32 of the Equal Pay Statutory Code of Practice. Romney D *Equal Pay: Law and Practice* (Oxford University Press 2018) 23.

[54] Para 32 of the Equal Pay Statutory Code of Practice.

[55] Section 71(1)(a)-(b) of the Equality Act.

evidence of direct sex discrimination – then she can bring a discrimination claim in terms of section 71 of the Equality Act.[56]

Section 67 of the Equality Act contains the sex equality rule which applies to occupational pensions. It provides at the outset that an occupational scheme that does not contain a sex equality rule should be treated as including one. Section 67(2)(a)-(b) of the Equality Act then sets out the effect of the sex equality rule as follows:

> "(2) A sex equality rule is a provision that has the following effect—
>
> (a) if a relevant term is less favourable to A than it is to B, the term is modified so as not to be less favourable;
>
> (b) if a term confers a relevant discretion capable of being exercised in a way that would be less favourable to A than to B, the term is modified so as to prevent the exercise of the discretion in that way."

The Equal Pay Statutory Code of Practice states that the sex equality rule in section 67(2) of the Equality Act is there to ensure that comparable females and males are treated equally in accordance with the equal pay for equal work principle in relation to access and benefits of an occupational pension scheme. Thus, where an occupational pension scheme including a term of it is less favourable to a female than to a male comparator then according to the sex equality rule it is treated as being modified in such a manner that it is no longer less favourable.[57] Section 69(4) of the Equality Act provides a defence to the sex equality rule where the trustees or managers of the scheme prove that the

---

56 Para 33 of the Equal Pay Statutory Code of Practice.

57 Paras 63-64 of the Equal Pay Statutory Code of Practice. Hepple B *Equality: The Legal Framework* 2ed (Hart Publishing 2014) states the following at 122 relating to the sex equality rule: "… if a term in a pension scheme confers a discretion capable of being exercised in a way that would be less favourable to a member of one sex than to a member of the opposite sex, then the term is modified so as to prevent the exercise of the discretion in that way." IDS Employment Law Guide: The Equality Act 2010 (Income Data Services Limited 2010) states the following at 172 regarding the sex equality rule in section 67 of the Equality Act: "Like a sex equality clause, this has the effect that if a relevant term of the scheme is less favourable to an employee than it is to a comparator of the opposite sex doing equal work, then the offending term is modified so as not to be less favourable – S.67(2)(a). Similarly, any term capable of being exercised in a way that would be less favourable to the employee than to the comparator is modified so as to prevent the exercise of the discretion in that way – S.67(2)(b). This rule covers those terms and discretions of the scheme that govern, or are capable of affecting, the way in which persons become members of the scheme or the way in which members are treated – S.67(3) and (4)."

difference between the claimant and the comparator is due to a material factor which is not the difference of sex.

In South Africa, section 6(4) of the EEA does not specifically deal with occupational pensions and this study would therefore not be able to take guidance from section 67 of the Equality Act for the answering of the research questions. There is no equal pay cause of action in section 6(4) of the EEA which specifically deals with occupational pensions and it does not seem prudent at this stage to make submissions for the inclusion of an equal pay cause of action which is not known in South African equal pay law. This should not be read to mean that it will never be prudent to do so but an argument for the inclusion of such cause of action into South African equal pay law at this stage might amount to an inappropriate transplant of foreign law into domestic law which may result in an abuse of the use of foreign law (as discussed under paragraph 2 above).[58] The purpose of the discussion of the sex equality rule which applies to occupational pensions here is thus to place the United Kingdom equal pay legal framework in context.

Sections 73-75 of the Equality Act provides for the equality clauses and equality rule specifically with regard to maternity. Section 73 of the Equality Act provides the following with regard to the maternity equality clause:

> "(1) If the terms of the woman's work do not (by whatever means) include a maternity equality clause, they are to be treated as including one.
>
> (2) A maternity equality clause is a provision that, in relation to the terms of the woman's work, has the effect referred to in section 74(1), (6) and (8).
>
> (3) In the case of a term relating to membership of or rights under an occupational pension scheme, a maternity equality clause has only such effect as a maternity equality rule would have."

The Equal Pay Statutory Code of Practice provides the following guidance with regard to the maternity clause in section 73 of the Equality Act:

---

58 See *Sanderson v Attorney-General Eastern Cape* (CCT10/97) [1997] ZACC 18 at para 26 and Kahn-Freund O "On Uses and Misuses of Comparative Law" *The Modern Law Review* 1974 37(1) 1 at 27 discussed under para 2 above.

"A woman should not receive lower pay or inferior contractual terms for a reason relating to her pregnancy and a maternity equality clause is implied into her contract to ensure this. There is no need to show equal work with a comparator in this situation."[59]

The Equal Pay Statutory Code of Practice further states that the maternity equality clause applies to (a) the calculation relating to the contractual maternity-related pay; (b) the payment of bonuses during maternity leave; and (c) pay increases.[60] Romney states that the maternity equality clause like the sex equality clause is an implied term to ensure equality of pay.[61] She further states that the purpose of the provisions relating to the maternity equality clause is to ensure that female employees are not discriminated against when they are on maternity leave and when they return to work. She also states that there is no material factor defence and comparator in the case of a maternity equality clause.[62]

Section 74 of the Equality Act relating to pay in relation to a maternity equality clause provides the following:

"(1) A term of the woman's work that provides for maternity-related pay to be calculated by reference to her pay at a particular time is, if each of the following three conditions is satisfied, modified as mentioned in subsection (5).

(2) The first condition is that, after the time referred to in subsection (1) but before the end of the protected period—
(a) her pay increases, or
(b) it would have increased had she not been on maternity leave.

(3) The second condition is that the maternity-related pay is not—
(a)what her pay would have been had she not been on maternity leave, or
(b) the difference between the amount of statutory maternity pay to which she is entitled and what her pay would have been had she not been on maternity leave.

---

59 Para 91 of the Equal Pay Statutory Code of Practice.

60 Para 92 of the Equal Pay Statutory Code of Practice. See also section 74 of the Equality Act.

61 Romney D *Equal Pay: Law and Practice* (Oxford University Press 2018) 132. Romney D *Equal Pay: Law and Practice* (Oxford University Press 2018) states the following at 132: "Under section 73 of the EqA: 'If the terms of the woman's work do not (by whatever means) include a maternity equality clause, they are to be treated as including one.' Like the sex equality clause, this is an implied term ensuring that equality of pay in accordance with section 74(1) (pay rises during maternity leave), (6) (a term excluding the claimant from pay or bonus during maternity leave), and (8) (a term excluding the claimant from pay rises following the protected period)."

62 Romney D *Equal Pay: Law and Practice* (Oxford University Press 2018) 133.

(4) The third condition is that the terms of her work do not provide for the maternity-related pay to be subject to—
(a) an increase as mentioned in subsection (2)(a), or
(b) an increase that would have occurred as mentioned in subsection (2)(b).

(5) The modification referred to in subsection (1) is a modification to provide for the maternity-related pay to be subject to—
(a) any increase as mentioned in subsection (2)(a), or
(b) any increase that would have occurred as mentioned in subsection (2)(b).

(6) A term of her work that—
(a) provides for pay within subsection (7), but
(b) does not provide for her to be given the pay in circumstances in which she would have been given it had she not been on maternity leave,

is modified so as to provide for her to be given it in circumstances in which it would normally be given.

(7) Pay is within this subsection if it is—
(a) pay (including pay by way of bonus) in respect of times before the woman is on maternity leave,
(b) pay by way of bonus in respect of times when she is on compulsory maternity leave, or
(c) pay by way of bonus in respect of times after the end of the protected period."[63]

(8) A term of the woman's work that—
(a) provides for pay after the end of the protected period, but
(b) does not provide for it to be subject to an increase to which it would have been subject had she not been on maternity leave,[64]

is modified so as to provide for it to be subject to the increase.

(9) Maternity-related pay is pay (other than statutory maternity pay) to which a woman is entitled—
(a) as a result of being pregnant, or
(b) in respect of times when she is on maternity leave."

---

[63] Romney D *Equal Pay: Law and Practice* (Oxford University Press 2018) states the following at 133-134 relating to section 74(6)-(7) of the Equality Act: "Section 74(6)-(7) of the EqA provide that the woman must receive bonus due for the periods (i) before she goes on maternity leave; (ii) for the two-week period of compulsory maternity leave after the birth; and (iii) for the period after the end of her maternity leave (the protected period). Section 74(7) defines pay as a bonus save in the circumstances of a woman's pay before she goes on maternity leave."

[64] Romney D *Equal Pay: Law and Practice* (Oxford University Press 2018) states the following at 134 relating to section 74(8) of the Equality Act: "Section 74(8) ensures that a term by which a woman receives full pay for the period after her protected period 'but does not provide for it to be subject to an increase to which it would have been subject had she not been on maternity leave'. The definition of protected period is the same as in section 18(6) of the EqA namely: The protected period, in relation to a woman's pregnancy, begins when the pregnancy begins, and ends – (a) if she has the right to ordinary and additional maternity leave, at the end of the additional maternity leave period of (if earlier) when she returns to work after the pregnancy; (b) if she does not have that right, at the end of the period of 2 weeks beginning with the end of the pregnancy."

Romney states that there are three conditions relating to the operation of the maternity equality clause in terms of section 74 which are as follows: (a) Firstly, the female employee's pay increases or would have increased had she not been on maternity leave; (b) Secondly, "there is a shortfall in her pay, either because it is not what it should have been had she not been on maternity leave or because it is less than what her pay should have been had she not been on maternity leave less the amount of her SMP [statutory maternity pay];", and (c) Thirdly, the female employee's contract does not include a provision which ensures that the employee's pay increases or would have increased during her maternity leave.[65] Romney states that the third condition is there to prevent double recovery of pay. She further states that the effect of the three conditions set out in section 74 of the Equality Act is as follows:

> "The effect of the three conditions is that if a woman gets a pay rise, or a smaller pay rise, than she would have got had she not been on maternity leave, or is denied one because she is on maternity leave, her pay will be equalized by operation of the maternity equality clause."[66]

The Equal Pay Statutory Code of Practice comments on section 75 of the Equality Act[67] that relates to the maternity equality rule which applies to occupational schemes by

---

[65] Romney D *Equal Pay: Law and Practice* (Oxford University Press 2018) 133.

[66] Romney D *Equal Pay: Law and Practice* (Oxford University Press 2018) 133.

[67] Section 75 of the Equality Act relating to the maternity equality rule provides the following: "(1) If an occupational pension scheme does not include a maternity equality rule, it is to be treated as including one. (2) A maternity equality rule is a provision that has the effect set out in subsections (3) and (4). (3) If a relevant term does not treat time when the woman is on maternity leave as it treats time when she is not, the term is modified so as to treat time when she is on maternity leave as time when she is not. (4) If a term confers a relevant discretion capable of being exercised so that time when she is on maternity leave is treated differently from time when she is not, the term is modified so as not to allow the discretion to be exercised in that way. (5) A term is relevant if it is—(a) a term relating to membership of the scheme, (b) a term relating to the accrual of rights under the scheme, or (c) a term providing for the determination of the amount of a benefit payable under the scheme. (6) A discretion is relevant if its exercise is capable of affecting— (a) membership of the scheme, (b) the accrual of rights under the scheme, or (c) the determination of the amount of a benefit payable under the scheme. (7) This section does not require the woman's contributions to the scheme in respect of time when she is on maternity leave to be determined otherwise than by reference to the amount she is paid in respect of that time. (8) This section, so far as relating to time when she is on ordinary maternity leave but is not being paid by her employer, applies only in a case where the expected week of childbirth began on or after 6 April 2003. (9) This section, so far as relating to time when she is on additional maternity leave but is not being paid by her employer— (a) does not apply to the accrual of rights under the scheme in any case; (b) applies for other purposes only in a case where the expected week of childbirth began on or after 5 October 2008. (10) In this section— (a) a reference to being on maternity leave includes a reference to having been on maternity leave, and (b) a reference to being paid by the employer includes a reference to receiving statutory maternity pay from the employer."

stating that if such scheme does not contain a maternity equality rule then it will be treated as including one and the effect of this is to ensure that a female on paid maternity leave is to be treated as if she were working for the purpose of her pension.[68] The Code further states that a female on maternity leave may only be treated differently when she is on unpaid additional maternity leave and is not entitled to accumulate, as of right, pension benefits.[69]

It is appropriate to mention here that no guidance for purposes of answering the research questions will be extracted from sections 73-75 of the Equality Act which contains the equality clauses and equality rule (applying to occupational pensions) relating to maternity. The reason is that there is no equal pay cause of action in section 6(4) of the EEA which specifically deals with maternity pay and maternity occupational schemes and it does not seem prudent at this stage to make submissions for the inclusion of such equal pay causes of action which are not known in South African equal pay law. Again, this should not be read to mean that it will never be prudent to do so but an argument for the inclusion of such causes of action into South African equal pay law at this stage might amount to an inappropriate transplant of foreign law into domestic law which can result in

---

[68] Romney D *Equal Pay: Law and Practice* (Oxford University Press 2018) states the following at 134 relating to section 75 of the Equality Act: "Section 75 of the EqA applies to a maternity equality rule which is implied into an occupational pension scheme by section 75(1). In particular, the section applies to ensure that: …if a relevant term does not treat time when the woman is on maternity leave as it treats time when she is not, the term is modified so as to treat time when she is on maternity leave as time when she is not (section 75(3));… if a term confers a relevant discretion capable of being exercised so that time when she is on maternity leave is treated differently from time when she is not, the term is modified so as not to allow the discretion to be exercised in that way (section 75(4));… under section 75(5), a relevant term, and under section 75(6), a relevant discretion, relates to membership of the scheme, the accrual of rights under the scheme, or providing for a benefit under the scheme;… under section 75(7), a woman's contributions to the occupational pension scheme on maternity leave are limited to the proportion of the sum she actually receives by way of pay." IDS Employment Law Guide: The Equality Act 2010 (Income Data Services Limited 2010) states the following at 174-175: "A woman on maternity leave also benefits from protection in relation to her rights under an occupational pension scheme. The protection is given effect by S.75 EqA, which provides for the deemed inclusion of a '*maternity equality rule*' in an occupational pension scheme. In brief, the rule has the effect that any term of the scheme, or any discretion capable of being exercised under it, that purports to treat a woman differently in respect of time when she is on maternity leave compared with time when she is not, is modified so that both periods fall to be treated in the same way – S.75(3) and (4). Any term or discretion relating to membership of the scheme, accrual of rights or determination of benefits payable under the scheme is within the scope of the maternity equality rule – S.75(5) and (6)."

[69] Paras 100-101 of the Equal Pay Statutory Code of Practice. See also section 74 of the Equality Act.

an abuse of the use of foreign law (as discussed under paragraph 2 above).[70] The purpose of the discussion of the maternity equality clauses and the maternity equality rule relating to occupational schemes is to place the United Kingdom equal pay legal framework in context.

The sections of the Equality Act relevant to equal pay having been placed in context, it should be easier to follow the discussion below which includes these sections at various places. It must also be mentioned here that the equal pay causes of action in the Equality Act deals with equal pay between women and men but pay (systems) may also be challenged on the grounds of race, age or other protected characteristics under the Equality Act.[71] This does not affect any guidance to be extracted for the equal pay causes of action in section 6(4) of the EEA because it deals with a number of listed grounds of discrimination and unlisted grounds of discrimination which goes beyond sex.

3.3 Equal Pay Relating to Non-Standard (Atypical) Employees

It suffices to mention here that the United Kingdom has specific regulations which contain equal pay provisions for certain agency workers, fixed-term contract workers and part-time workers in the form of the Agency Workers Regulations Statutory Instrument No 93 of 2010; the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations Statutory Instrument No 2034 of 2002; and the Part-time Workers (Prevention of Less Favourable Treatment) Regulations Statutory Instrument No 1551 of 2000. These regulations will be discussed in paragraphs 7.1-7.3 below.

3.4 Proactive measures relating to equal pay

It is also sufficient to mention here that the United Kingdom equal pay regime contains the following proactive measures relating to equal pay: (a) the Equal Pay Statutory Code

---

70 See *Sanderson v Attorney-General Eastern Cape* (CCT10/97) [1997] ZACC 18 at para 26 and Kahn-Freund O "On Uses and Misuses of Comparative Law" *The Modern Law Review* 1974 37(1) 1 at 27 discussed under para 2 above.

71 Para 11 of the Equal Pay Statutory Code of Practice.

of Practice which, *inter alia*, provides non-binding guidance to employers on how to go about eliminating gender pay inequalities (including pay inequalities on other grounds) by conducting equal pay audits; (b) the Equality Act 2010 (Equal Pay Audits) Regulations 2014 which gives the Employment Tribunal the power, where it finds that an equal pay breach has been committed, to order an employer to carry out an equal pay audit; and (c) the Equality Act 2010 (Gender Pay Gap Information) Regulations 2017 which places an obligation on an employer with 250 or more employees to publish annual information relating to pay. These proactive measures will be discussed in paragraphs 8.1-8.3 below.

With this background in mind, it is appropriate to now deal with the specific aspects of equal pay law in the United Kingdom which can assist with the answering of the research questions to the extent called for in paragraphs 13.1-13.11 of Chapter 2 of this thesis.

4. INTERPRETATION OF TERMINOLOGY: 'TERMS AND CONDITIONS OF EMPLOYMENT', 'EMPLOYER', 'COMPARATOR', 'SAME WORK, SUBSTANTIALLY THE SAME WORK, WORK OF EQUAL VALUE'

4.1 Terms and Conditions of Employment

The sex equality clause in section 66 of the Equality Act as read with section 65 thereof which contains the equal pay causes of action refers to *terms of work* but there is no definition as to what would constitute terms of work.[72] Section 80(2)(a) of the Equality Act does, however, state that the terms of a person's work are the terms that are contained in the person's employment contract.[73] While there is also no definition relating to the

[72] Romney D *Equal Pay: Law and Practice* (Oxford University Press 2018) states the following at 156 with regard to common terms referred to in section 79(4)(b)-(c) of the Equality Act: "The purpose of the legislation is to ensure that men and women in the same employment are paid equal pay for equal work, and to construe the phrase 'common terms and conditions' too narrowly would defeat that purpose and fail to accord with Article 157."

[73] Section 80(2)(a)-(b) of the Equality Act provides the following: "(2) The terms of a person's work are— if the person is employed, the terms of the person's employment that are in the person's contract of employment, contract of apprenticeship or contract to do work personally; (b) if the person holds a personal or public office, the terms of the person's appointment to the office." McCrudden C *Equality in Law between Men and Women in the European Community: United Kingdom* (Martinus Nijhoff Publishers 1994) states the following at 37: "The following have, however, been held to be included as

phrase "contract of employment" in section 80(2)(a) of the Equality Act, it is commonplace that express contractual terms as well as implied contractual terms are covered, provided that their existence can be established. Contractual terms may, furthermore, be written or verbal (provided that their existence can be established) and includes terms that have been incorporated by operation of a collective agreement.[74]

The Equal Pay Statutory Code of Practice provides guidance relating to what falls within the terms of a person's work for the purpose of the equal pay provisions by stating that the equal pay provisions applies to all contractual terms which will include the following: (a) wages/salaries (b) overtime; (c) shift payments; (d) holiday pay; (e) sick pay;[75] (f) non-discretionary bonuses;[76] (g) occupational pension benefits; and (h) non-monetary terms such as leave entitlements, access to social benefits and sports.[77] The following can be added to this list: (i) an automatic increase in pay level, for example, a seniority increment;[78] and (j) a benefit in kind, such as the use of a car.[79] It is important to note that this is not a closed list of what can fall within terms of work because the Code goes further and states that the equal pay provisions applies to all contractual terms which goes beyond those directly related to remuneration and the result of this is that a woman who is engaged in equal work with a man in the same employment is entitled to receive equal

---

terms of a contract: basic pay, benefits in kind such as the use of a car, cash bonuses, and sickness benefits."

[74] IDS Employment Law Guide: The Equality Act 2010 (Income Data Services Limited 2010) at 154.

[75] McCrudden C *Equality in Law between Men and Women in the European Community: United Kingdom* (Martinus Nijhoff Publishers 1994) states the following at 37: "The following have, however, been held to be included as terms of a contract: … sickness benefits."

[76] Duggan M *Equal Pay – Law and Practice* (Jordan Publishing Limited 2009) states the following at 59: "Payment of a bonus under the contract of employment is almost certainly pay as it relates to work that has been carried out." McCrudden C *Equality in Law between Men and Women in the European Community: United Kingdom* (Martinus Nijhoff Publishers 1994) states the following at 37: "The following have, however, been held to be included as terms of a contract: … cash bonuses …."

[77] The Equal Pay Statutory Code of Practice at para 31.

[78] Duggan M *Equal Pay – Law and Practice* (Jordan Publishing Limited 2009) states the following at 60: "Where there are automatic increases in pay levels, based, for example, upon seniority, then the increases will constitute pay and will give rise to claims under the EqPA 1970 where there is a contractual right." McCrudden C *Equality in Law between Men and Women in the European Community: United Kingdom* (Martinus Nijhoff Publishers 1994) states the following at 37: "The following have, however, been held to be included as terms of a contract: basic pay …."

[79] McCrudden C *Equality in Law between Men and Women in the European Community: United Kingdom* (Martinus Nijhoff Publishers 1994) states the following at 37: "The following have, however, been held to be included as terms of a contract: … benefits in kind such as the use of a car …."

pay and equality in other contractual terms which should ensure that her pay and other contractual terms are no less favourable than the man's.[80] Napier states that because of the wide range of contractual matters that the Equality Act applies to one should strictly speaking not be referring to equality of term claims as equal pay claims because this would be a narrow description but it is commonplace to refer to such claims as equal pay claims.[81]

Before proceeding to discuss the case law of the United Kingdom which dealt with the interpretation of "terms of work" it is convenient to set out the guidance that can be taken from the above sources for the phrase "terms and conditions of employment" (paragraph 13.1 of Chapter 2 of this thesis). The guidance sought from the United Kingdom equal pay law relates to: whether submissions can be made regarding the inclusion of payments set out in the lists of payments in the BCEA Schedule under the phrase "terms and conditions of employment" in section 6(4) of the EEA based on the United Kingdom equal pay law and whether the United Kingdom equal pay law can contribute further towards addressing the issue of what can fall within the phrase "terms and conditions of employment" under section 6(4) of the EEA.

The following payments listed under the United Kingdom equal pay law overlap with the payments listed in the BCEA Schedule (as set out in paragraph 5.1 of Chapter 2 of this thesis): (a) wages/salaries;[82] (b) occupational pension benefits;[83] and (c) use of a car.[84]

---

[80] The Equal Pay Statutory Code of Practice at paras 26, 28, 29.

[81] Napier BW "Division K – Equal Pay" at para 35 in Smith I (gen editor) *Harvey on Industrial Relations and Employment Law* (loose-leaf). Kelly D, Hammer R, Hendy J & Denoncourt J *Business Law* 3ed (Routledge 2018) states the following at 480 relating to equal pay claims under the Equality Act: "A claim is not restricted to purely claims for pay, but applies to any terms in the applicant's contract that are less favourable than the comparator's. Each term must be considered individually, rather than as part of the remuneration package, as decided in *Hayward v Cammell Laird Shipbuilders Ltd* (1998)." Pitt G *Employment Law* 6ed (Sweet & Maxwell Limited 2007) states the following at 179: "The right to equal pay-which actually means equal terms and conditions of employment, not just pay-is enshrined in the Equal Pay Act 1970 (in force December 29, 1975)."

[82] This payment is set out in item 1(c) of the BCEA Schedule and also falls under terms of work as discussed under para 4.1 above.

[83] This payment (benefit) is set out in item 1(e) of the BCEA Schedule and also falls under terms of work as discussed under para 4.1 above.

[84] This payment (benefit) is set out in item 1(b) read with item 2(a) of the BCEA Schedule and also falls under terms of work as discussed under para 4.1 above.

Based on this, it is submitted that these payments should fall under the phrase "terms and conditions of employment" under section 6(4) of the EEA.

The United Kingdom equal pay law contributes the following as far as the interpretation of the phrase "terms and conditions of employment" is concerned:

(a) It is important to note that whilst terms of work in the form of overtime pay, holiday pay, sick pay and leave entitlement (pay) as set out in the Equal Pay Statutory Code of Practice discussed under this paragraph 4.1, are not found in the lists of payments in the BCEA Schedule,[85] these terms of work are found in the Integration of Employment Equity Code[86] as overtime rates, annual leave (including holiday pay and leave entitlement) and sick leave and thus strengthens the submission made in Chapter 2 that these forms of terms and conditions of employment fall within the ambit of the phrase "terms and conditions of employment" under section 6(4) of the EEA;[87] and

(b) The following elements of what falls within terms of work under the United Kingdom law referred to under this paragraph 4.1 are not mentioned in the lists of payments in the BCEA Schedule or the list of terms and conditions of employment in the Integration of Employment Equity Code:[88] (i) shift payments; (ii) non-discretionary bonuses; (iii) access to social benefits and sports; and (iv) automatic increases in pay such as a seniority increment. Notwithstanding this, the following guidance can be extracted for the research question in (b) above. This list of payments (working conditions) provides examples of what falls under the ambit of terms of work for the purposes of an equal pay (terms and conditions) claim under the United Kingdom equal pay law, and to this end, it is submitted that the list of payments (working conditions) should be listed as examples of what has been found under the United Kingdom law to fall within the ambit of terms of work which

[85] As set out in paragraph 5.1 of Chapter 2 of this thesis.
[86] As set out in paragraph 5.1 of Chapter 2 of this thesis.
[87] See paragraphs 5.1 and 13.1 in Chapter 2 of this thesis.
[88] As set out in paragraph 5.1 of Chapter 2 of this thesis.

can assist with determining whether such pay (working conditions) falls within the ambit of "terms and conditions of employment" in section 6(4) of the EEA.

4.1.1 Case law dealing with the interpretation to be accorded to "terms of work"

In *Hayward v Cammell Laird Shipbuilders Ltd*[89] the House of Lords remarked that there was no definition of the word "term" in the Equal Pay Act (which has been repealed). The House of Lords held that the natural meaning of the word "term" in the context of the Equal Pay Act should be understood as follows:

> "… a distinct provision or part of the contract which has sufficient content to make it possible to compare it from the point of view of the benefits it confers with similar provision or part in another contract."[90]

The interpretation of the word "term" in the Equal Pay Act arose in circumstances where the appellant received less favourable basic pay than the relevant men as well as less favourable overtime rates than men. The Industrial Tribunal held that the appellant was not entitled to relief with regard to specific terms of her employment contract in circumstances where her contract taken as a whole was as favourable to the appellant as it was to the relevant men. The appellant then appealed to the Employment Appeal Tribunal wherein the appeal was dismissed and a further appeal by her was dismissed by the Court of Appeal. The matter then came before the House of Lords by way of a further appeal. The issue before the House of Lords was whether the Equal Pay Act allows for a situation where a female can point to a term of her employment contract that is less favourable than a term of a similar kind in the male's contract and then have that term of her employment contract made not less favourable, notwithstanding that she is treated as favourably as the male when regard is had to the whole of her contract and his contract, or whether even though she can point to a less favourable term her claim could still fail if it can be shown that the terms of her employment contract taken as a whole are not less favourable than those of the male.[91]

---

89 [1988] IRLR 257 (HL) ("*Hayward*").
90 At para 9.
91 At paras 3, 8.

The respondent's argued that the reference to "term" in section 1(2) of the Equal Pay Act should be understood as meaning that pay should be considered as constituting a single term and a comparison can only be made by taking into account all the contractual terms relating to pay. The House of Lords rejected this argument by the respondent. The House of Lords held that the elimination of sex discrimination in relation to all aspects of remuneration requires each aspect of remuneration to be evaluated and where there is discrimination in relation to any aspect then it has to be eliminated notwithstanding any other aspects of remuneration. It held further that it is not natural to rely on a position that if the remuneration on the whole as it related to both a male and female provides the same result then it thus means that it is irrelevant that some aspects of remuneration are discriminatory in favour of the female provided that there are also some aspects of remuneration that favour the male.[92] The House of Lords allowed the appeal and remitted the matter to the Industrial Tribunal to determine the appellant's case in accordance with its decision on the meaning of "term" in the Equal Pay Act.[93]

It is important to refer to certain statements made by Lord Goff in *Hayward* in his separate concurring judgement.[94] Lord Goff stated that where a contract contains provisions which relate to for example; basic pay, the benefit of the use of a car, a cash bonus and sick benefits, it would not occur to him to put them all together and consider them one term of the employment contract because they are different terms. Lord Goff then went on to state that when dealing with the issue of "term" in an equal pay claim one has to look at two contracts and ask the simple question as to whether there is a term of a similar kind in the claimant's employment contract and the comparator's employment contract and if there is then the two terms must be compared and if the comparison shows that the term of the claimant's contract is less favourable than the term of the comparator's contract then the claimant's term is to be treated as modified so as to make it not less favourable.[95] Romney states that the effect of *Hayward* is that an employment contract should not be considered as a whole even if it results in an equal pay claimant being in a stronger

92 At paras 13, 20, 23.
93 At paras 20, 26.
94 Lord Goff's separate concurring judgment starts at para 30 of *Hayward*.
95 At paras 35, 37.

financial position than her comparator.[96] She further states that it is essential that terms are properly separated out in order to ensure that there is a proper comparison.[97] Hardy states that an employer is not allowed to argue that less favourable treatment experienced regarding one term, for example, basic pay, can be offset by having regard to better treatment in another term, for example, holiday entitlement or sick leave.[98]

In *St Helens & Knowsley Hospitals NHS Trust v Brownbill and Others*[99] female employees launched equal pay claims in terms of the Equal Pay Act on the grounds that the terms in their employment contracts relating to working unsocial hours were less favourable as compared to the terms of a similar kind afforded to their male comparators. They launched equal pay claims in terms of the Equal Pay Act since their male counterparts received a higher rate of pay for working unsocial hours. It is apposite to note that the claimants received higher total earnings than their male comparators. The Employment Tribunal held that the term relating to unsocial hours is a term relevant to the basic pay of the claimants and the comparators and as such it is not permissible to afford the claimants the same term relating to unsocial hours of the comparators as this would further increase the difference between the claimants pay and that of the comparators (the claimants pay would be more than the comparators). The Employment Tribunal thus made a finding in

---

[96] Romney D *Equal Pay: Law and Practice* (Oxford University Press 2018) 28. Romney further states the following: “The statutory language of the section refers to terms, not to contracts.” (Romney D *Equal Pay: Law and Practice* (Oxford University Press 2018) 28). Romney D *Equal Pay: Law and Practice* (Oxford University Press 2018) states the following at 143-144: “A woman may be entitled to equal pay with her comparator but she is not entitled to more than her comparator, even where she is more senior to him, has more experience than him, or does work of more value that he does. Were it otherwise, there would not be equality between them and it would be the comparator who would then be able to bring a claim citing *her* as his comparator. In other words, the point of an equal pay claim is to provide equal pay, not equal pay with extra benefits.”

[97] Romney D *Equal Pay: Law and Practice* (Oxford University Press 2018) 123. Bowers J *A Practical Approach to Employment Law* 7ed (Oxford University Press 2005) states the following at 138-139: “Each aspect of remuneration must be compared separately in order to achieve genuine transparency in assessing equality of pay … Terms have to be modified for equal pay purposes on a term by term basis; if the comparator’s contract contained a term which was beneficial and which had no equivalent in the applicant’s contract, the applicant’s contract was altered so as to include the beneficial term …”

[98] Hardy S *Labour Law and Industrial Relations in Great Britain* 3rd revised edition (Kluwer Law International 2007) states the following at 226: “An employer cannot argue that less favourable treatment in respect of one term, such as basic pay, is off-set by better treatment in respect of another term, such as holiday entitlement or sick leave, although it is possible that the defence of justification might apply.”

[99] [2011] IRLR 815 (EWCA).

favour of the employer. The Employment Appeal Tribunal overturned this decision and held that the Employment Tribunal had erred in law by not comparing the term of the claimants' contracts relating to working unsocial hours with that of the comparators contracts when it found that there were terms capable of being compared. The Employment Appeal Tribunal was not concerned with the fact that allowing the comparison might have the result that there would be an increase in the women's ultimate pay which would exceed that of their male comparators. The Employment Appeal Tribunal allowed the appeal by the claimants.[100]

The matter then came before the Court of Appeal and it held that the decision of the Employment Appeal Tribunal was correct. The Court of Appeal stated the following with regard to when terms of a contract can be compared for purposes of the Equal Pay Act as follows:

> "… Once the employment tribunal has correctly found that there were terms in the women's contracts and in the men's contracts that were susceptible to comparison and that each of the terms was a distinct provision with sufficient content to make it possible to compare them 'so that the benefits that are conferred by the provision can be contrasted' (paragraph 35), it ought to have proceeded to compare them in accordance with *Hayward*. … This analysis is required by *Hayward*."[101]

The Court of Appeal finally held that the focus of equal pay law is on the equality of terms and not on the total pay actually received. It thus dismissed the appeal and remitted the matter to the Employment Tribunal.[102]

In *Evesham v North Hertfordshire Health Authority and Secretary of State for Health*[103] the Court of Appeal held that the employer has to provide the claimant with treatment that is equal to that of the chosen comparator. It held that this equal treatment, in the case of the appellant, can be achieved in one of two ways in section 1(2)(c) of the Equal Pay Act. The first way is to achieve equal treatment by examining the employment contracts of

[100] At paras 1, 17-19.
[101] At paras 20-21.
[102] At paras 25-26.
[103] More fully reported as *Evesham v North Hertfordshire Health Authority and Secretary of State for Health*; *Enderby v Frenchay Health Authority and Secretary of State for Health*; *Hughes v West Berkshire Health Authority and Secretary of State for Health* [2000] IRLR 257 (CA).

both the claimant and the comparator term by term and if there is a term in the claimant's employment contract that is less favourable than a similar term in the employment contract of the comparator then equal treatment is achieved by the less favourable term in the claimant's employment contract being modified so as not to be less favourable. The second way is where the comparator has a beneficial term in his employment contract which the claimant does not have in her employment contract then equal treatment is achieved by including (amending) such a beneficial term in the claimant's contract.[104]

The Court of Appeal held that if there are terms in the claimant's employment contract that are more favourable than equivalent terms in the comparator's employment contract then the claimant simply keeps those terms and the focus is on the less favourable term in her employment contract to be modified (amended) so as to be equivalent to the term in the comparator's employment contract. It further held that this is the manner in which the Equal Pay Act requires equality of treatment to be achieved. It remarked that an employer is not allowed to state that it has not modified the less favourable clause in the claimant's employment contract because the claimant's employment contract overall is as favourable as the comparator's employment contract.[105]

In *Hartlepool Borough Council v Llewellyn*[106] the Employment Appeal Tribunal held that reference to the phrase "term" in section 1(2) of the Equal Pay Act should be interpreted as referring to the following: (a) an agreed term in the employment contract agreed to by the employee and employer; or (b) a term which is acknowledged by the employer; or (c)

---

[104] At para 27.

[105] At para 27. Duggan M *Equal Pay – Law and Practice* (Jordan Publishing Limited 2009) commenting on *Evesham* states the following at 39-40: "However, the claimant must be careful about the comparator that is chosen since the Tribunal can only modify the term of the contract and award higher pay based upon the earnings of the comparator. … Thus, although the men earned more than the women in this case the women should have identified more experienced comparators who were higher on the pay scale. It should be noted that if there was not a senior comparator who worked for the particular health authority it may have been possible to identify one working for another authority on the basis of the EqPA 1970, s 1(6) or Art 141 … ."

[106] More fully reported as *Hartlepool Borough Council v Llewellyn*; *Middlesbrough Borough Council v Matthews*; *South Tyneside Borough Council v McAvoy*; *Middlesbrough Borough Council v Ashcroft* [2009] IRLR 796 (EAT).

a term which has been ordered by a tribunal to be modified or inserted pursuant to an equal pay claim.[107]

In *Degnan v Redcar & Cleveland Borough Council*[108] the England and Wales Court of Appeal agreed with the Employment Appeal Tribunal's findings that basic hourly pay, a bonus and an attendance allowance relate to the same subject matter and as such does not constitute a distinct part of the employment contract but are rather elements of a distinct part of the employment contract which is the provision for monetary payment. The Court of Appeal also agreed with the rejection of a submission by the Employment Appeal Tribunal to the effect that any provision dealing with an element of pay should be viewed as a separate term for the purpose of an equal pay comparison. It further held that the Employment Appeal Tribunal did not engage in an overall comparison relating to different terms but it applied itself to the reality of the contractual provisions in the particular case. The Court of Appeal held that it did not understand Lord Goff in *Hayward* to say that basic pay and cash bonuses are always different provisions. It then went on to find that this approach was in accordance with the principles set out in *Hayward*. The Court of Appeal then said that the approach by the Employment Appeal Tribunal has the effect of achieving equalisation which was intended by the Equal Pay Act as opposed to the increase of a women's rate of pay to where it is higher than any comparator.[109] Nag states that *Degnan* makes the important point which is that the ambit of a term can be identified by having regard to the subject matter to which is relates but further states that this is a question of fact in each case as *Degnan* has not laid down a general rule with regard to all bonus schemes and attendance allowances.[110]

It is submitted that as, according to Nag, *Degnan* has not laid down a general rule that all bonus schemes, attendance allowances and basic pay constitute one term for the purposes of an equal pay comparison, the general rule laid down in *Hayward* to the effect that, the elimination of sex discrimination in relation to all aspects of remuneration

[107] At para 34.
[108] [2005] IRLR 615 (EWCA).
[109] At paras 10-12, 14.
[110] Nag S "Equality of Terms" in *Tolley's Employment Law Service* (loose-leaf) E7020.

requires each aspect of remuneration to be evaluated and where there is discrimination in relation to any aspect then it has to be eliminated notwithstanding any other aspects of remuneration, should be followed.[111] It is also important to note that the decision in *Degnan* to lump basic hourly pay, a bonus and an attendance allowance together and consider same as one term is contrary to the separate concurring judgment of Lord Goff in *Hayward* wherein he states that it would not occur to him to put, for example, basic pay, the benefit of the use of a car, a cash bonus and sick benefits, all together and consider them one term of the employment contract because they are different terms.[112]

In *McNeil & Others v Revenue and Customs Commissioners*[113] the Employment Appeal Tribunal held that a term by term analysis is required in an equal pay claim brought in terms of the Equality Act. It remarked that there is no definition of the word *term* in the Equality Act. The Appeal Tribunal further held that it agreed with the submission by the respondent that an employer is not allowed in terms of section 66 of the Equality Act to engage in an overall comparison of differing terms or lumping these terms together and a claimant is not allowed to subdivide, as it were, a single term into more parts for the purpose of complaining about one part. It stated that the reality of the contractual provisions in the case were indivisible and the only relevant consideration was the average total pay. The Employment Appeal Tribunal rejected the appellant's argument that basic pay can be subdivided into separate elements especially where there is no evidence that such a distinction has been drawn in contract or practice and where the Employment Tribunal held that basic pay was not capable of being divided.[114] Smith and Baker state that while the term by term approach might appear counter-intuitive, a possible rationale for its use is the difficulty which an overall assessment of all the elements of the contract might present to a court.[115]

---

111 See the discussion of *Hayward* in para 4.1.1 above.
112 See the discussion of the separate concurring judgment of Lord Goff in *Hayward* in para 4.1.1 above.
113 [2018] IRLR 398 (EAT).
114 At paras 52-54. Connolly M *Discrimination Law* 2ed (Sweet & Maxwell 2011) states the following at 323: "This means that the comparison must be on a term-by-term basis. So, for example, basic pay, cash bonuses, perks (such as company car) and sickness benefits, are not lumped together, so as to compare the overall package each worker receives."
115 Smith I & Baker A *Smith & Wood's Employment Law* 10ed (Oxford University Press 2010) 327.

In *Lloyds Banking Group Pensions Trustees Ltd v Lloyds Banking Plc & Others*[116] the trustees of pension schemes were held to have a legal duty to adjust benefits to address the inequality between men and women as far as occupational pension schemes are concerned.[117] The representative beneficiaries (all females) argued that in order to equalise benefits a term by term approach is required in accordance with European Union and English law. They further argued that the term by term approach requires the identification of separate terms of the occupational pension scheme which produce inequality and once this is done, adjustments have to be made to each term so that it produces equality. The Banks and the Crown argued that European Union law and English law require the equalisation of the total benefits payable under the occupational pension schemes. The Court referred to European Union case law and held that the following guidance, *inter alia*, can be derived therefrom: (a) the general rule is to treat each element of remuneration independently when an equal pay comparison is done as this is the only proper manner to ensure equality; (b) in cases where the pay structure is complex to the extent that a comparison of the elements of remuneration is unprofitable, impossible, difficult or unrealistic then the general rule will not apply; and (c) the general rule will also not apply where its application might lead to the other sex being discriminated against.[118]

The Court then referred to English law and derived the following guidance, *inter alia*, therefrom: (a) the court is required to follow a term by term approach when undertaking a comparison in an equal pay case; (b) the terms that fall to be compared must be such that it is natural to compare them; (c) what should be compared is a common sense question; (d) the terms should be realistically classified; (e) there might be instances where it would be prudent to ask whether a term is itself a distinct part of the contract or whether it is an element of a distinct part of the contract; and (f) it is wrong to undertake an overall comparison of different terms and to subdivide one term into several parts for

[116] [2018] EWHC 2839 (Ch).

[117] This duty only arises in respect of GMPs (guaranteed minimum pensions) accrued since 17 May 1990. This is the date from which European law requires employment-based pension benefits to accrue on an equal basis for men and women (paras 2, 4-5).

[118] At paras 305, 307, 323, 472.

the purpose of complaining about one part. The Court held that all of this requires evaluation. The Court found that it would be unprofitable and unrealistic to compare individual calculation factors as opposed to comparing the overall result. It further found that the relevant term to be compared was the overall benefits (total benefit) and not the individual calculation factors.[119]

The following guidance can be extracted from the above case law as far as the interpretation of the phrase "terms and conditions of employment" is concerned:

(a) Each aspect of remuneration must be evaluated/compared and it is not natural to compare remuneration on the whole. It is incorrect to lump different terms together and consider them as one term for the purpose of comparison.[120] The result is that a term by term comparison is required in an equal pay claim as the focus of equal pay law is on the equality of terms and not on the total pay actually received.[121] Based on this, it is submitted that every aspect of remuneration will constitute a term and condition of employment under section 6(4) of the EEA. It is further submitted that section 6(4) of the EEA should be restricted to a term by term comparison in an equal pay claim. This should be mentioned in the Equal Pay Code;

(b) An employer is not allowed to lump different terms together (for the purpose of preventing a term by term comparison) and a claimant is not allowed to subdivide a single term into more parts for the purpose of complaining about one part.[122] Based on this, it is submitted that an employer faced with an equal pay claim in terms of section 6(4) of the EEA should not be allowed to defeat such a claim from the outset by arguing that the term to which the complaint relates should be lumped with other terms in circumstances where the term is capable of being compared without being so lumped which then essentially prevents a term by term comparison from being carried out. It is further submitted that an

---

[119] At paras 336, 338-339.

[120] See *Hayward v Cammell Laird Shipbuilders Ltd* discussed under this para above.

[121] See *McNeil & Others v Revenue and Customs Commissioners* and *St Helens & Knowsley Hospitals NHS Trust v Brownbill and Others* discussed under this para above.

[122] See *McNeil & Others v Revenue and Customs Commissioners* discussed under this para above.

equal pay claimant under section 6(4) of the EEA should, likewise, not be allowed to subdivide a single term into several parts and then launch a complaint against the one part because this will amount to comparing an element of a term and what is required to be compared is a term and not an element thereof. This should be mentioned in the Equal Pay Code; and

(c) It is submitted that the following guidance from the United Kingdom equal pay law will provide the South African Labour Courts (including the Commission for Conciliation Mediation and Arbitration ("CCMA")) with the necessary guidance in order to determine whether or not an employer faced with an equal pay claim is (incorrectly) lumping the term to which the equal pay complaint relates with other terms in order to defeat such equal pay claim from the outset and whether or not an equal pay claimant is complaining about an element of a term and not the term itself which is not allowed (as stated in the immediate preceding paragraph): (i) the terms that fall to be compared must be such that it is natural to compare them; (ii) what should be compared is a common sense question; (iii) the terms should be realistically classified; (iv) there might be instances where it would be prudent to ask whether a term is itself a term or whether it is an element of a term of the contract; and (v) it is impermissible to subdivide one term into several parts for the purpose of complaining about one part. The guidance listed in (i)-(v) requires evaluation by the court.[123] It is further submitted that this should be mentioned in the Equal Pay Code.

4.2 The Employer, the Establishment and the section 79 Comparators

It should be noted from the outset that an equal pay claimant is not restricted to choose a comparator employed by her employer (the same employer) and is allowed to compare her equal pay situation with that of a comparator employed by an associate of her employer. Section 79 of the Equality Act which deals with who a suitable comparator is for the purposes of an equal pay claim makes a distinction between a comparator

[123] See *Lloyds Banking Group Pensions Trustees Ltd v Lloyds Banking Plc & Others* discussed under this para above.

employed at the same establishment as the claimant and a comparator employed at a different establishment to that of the claimant provided that the comparator is either employed by the claimant's employer or by an associate of the claimant's employer. It should further be noted that a comparator employed as mentioned in both scenarios is a suitable comparator and this results in their being four section 79 comparators.[124]

It is thus not sufficient for a claimant to only show that her comparator is employed by the same employer or an associate of her employer. She also has to prove that the comparator works at the same establishment where she works and where the comparator is employed at a different establishment then she must prove that common terms apply at the establishments, either generally or as between the claimant and comparator.[125] The choosing of a comparator is thus intertwined with who the comparator's employer is as well as whether he works at the same establishment as the claimant.

With this background in mind, it is important to discuss the four section 79 comparators as well as deal with the following issues related thereto, before determining whether any guidance can be extracted from the United Kingdom equal pay law for the research questions relating to the phrase "the same employer" in section 6(4) of the EEA (research question 2 posed in paragraph 13.2 of Chapter 2 of this thesis). Other questions related to this which should be answered at the same time are what constitutes an establishment?; who or what is an associate of the claimant's employer?; and what

---

[124] Section 79(1)-(4) of the Equality Act.

[125] Napier BW "Division K – Equal Pay" at para 389 in Smith I (gen editor) *Harvey on Industrial Relations and Employment Law* (loose-leaf). Romney D *Equal Pay: Law and Practice* (Oxford University Press 2018) states the following at 155: "Section 79 draws a distinction between a comparison when the claimant and the comparator work in the same establishment and a comparison where the claimant and the comparator work in different establishments. In the former, their terms and conditions are irrelevant. In the latter, the claimant must show that her establishment and his operate common terms and conditions. Where each works under a different collective agreement or terms and conditions, this could prevent a valid comparison for the purposes of establishing a claim." Section 80(3) of the Equality Act provides the following: "If work is not done at an establishment, it is to be treated as done at the establishment with which it has the closest connection." Bowers J *A Practical Approach to Employment Law* 7ed (Oxford University Press 2005) mentions the following example at 118 regarding comparators employed at another establishment under the Equal Pay Act: "Crest Department Stores Ltd has two branches. All the check-out assistants at Branch A are women but at Branch B some are male – the males receive a higher rate of pay: a woman at Branch A may compare herself to a man at Branch B if, but only if, the same general terms, possibly because of a collective agreement, apply to both places."

amounts to common terms applying at the establishments where the comparator is employed at a different establishment? These issues will be dealt with below under the discussion dealing with the four section 79 comparators, which comparators are:

- a comparator employed by the claimant's employer and both work at the same establishment; or
- a comparator employed by an associate of the claimant's employer and both work at the same establishment; or
- the comparator is employed by the claimant's employer but works at a different establishment provided common terms apply at both establishments; or
- the comparator is employed by an associate of the claimant's employer but works at a different establishment provided common terms apply at both establishments.

4.2.1 The first and second section 79 (statutory) comparators

Section 79(2) read with section 79(3)(a)-(b) of the Equality Act provides that B is a comparator of A (claimant) if B is employed either by the claimant's employer or an associate of the claimant's employer and both the claimant and the comparator work at the same establishment.[126] It is clear from a reading of these sections that it refers to two comparators as follows: (a) the first comparator is one who is employed by the claimant's employer and both the claimant and the comparator work at the same establishment; and (b) the second comparator is one who is employed by an associate of the claimant's employer and both the claimant and the comparator work at the same establishment. The issues relating to what constitutes an establishment and what or who is an associate employer is dealt with below.

[126] Hepple B *Equality: The Legal Framework* 2ed (Hart Publishing 2014) states the following at 124 relating to equal pay comparisons: "The first [comparison] is where A and B share the same employer, and work at the same establishment."

4.2.1.1 What constitutes an establishment?

It should be noted that "establishment" is not defined in the Equality Act.[127] What constitutes an "establishment" was extensively dealt with in *City of Edinburgh Council v Wilkinson & Others*.[128] In this case the claimants worked for the Council and the male comparators also worked for the same Council but not at the same place as the claimants. One of the issues was whether the claimants and comparators were employed at the same establishment. The Employment Tribunal held that the claimants and comparators were not employed at the same establishment. The Council appealed this decision, *inter alia*, of the Employment Tribunal to the Employment Appeal Tribunal. The Employment Appeal Tribunal held on this issue that the starting point is that the Council is a single undertaking and on the face of it a single establishment and this presumption will only be put to the side if it is shown that there are subsets of its operation which should be regarded as separate establishments. It then held that the Employment Tribunal erred in finding that the claimants and the comparators were employed at different establishments as the only finding open to it was that the Council was a single establishment and it dismissed the appeal.[129]

The Council then appealed the decision of the Employment Appeal Tribunal to the Court of Session. The Council argued that the Employment Appeal Tribunal's approach to the concept of "establishment" was incorrect because it primarily referred to a place of work and was not to be equated to be the employer's undertaking. The Council further argued that the Employment Appeal Tribunal erred in that there was no presumption from the Act that the entirety of an undertaking constituted a single establishment. The claimants argued for the Employment Appeal Tribunal's decision to be upheld and it would be inconsistent with European Union law to give a meaning to the word "establishment" that confined it to a place of work. The Court of Session held that there was merit in the

---

127 Nag S "Equality of Terms" in *Tolley's Employment Law Service* (loose-leaf) E7039. IDS Employment Law Guide: The Equality Act 2010 (Income Data Services Limited 2010) states the following at 158: "The EqA does not define 'establishment' (and nor did the EqPA) and so this concept is only limited by the small amount of case law that has built up on it."

128 [2012] IRLR 202 (Ct Sess).

129 At paras 1, 3, 7-8, 13, 15.

arguments made by the Council and it was clear from section 1(6) of the Equal Pay Act that the Act treats an establishment as something separate from the whole undertaking of the employer. It further remarked that it could not find anything in the Act which indicates a presumption that the whole undertaking should amount to a single establishment. The Court stated that a distinct geographical location could, depending on the circumstances, be an important element to identify the establishment. It held that the Council correctly argued that the term "establishment" primarily refers to the place of work. It also provided an example of what would be a place of work and stated that a laboratory assistant employed at a University in a specific campus would have her place of work in one of the University buildings but the establishment for the purpose of the Act would be the specific campus where she works. The Court held that the Act envisages that an employer can have separate establishments.[130] The Court then provided guidance and stated that the question as to whether a claimant and the comparator are employed in the same establishment is a matter to be answered by evaluating the facts and circumstances of the case in question. It held that the Employment Tribunal was correct in finding that the claimants and the comparators did not work at the same establishment.[131]

It is clear from the above discussion that the following principles apply to determine what constitutes an establishment: (a) an establishment is something separate from the whole undertaking of the employer; (b) there is no presumption that the whole undertaking should amount to a single establishment; and (c) the term establishment primarily refers to the place of work of the claimant and comparator.

It is submitted that no guidance can be extracted from these principles for research question two (paragraph 13.2 of Chapter 2) relating to the phrase "the same employer".

[130] At paras 8, 16-17, 19, 21-22.

[131] At paras 24-25. Romney D *Equal Pay: Law and Practice* (Oxford University Press 2018) states the following at 154: "*Establishment* means the place where the claimant or comparator works, and not the whole business or enterprise with the employer operating a number of different sites. Particular issues arise in organizations with occupational gender segregation, where men and women do separate work on separate sites. A refuse collector would not work in a school, albeit that he might go there once a week to empty the bins. A store assistant would not work at a distribution depot."

A claimant under section 6(4) of the EEA is allowed to choose a comparator employed by her employer and there is no distinction made as to whether the comparator is employed at the same place of work as the claimant or at another place of work. It is settled law in South Africa that the State is the employer of all employees employed in the public service and as a consequence thereof a claimant employee in one department is able to choose a comparator in another department or the same department in a different geographical location.[132] It is further submitted that had the *City of Edinburgh Council v Wilkinson & Others* case been heard in the South African Labour Court then the Court would have found that the claimants who worked for the council are allowed to choose comparators employed by the council who worked at a different place of work to that of the claimants.

Whilst no guidance could be extracted from this discussion for the research questions relating to the phrase "the same employer" it is still a necessary discussion because it places the United Kingdom legal framework relating to equal pay in context.

4.2.1.2 Who or what constitutes an associate employer?

Section 79(9)(a)-(b) of the Equality Act states that employers are associated provided that: (a) one employer is a company of which the other employer company has control either directly or indirectly; or (b) both employers are companies which are controlled either directly or indirectly by a third person – for example a parent company.[133] Section 1(6)(c) of the Equal Pay Act provided the following with regard to associated employers:

> "two employers are to be treated as associated if one is a company of which the other (directly or indirectly) has control or if both are companies of which a third person (directly or indirectly) has control".

[132] See para 5.2 read with para 13.2 of Chapter 2 of this thesis.

[133] The Equal Pay Statutory Code of Practice at para 52. Romney D *Equal Pay: Law and Practice* (Oxford University Press 2018) states the following at 151: "For the purposes of section 79(9)(a), one of the two employers must be a company, but the section does not say that they both must be companies. The reference to 'of which the other' is a reference to the person, natural or otherwise, controlling the company identified at the beginning of the sentence. They might both be companies, but the section does not require it and any suggestion to the contrary was described by the Court of Session in *Fox Cross Claimants v Glasgow City Council* as 'erroneous' (although that point was not pursued on appeal). In contrast, section 79(9)(b) requires both employers to be companies where one does not control the other, but both are owned by a third person. However, in this case, the third person does not need to be a company."

In *Hasley v Fair Employment Agency*[134] the appellant applied to an Industrial Tribunal seeking a decision, *inter alia*, regarding whether the Equal Opportunities Commission ("EOC") can be regarded as an associate employer to the Fair Employment Agency ("FEA") both of them being controlled either directly or indirectly by the Department of Economic Development ("DED") as well as the Department of Finance and Personnel ("DOFAP") as contemplated in section 1 of the Equal Pay Act (Northern Ireland) of 1970. The appellant stated that she was employed by the FEA, and the EOC and the FEA were associated employers with both the DED and the DOFAP being third parties having control directly or indirectly over both the employer as well as the associated employer. The DED and the DOFAP argued, *inter alia*, that the FEA and the EOC were not associated employers notwithstanding that the DED and the DOFAP may have control over them, if any. The FEA made a concession before the Industrial Tribunal to the effect that it and the EOC were associated employers as contemplated in section 1(7)(c) of the Equal Pay Act (Northern Ireland) both of them being controlled directly or indirectly by the DED and the DOFAP. The appellant placed reliance on this concession before the Industrial Tribunal but the Industrial Tribunal held that the FEA and the EOC were not associated employers for the purpose of the Equal Pay Act.[135]

The appellant argued that the FEA and the EOC were both companies which were controlled directly or indirectly by a third person being the DED or DOFAP. The Northern Ireland Court of Appeal stated that the FEA and EOC were both statutory bodies and were not commonly described as companies and it did not consider it as companies within the meaning of the word company as stated in section 1(7)(c) of the Equal Pay Act and one of them would need to be a company in order for the appellant to succeed. It stated that an employee of the FEA will not be able to compare their situation with that of another employee employed by the EOC because the FEA and the EOC were two employers and are required to be associated employers in order for the comparison to be permitted. It further stated that even though the FEA and the EOC can be said to be controlled by the DED or the DOFAP, the FEA and the EOC are not associated employers. The Northern

134 [1989] IRLR 106 (NICA).
135 At paras 1, 2, 3, 6.

Ireland Court of Appeal held that the correct interpretation to section 1(7)(c) of the Equal Pay Act is that two employers are associated if one is a company of which the other not necessarily a company has control. The remainder of section 1(7)(c) of the Equal Pay Act deals with the scenario where both employers are companies and a third person not necessarily a company has control. The Northern Ireland Court of Appeal finally held, *inter alia*, that the Industrial Tribunal was correct in law in finding that the FEA and the EOC were not associated employers and accordingly dismissed the appeal.[136]

In *Glasgow City Council v Unison*[137] the issue before the Court of Session was whether the respondents were allowed to compare their pay with that of men working for Glasgow City Council ("Glasgow"). The respondents argued that they were allowed to compare their pay with men employed by Glasgow because Glasgow, City Parking LLP ("Parking") and Cordia (Services) LLP ("Cordia") were associated employers in terms of the Equal Pay Act. Glasgow, Parking and Cordia were the appellants before the Court of Session. The respondents were employees of Parking and Cordia. The Employment Tribunal held that Glasgow, Parking and Cordia were not associated employers as contemplated in the Equal Pay Act. It held that this was so because neither Parking nor Cordia were companies but were Limited Liability Partnerships and it was not suggested that Glasgow was a company. It further held that this being the case, there was no employer company of which the other employer, not necessarily a company, has control as required by section 1(6)(c) of the Equal Pay Act.[138]

The Appeal Tribunal overruled the Tribunal's decision and held that Glasgow, Parking and Cordia were associated employers as contemplated in the Equal Pay Act and the consequence was that the respondents were allowed to compare their pay with male employees who were working for Glasgow. It held that the word "company" as used in section 1(6) of the Equal Pay Act was wide enough to include a Limited Liability Partnership. The Court of Session stated that section 1(6) of the Equal Pay Act states

[136] At paras 8, 12-13, 29.
[137] [2014] IRLR 532 (CS).
[138] At paras 3-5, 17.

that men will be treated as being in the same employment with women provided that they are employed by the same employer or an associated employer. The Court of Session held that the word “company” in section 1(6) of the Equal Pay Act should be interpreted in accordance with its ordinary meaning and once this is done then a Limited Liability Partnership must fall within the ambit of the word “company” in the Equal Pay Act. It finally held on this point that Glasgow was to be treated as an associated employer of Parking and Cordia.[139]

Based on the above discussion, it is submitted that no guidance can be extracted therefrom for research question 2 relating to the phrase “the same employer” (paragraph 13.2 of Chapter 2) for the following reasons: (a) Section 6(4) of the EEA only refers to the same employer and does not include reference to an associate of the same employer which under section 79(9)(a)-(b) of the Equality Act quintessentially refers to looking at whether one employer (company) has control over another employer (company); (b) a claimant under section 6(4) of the EEA would not be allowed to choose a comparator employed by another company because the comparator would simply not be employed by the same employer as the claimant as is required under section 6(4) of the EEA; and (c) section 79 of the Equality Act specifically refers to the choosing of a comparator employed by an associate of the claimant’s employer and the absence of reference to an associate of the claimant’s employer under section 6(4) of the EEA is a strong indication that such comparison is not allowed.

Whilst no guidance could be extracted from this discussion for the research questions relating to the phrase “the same employer”, such discussion is still necessary because it places the United Kingdom legal framework relating to equal pay in context.

4.2.2 The third and fourth section 79 (statutory) comparators

Section 79(2) read with section 79(4)(a)-(c) of the Equality Act provides that B is a comparator of A (claimant) if B is employed by the claimant’s employer or an associate

[139] At paras 5, 21, 40, 46-47.

of the claimant's employer but does not work at the establishment where the claimant works but at another establishment and common terms apply at both establishments either generally or between the claimant and the comparator.[140]

It is clear from a reading of these sections that it refers to two comparators as follows: (a) the third comparator is one who is employed by the claimant's employer but works at a different establishment to that of the claimant and common terms apply at both establishments either generally or between the claimant and the comparator ; and (b) the fourth comparator is one who is employed by an associate of the claimant's employer but works at a different establishment to that of the claimant and common terms apply at both establishments either generally or between the claimant and the comparator.

---

[140] Hepple B *Equality: The Legal Framework* 2ed (Hart Publishing 2014) states the following at 124 relating to equal pay comparisons: "The second [comparison], is where they work at different establishments but share the same employer. In the second case they can make a comparison only if common terms and conditions apply at the establishments (either generally or as between A and B). These common terms need not be identical so long as they are 'substantially comparable'. The paradigm is where a collective agreement prescribes common terms." IDS Employment Law Guide: The Equality Act 2010 (Income Data Services Limited 2010) states the following at 157-158: "By replacing the requirement of commonality of terms for the 'relevant classes' [under section 1(6) of the Equal Pay Act] with a requirement of commonality as between claimant and comparator, S.79(4) has the effect that a situation highlighted by the British Coal analysis is no longer covered by the new law – namely, where common terms apply in respect of the claimant's work at all establishments, and common terms apply in respect of the comparator's work at all establishments, but there is no commonality of terms as between those two sets of terms. If there is no commonality between the terms enjoyed by the claimant and those enjoyed by the comparator – and there is no commonality 'generally', as outlined above – then S.79(4) cannot apply. This change of wording was not highlighted in any of the consultations on the Equality Bill, the Parliamentary debates, nor in the Explanatory Notes. It is therefore impossible to tell whether it reflects an intention to restrict the circumstances in which comparison may be made, or if it is merely a result of infelicitous drafting. Nevertheless, on the straight wording of the Act, at least, the scope for showing 'same employment' where claimant and comparator are employed at different establishments has been narrowed." Romney D *Equal Pay: Law and Practice* (Oxford University Press 2018) states the following at 154: "The leading cases on section 1(6), *Leverton v Clwyd County Council*, *British Coal v Smith*, and *North v Dumfries & Galloway Council* all emphasized that where there is no man in the comparator's role working at the woman's establishment, a hypothetical man is used to determine the terms on which he would work, were he to work there. Section 79(4) appears to abandon that principle by dispensing with the hypothetical man doing the same job as the comparator ('of a relevant kind') at the woman's establishment. Now she must show that her establishment shares common terms and conditions with those at the comparator's establishment, or that her terms and conditions are the same as his. What is necessary is that both establishments (or A and B) have common terms and conditions. This makes the task of comparison for a claimant much harder than previously." Romney D *Equal Pay: Law and Practice* (Oxford University Press 2018) states the following at 161: "The problem now is that there is no hypothetical man in section 79(4) who might work at the claimant's establishment. On the face of it, he has been removed from consideration. … On an ordinary interpretation of the words, the claimant cannot succeed on section 79(4) unless common terms apply in her establishment and her comparator's generally … or her terms are common with his. If there is no commonality, section 79(4) does not assist her."

It should be stated here that section 79(2) read with section 79(4)(a)-(c) of the Equality Act including the attendant materials and case law relevant thereto which is discussed below will not assist with the research questions relating to the phrase "the same employer" for the reasons already advanced under paragraphs 4.2.1.1 and 4.2.1.2 above but such discussion is still necessary as it places the United Kingdom legal framework relating to equal pay in context.

The Equal Pay Statutory Code of Practice states that where the claimant and comparator work at different establishments then the claimant has to show that common terms and conditions apply at both establishments. It further states that an example of common terms and conditions is where the same collective agreement governs the common terms and conditions but the concept of common terms and conditions is not limited to a situation where the same collective agreement governs it.[141]

In *Thomas v National Coal Board*[142] the Employment Appeal Tribunal agreed with the Industrial Tribunal's finding that the claimants and the comparator were in the same employment because all canteen assistants across different collieries were employed on common terms and conditions of employment within the meaning of section 1(6) of the Equal Pay Act. It further agreed with the Industrial Tribunal that the differing of incentive payments and concessionary entitlements, which formed a significant part of remuneration, from colliery to colliery did not affect the basic similarity of the terms and conditions of employment. This was because the incentive bonus and concessionary entitlements were negotiated and agreed nationally but it was only the amount that varied between the collieries.[143]

In *Leverton v Clwyd County Council*[144] the appellant was employed as a nursery nurse by the respondent. She claimed before the Industrial Tribunal that she was employed on work of equal value to that of male employees of the respondent. It was common cause

---

141 The Equal Pay Statutory Code of Practice at para 54.
142 [1987] IRLR 451 (EAT).
143 At para 4.
144 [1989] IRLR 28 (HL).

that the comparators worked at different establishments to that of the appellant but the appellant and the comparators were employed on terms and conditions of employment that were derived from the same collective agreement known as the Purple Book. The Industrial Tribunal held, *inter alia*, that the appellant and the comparators were not in the same employment. The Employment Appeal Tribunal confirmed this finding by the Industrial Tribunal on appeal to it. The Court of Appeal confirmed the finding of the Industrial Tribunal as confirmed by the Employment Appeal Tribunal that the appellant and the comparators were not in the same employment. The House of Lords stated that the approach taken by the Industrial Tribunal, the Employment Appeal Tribunal and the Court of Appeal to the issue relating to whether the appellant and the comparators working at different establishments were nevertheless in the same employment, was that section 1(6) of the Equal Pay Act called for a comparison between the terms and conditions of the appellant and the terms and conditions of employment of the comparators and if this comparison showed that their terms and conditions were broadly similar then this would satisfy the test of common terms and conditions of employment as referred to in section 1(6) of the Equal Pay Act.[145]

The House of Lords stated that section 1(6) of the Equal Pay Act is clear and unambiguous in that it asks the question whether the terms and conditions in force at two or more establishments at which the claimant and the comparators are employed are common in the sense of being terms and conditions observed generally or for employees of a relevant class. It further stated that the concept of common terms and conditions generally observed at different establishments contemplates terms and conditions relating to employees where their individual terms vary greatly. The House of Lords held that terms and conditions of employment which are governed by the same collective agreement is an example of the common terms and conditions of employment which is contemplated by section 1(6) of the Equal Pay Act but it is not the only example. It held that the purpose of section 1(6) of the Equal Pay Act is to allow a female to eliminate differences which amount to discrimination between the terms of her contract and the terms of the comparator male employees doing like work, work rated as equivalent, or

[145] At paras 1, 4-6.

work of equal value whether the comparator works in the same establishment or in another establishment where common terms and conditions of employment are observed.[146] The House of Lords stated that deciding whether there are common terms and conditions of employment observed at two establishments either generally or for employees of the relevant classes will always be a question of fact. It held that the Industrial Tribunal had misdirected itself in law by finding that the appellant and the comparators were not in the same employment.[147]

In *British Coal Corporation v Smith & Others*[148] the claimants were employed at 47 different establishments and they sought to compare themselves with a number of comparators employed at 14 different establishments. The Industrial Tribunal ordered, by agreement between the parties, that it had to decide, *inter alia*, whether the claimants who have sought to compare their situation with comparators who work at other establishments are nevertheless in the "same employment" as the comparators. This question was further elaborated on as follows: whether the claimants who were canteen workers and cleaners could compare themselves with the comparators who were surface mineworkers and clerical workers who worked at establishments which were different to the establishment at which the claimants worked. The Industrial Tribunal found that the surface mineworkers and clerical workers were in the same employment as the claimants.[149]

The appellant then appealed to the Employment Appeal Tribunal which essentially held that there were common terms and conditions between the claimants and the comparators. The appellant launched another appeal to the Court of Appeal. The Court of Appeal rejected the argument that it is sufficient to satisfy "common terms and conditions" for it to be broadly similar. It held that the word "common" means the same and the terms and conditions at the two establishments must be the same. The Court of Appeal then held that the Industrial Tribunal erred by finding that the comparators

[146] At paras 7-8.
[147] At para 9.
[148] [1996] IRLR 404 (HL).
[149] At paras 6, 8, 17-19.

employed at establishments other than those of the claimants were in the same employment as the claimants. The matter then came before the House of Lords. The House of Lords stated that the crisp question was the meaning to be attached to the phrase “common terms and conditions of employment” and between who should the terms and conditions be common.[150]

The House of Lords stated that the female claimant does not have to prove that she shares common terms and conditions of employment with the comparator. It further stated that what has to be proved is that male comparators employed at the other establishments and those at the claimant’s establishment share common terms and conditions and if there are no men at the claimant’s establishment then she must prove that like terms and conditions of employment would apply if men were employed in her workplace in the particular job concerned. The appellant argued that the female claimants can only succeed if they proved that all the terms and conditions observed at the two establishments were the same, subject to the *de minimus non curat lex* principle. The claimants argued that it was sufficient for them to prove a broad similarity of terms. The House of Lords then stated that the real question is whether the legislation sought to exclude a female’s claim unless the terms and conditions of the comparator at his establishment and those which applies or would apply to male workers in a similar position at her establishment are completely identical or whether the legislation sought to establish that the terms and conditions are sufficiently similar for a proper comparison to be made.[151]

The House of Lords held that it could not have been the intention of the legislation to require completely identical terms and conditions as this would mean that the female claimant will fail at the first hurdle if there is any difference between terms and conditions of the men at the various establishments because then she cannot prove that the men were in the same employment that she was in. It held that the purpose of requiring “common terms and conditions” is to avoid a scenario where a claimant can simply claim

[150] At paras 24-25, 28-29, 37.
[151] At paras 38-42.

that "'a gardener does work of equal value to mine and my comparator at another establishment is a gardener'". It held that such claimant has to go further and prove that gardeners at her establishment and at the other establishments were or would be employed on broadly similar terms. The House of Lords held that this was not only sufficient but also necessary. It held that the Industrial Tribunal was correct by using a test relating to a broad comparison and adopting a broad common-sense approach. It finally held that the terms and conditions are not required to be identical but what is required is that it should be substantially comparable on a broad basis (broadly similar).[152]

Nag states that the effect of the decisions of the House of Lords in *Leverton* and *British Coal Corporation* (as discussed above) are as follows:

> "Common terms and conditions of employment are observed at two establishments if:
> (i) the claimant's terms and conditions would be broadly comparable whether she worked at establishment A or establishment B; and
> (ii) the comparator's terms and conditions would be broadly comparable whether he worked at establishment A or establishment B."[153]

In *North v Dumfries & Galloway Council*[154] the Supreme Court held that the following principles can be extracted from the *Leverton* and *British Coal Corporation* cases: (a) the phrase "common terms and conditions" in section 1(6) of the Equal Pay Act refers to the terms and conditions applying to male comparators employed at different establishments from women and the terms and conditions that would apply to those male comparators if they were to be employed at the same establishment as the female claimants; (b) the phrase "common terms and conditions" does not refer to the terms and conditions of employment applying to the female claimants and the terms and conditions applying to their male comparators; and (c) it is not an acceptable answer to assert that no male

---

[152] At paras 43-44, 50-51, 55.
[153] Nag S "Equality of Terms" in *Tolley's Employment Law Service* (loose-leaf) E7039.
[154] [2013] IRLR 737 (SC). Hepple B *Equality: The Legal Framework* 2ed (Hart Publishing 2014) states the following at 125 regarding this case: "The *North* decision should be regarded as authoritative under the 2010 [Equality] Act."

comparators would be employed on the common terms and conditions at the same establishment as the female claimants.[155]

4.3 The Other Comparators (non-statutory)[156]

It should be noted from the outset that an equal pay claimant is not allowed an unlimited choice of comparator.[157] A wrong choice in comparator can lead to the equal pay claim being defeated.[158] The issue regarding the comparator to be chosen is closely linked with the requirement of the same establishment or an establishment where common terms and conditions apply. This is clear from a reading of section 79 of the Equality Act which refers to four types of comparators. It should be stated here that no guidance can be extracted from the four statutory types of comparators contained in section 79 of the Equality Act for the research questions relating to the phrase "employees of the same employer" in section 6(4) of the EEA because it has been stated under paragraphs 4.2.1.1, 4.2.1.2 and 4.2.2 above that section 79 of the Equality Act does not provide any guidance for the research questions relating to the phrase "the same employer" in section

155 At paras 12-13. See also *Lawson v Britfish Ltd* [1988] IRLR 53 (EAT); *North Cumbria Acute Hospitals NHS Trust v Potter and Others* [2009] IRLR 176 (EAT); *South Tyneside Metropolitan Borough Council v Anderson* [2007] EWCA Civ 654; *Asda Stores Ltd v Brierley* [2019] IRLR 335 (CA).

156 This will be discussed under the following headings: 4.3.1 The issue regarding contemporaneous employment of the claimant and comparator (which relates to the use of a predecessor or successor comparator) (4.3.1.1 Predecessor Comparator; 4.3.1.2 Successor Comparator) 4.3.2 Hypothetical Comparator, 4.3.3 Subordinate Comparator; 4.3.4 The Choice of Comparator.

157 IDS Employment Law Guide: The Equality Act 2010 (Income Data Services Limited 2010) 155. Kelly D, Hammer R, Hendy J & Denoncourt J *Business Law* 3ed (Routledge 2018) states the following at 482: "The applicant must select a comparator of the opposite sex." Lockton DJ *Employment Law* 9ed (Palgrave Macmillan 2014) states the following at 170: "Once a woman has chosen her comparator, that will then determine her route to equal pay. The route will either be like work, or work rated equivalent or work of equal value."

158 Duggan M *Equal Pay – Law and Practice* (Jordan Publishing Limited 2009) states the following at 43: "There is a risk that choosing the wrong comparator may lead to the case failing or claim being limited to that of the comparator's employment contract. The claimant can name as many comparators as she wishes and in some circumstances, it may be that the cautious approach is to name a number of comparators of varying grades or jobs. This may particularly be the approach to take in a claim of equal pay for work of equal value because the expert will have to carry out a job evaluation and it may not be until this is carried out that the claimant can make her assertion of parity. It is to be noted that in a number of well-known cases the claimants compared themselves to several different jobs … Naming several comparators may lead to a better prospect of success but on the other hand there is a danger of abuse where the claimant sets out her claim too widely."

6(4) of the EEA (posed in paragraph 13.2 of Chapter 2 of this thesis) and this is intertwined with the research questions relating to the phrase "employees of the same employer".

The use and choosing of non-statutory comparators in the United Kingdom equal pay law is important and can provide valuable guidance in answering the relevant research questions (posed in paragraph 13.3 of Chapter 2 of this thesis). The guidance sought from the United Kingdom equal pay law regarding these research questions relates to the following paragraphs below:

Paragraph 4.3.1 on how the issue of contemporaneous employment of the claimant and comparator which relates to the use of a predecessor (4.3.1.1) or successor (4.3.1.2) comparator is dealt with under the United Kingdom equal pay law.

Paragraph 4.3.2 on whether the arguments put forth relating to the use of a hypothetical comparator based on South African law can be supported by the United Kingdom equal pay law and paragraph 4.3.3 on whether the argument put forth relating to the use of a subordinate employee, who is engaged in work of lesser value than the equal pay claimant but who earns higher pay can be supported by the United Kingdom equal pay law. Paragraph 4.3.4 concludes the discussion with how the correct choice of a comparator is made in the United Kingdom law.

4.3.1 The issue regarding contemporaneous employment of the claimant and comparator (which relates to the use of a predecessor or successor comparator)

4.3.1.1 Predecessor Comparator

Section 64(2) of the Equality Act states that the work done by an equal pay claimant and the comparator is not restricted to work which is done contemporaneously. The Equal Pay Statutory Code of Practice states that the comparator does not have to work at the same time as the claimant and the comparator can thus be a predecessor in the job.[159]

[159] The Equal Pay Statutory Code of Practice at para 60.

Napier states that the claimant's chosen comparator does not have to be employed at the same time as the claimant.[160] McCrudden, similarly, states that equal pay under European Union law as applied in the United Kingdom is not confined to where the claimant and the comparator are contemporaneously doing equal work and applies where it is shown that a claimant has received less pay than a comparator employed immediately prior to her employment (a predecessor comparator).[161] Romney states that paragraph 219 of the Explanatory Notes to the Equality Act confirms that section 64(2) of the Equality Act reflects the ruling of the European Court of Justice in *Macarthys Ltd v Smith*[162] and that the section applies to a predecessor.[163]

It is evident from the above that an equal pay claimant is allowed under the United Kingdom equal pay law to compare her situation with a predecessor comparator who was engaged in the same work/substantially the same work that she is engaged in and such predecessor comparator will be an appropriate comparator. There is no mention in South African equal pay law relating to the use of a predecessor comparator in an equal pay claim and it is submitted that the United Kingdom equal pay law on this score provides invaluable guidance for South Africa.

It is further submitted that the phrase "employees of the same employer" under section 6(4) of the EEA should be interpreted to include the use of a predecessor comparator as such interpretation would be in accordance with the United Kingdom equal pay law. The inclusion of a predecessor comparator under section 6(4) of the EEA will also provide an equal pay claimant who can only prove unfair pay discrimination (including terms and conditions) by comparing her situation to that of a predecessor employee with the

---

160 Napier BW "Division K – Equal Pay" at para 356 in Smith I (gen editor) *Harvey on Industrial Relations and Employment Law* (loose-leaf).

161 McCrudden C *Equality in Law between Men and Women in the European Community: United Kingdom* (Martinus Nijhoff Publishers 1994) 41-42.

162 Case 129/79, [1980] ECR 1276 (ECJ).

163 Romney D *Equal Pay: Law and Practice* (Oxford University Press 2018) 74. Romney D *Equal Pay: Law and Practice* (Oxford University Press 2018) states the following at 74: "The amendment to insert section 64(2) was proposed by Lord Lester of Herne Hill, who had appeared as counsel for Wendy Smith in the CJEU. Lord Lester was also responsible for the change of wording to substitute 'person' for 'colleague' in section 64, arguing that the word 'colleague' was inappropriate as it suggested a condition of contemporaneity."

opportunity to do so where she would otherwise be unable to launch an equal pay claim in such circumstances.

4.3.1.2 Successor Comparator

Nag states that section 64(2) of the Equality Act cannot be interpreted to allow a claimant to claim equal pay with a successor.[164] The IDS Employment Guide, however, states that the wording of section 64(2) of the Equality Act is wide enough to allow for an equal pay comparison to be made with a successor comparator, but it is unlikely that the courts will find that section 64(2) is wide enough to include a comparison with a successor comparator due to the case law which prohibits it.[165]

---

164 Nag S "Equality of Terms" in *Tolley's Employment Law Service* (loose-leaf) E7037. Duggan M *Equal Pay – Law and Practice* (Jordan Publishing Limited 2009) states the following at 40: " … The comparator may, however, be a predecessor in employment to the claimant where there is no male comparator in employment. It may also be possible in limited circumstances to rely on Art 141 so that there is no requirement to name a comparator. The comparator cannot be a successor …" Duggan M *Equal Pay – Law and Practice* (Jordan Publishing Limited 2009) states the following at 42: "Thus the whole basis of the EqPA 1970 prevents comparison with a successor."

165 IDS Employment Law Guide: The Equality Act 2010 (Income Data Services Limited 2010) 155. IDS Employment Law Guide: The Equality Act 2010 (Income Data Services Limited 2010) states the following at 155: "Case law also established that, in contrast to predecessor comparators, *successor* comparators were *not* permitted. In Walton Centre for Neurology and Neuro Surgery NHS Trust v Bewley 2008 ICR 1047, EAT, Mr Justice Elias, the then President of the EAT, rejected the possibility of comparison with a successor under the EqPA, noting that such a comparison would involve speculative, hypothetical assumptions. It must be presumed that the intention is to preserve the status quo here too – although the wording of S.64(2) quoted above is potentially wide enough to allow for successor comparators, we do not consider it likely that the courts will conclude that this provision has effected a change to the established law in the absence of clear, unambiguous wording." Honeyball S *Honeyball & Bowers' Textbook on Employment Law* 11ed (Oxford University Press 2010) states the following at 279: "The applicant for equal pay may choose with whom she is to be compared …, but the search for a precise comparator has proved very difficult in those areas where women are generally underpaid, and for which the statute was most needed. In particular, employment in many offices, textile, catering and retail businesses is the preserve of women, so that no man is employed on like work. This problem had led to the desire of women to compare their wages with a man who was no longer employed at the time of a tribunal application, and this important issue was resolved eventually by the ECJ in *Macarthys Ltd v Smith* (1980). … The European Court, however, decided that the applicant could compare herself with the predecessor … and the EAT extended this by allowing comparison with a successor, in *Diocese of Hallam Trustee v Connaughton* (1996). Nevertheless, the decision in *Hallam* was held by a later EAT to be *per incuriam* and wrongly decided in *Walton Centre for Neurology and Neurosurgery NHS Trust v Bewley* (2008) in that it had misinterpreted a passage in the judgment by the ECJ in *Macarthys* to be its own, rather than from the Commission's submissions which it had specifically rejected."

In *Diocese of Hallam Trustee v Connaughton*[166] the respondent launched an equal pay claim before the Industrial Tribunal claiming equal pay with a male comparator who succeeded her in her position at the appellant. The appellant appealed to the Employment Appeal Tribunal on the ground, *inter alia*, that the Industrial Tribunal committed an error of law by allowing the respondent to compare her situation with that of a male comparator who had succeeded her in her position. The respondent was employed by the appellant in November 1987 and from 1 January 1990 her role was as Director of Music. The respondent then on 6 April 1994 gave notice of her intention to resign effective on 1 September 1994 and her salary was £11,138 per annum supplemented with benefits. In June 1994, the respondent's position was advertised with a salary of £13,434 per annum. The appellant then appointed a male at a salary of £20,000 per annum. The male comparator signed his contract on 26 October 1994 and commenced employment on 1 January 1995. The respondent then launched her equal pay claim on 25 January 1995 before the Industrial Tribunal.[167]

Before the Industrial Tribunal, the appellant took a jurisdictional point relating to the respondent not being allowed to launch an equal pay claim with a male successor. The Industrial Tribunal found that the respondent had established a *prima facie* basis for her equal pay claim under Article 119 of the EEC Treaty. The Employment Appeal Tribunal remarked that if the equal pay claim with a male successor is solely decided by reference to the Equal Pay Act then the Industrial Tribunal would not have jurisdiction and if it had jurisdiction then such claim would fail for lack of evidence because an equal pay claimant/the respondent would not be able to put forth a comparison as required by the Act with male employees contemporaneously employed because there was no comparator. The Employment Appeal Tribunal referred to the European Court of Justice case of *Macarthys* which held that the principle of equal pay was not confined to situations where men and women were contemporaneously engaged in equal work for the same employer and also applied to a situation where a woman received less pay than a man who was employed prior to the woman and who was engaged in equal work for the

[166] 1996 ICR 860 (EAT).
[167] At 861B-C, 861F-H.

employer (an equal pay comparison with a predecessor). The appellant argued that *Macarthys* does not allow an equal pay comparison with a successor employee because there is no authority that expressly allows for the use of a male comparator who is a successor. The appellant further argued that equality of pay can only be achieved by a comparison with a male contemporaneously employed or a comparison with a predecessor.[168]

The respondent argued that Article 119 of the EEC Treaty has a purposive nature and requires that there should not be any obstacles to its application and if there is any doubt then the question as to whether a successor comparator can be used should be formulated by the Employment Appeal Tribunal and be referred to the European Court of Justice as was done in *Macarthys*. The Employment Appeal Tribunal stated that the respondent's use of a male successor in her equal pay claim is supported by the European Court of Justice because she is not able to use a contemporaneous male comparator or a preceding male comparator (predecessor) and this does not prevent her from requesting the Industrial Tribunal to adjudicate her equal pay claim by using a male successor as a notional rather than as an actual contemporaneous comparator. The Employment Appeal Tribunal did, however, state that the respondent's equal pay claim does pose evidential problems but this does not mean that it constitutes a form of stay. The Employment Appeal Tribunal held that Article 119 of the EEC Treaty is wide enough to permit the respondent to launch an equal pay claim comparing her situation to that of a male successor "to the effect that the male successor's contract was so proximate to her own as to render him an effective comparator, as effective as if actual." The Employment Appeal Tribunal remarked that even though it finds that *Macarthys* is wide enough to allow an equal pay claim with a successor where there is no actual comparator, either contemporaneous or immediately preceding, proof of inequality of pay becomes more difficult not in principle but in practice and the employer's evidential burden may be easier to fulfil not in principle but in practice.[169]

[168] At 862A-B, 863B-C, 863E-F, 864C-D.
[169] At 865B, 866E-H, 867B.

The Employment Appeal Tribunal noted that the respondent argued that in her case there was clear *prima facie* evidence of pay discrimination. It remarked that once the facts are fully before the Industrial Tribunal it may be in a position to draw that inference but it commented that the facts will have to be more comprehensive than those known which readily raise inferences. The Employment Appeal Tribunal remarked that the Industrial Tribunal, when fully appraised by the facts, has to decide whether an equal pay claim can be sustained with reference to the male successor's contract and to decide the period over which any such equal pay comparison can be made. The Employment Appeal Tribunal then held that they are satisfied with regard to the scope of Article 119 of the EEC Treaty to the extent that no reference to the European Court of Justice is needed. It dismissed the appeal and remitted the matter to the Industrial Tribunal for a hearing on the merits.[170]

In *Walton Centre for Neurology and Neurosurgery NHS Trust v Bewley*[171] the crisp question was whether an equal pay claimant can compare herself with a successor in an equal pay claim. The Employment Tribunal held that an equal pay claimant could compare herself with a successor but it found this with reluctance as it found that it was bound by the principles set out by the Employment Appeal Tribunal in *Diocese of Hallam Trustee v Connaughton*.[172] The question to be decided by the Employment Appeal Tribunal was whether the principles set out in *Diocese* were correct. The respondent equal pay claimant was employed by the appellant trust as a senior nursing assistant/health-care assistant. The respondent sought to compare her situation with three male comparators who were employed as a performance and governance assistant and IT helpdesk officers (her claim was thus equal pay for work of equal value). There was no dispute that a comparison could properly be made during the period when the respondent and the comparators were contemporaneously employed.[173]

---

[170] At 867B-F. Romney D *Equal Pay: Law and Practice* (Oxford University Press 2018) states at 75 that an equal pay comparison with a successor is not allowed but the law (as set out in *Diocese*) did briefly allow such a comparison.

[171] [2008] IRLR 588 (EAT). Romney D *Equal Pay: Law and Practice* (Oxford University Press 2018) states at 75 that *Walton* was cited with approval in *ASDA Stores v Brierley* [2017] IRLR 1058 (EAT).

[172] [1996] IRLR 505 (EAT).

[173] At paras 1-2, 5-6.

The Employment Appeal Tribunal stated that *Diocese* was the only Employment Appeal Tribunal decision which held that an equal pay claimant can compare her situation with a successor. It further stated that *Diocese* was decided *per incuriam*[174] and as such it is not good authority which should be relied upon. The Employment Appeal Tribunal stated that the respondent accepted that section 1(2) of the Equal Pay Act cannot be accorded a natural meaning to include equal pay comparisons with a successor. It further stated that as the Equal Pay Act does not allow a comparison with a successor such comparison, if allowed, can only find basis in European Union law. The Employment Appeal Tribunal referred to *Coloroll Pension Trustees Ltd v Russell*[175] which in essence stated that the equal pay principle requires a comparison with a comparator "'either now or in the past'" and this is further in accordance with the principle that the equal pay comparison must be undertaken on the basis of a concrete appraisal of the work actually performed. It stated that this formulation by *Coloroll* does not allow an equal pay comparison to be made with a successor.[176]

The following guidance can be extracted for purposes of answering research question 3 (paragraph 13.3. of Chapter 2 of this thesis) relating to the aspect concerning contemporaneous employment of the claimant and comparator which relates to the use of a successor comparator. The bulk of the sources discussed under this paragraph 4.3.1.2, save for the EAT in *Diocese*, is to the effect that the use of a successor comparator in an equal pay claim is not allowed in an equal pay claim (and consequently under section 64(2) of the Equality Act) and this would ordinarily lead to the submission being made that the use of a successor comparator should likewise not be allowed under an equal pay claim in section 6(4) of the EEA but such submission cannot be made in this situation because of the following. There is, in addition to the EAT case of *Diocese*, a compelling argument made in the IDS Employment Law Guide discussed under paragraph 4.3.2 below to the effect that the use of a successor comparator can, however,

174 Claassen RD *Claassen's Dictionary of Legal Words and Phrases* (last updated June 2020 – SI23) defines *per incuriam* as follows: "By mistake or carelessness, therefore not purposely or intentionally. …"
175 [1994] IRLR 586 (ECJ).
176 At paras 10, 13, 17, 36-37.

be allowed under section 71 of the Equality Act which allows a claimant woman who has evidence of direct sex discrimination relating to her contractual pay in circumstances where there is no comparator engaged in equal work to her which makes the sex equality clause inapplicable, to launch a sex discrimination claim using a hypothetical comparator. The submission relating to whether or not the use of a successor comparator should be allowed under section 6(4) of the EEA will thus be made under paragraph 4.3.2 below.

4.3.2 Hypothetical Comparator

The general rule is that a female claimant has to compare herself with an actual male comparator and she cannot use a hypothetical comparator.[177] The exception to this is

---

[177] Nag S "Equality of Terms" in *Tolley's Employment Law Service* (loose-leaf) E7036. Napier BW "Division K – Equal Pay" at para 356 in Smith I (gen editor) *Harvey on Industrial Relations and Employment Law* (loose-leaf). IDS Employment Law Guide: The Equality Act 2010 (Income Data Services Limited 2010) states the following at 159: "… the EqPA approach to equal pay – which is more or less preserved under the new Act – is founded on a comparison between the claimant and a real comparator of the opposite sex who does (or did) equal work. Case law has consistently rejected the argument that the right to equal pay can be established on the basis of a hypothetical comparator, even though this approach is permitted for most other kinds of discrimination." Duggan M *Equal Pay – Law and Practice* (Jordan Publishing Limited 2009) states the following at 39: "The general principle is that a claimant cannot succeed under the EqPA 1970 unless she can point to an actual comparator. This principle has, however, been subject to a recent exception and it will be of interest to see whether this inroad will be carried further. … The comparator will have to be of the opposite sex…" Taylor S & Emir A *Employment Law: An Introduction* 3ed (Oxford University Press 2012) states the following at 335: "The major way in which equal pay claims differ from those brought under sex discrimination law is the requirement for the woman to name a 'real live' male comparator who she believes is unlawfully being paid more than she is. There is no scope for basing a claim on how a hypothetical man would have been treated as is the case with the sex discrimination provisions in the Equality Act." Lewis D, Sargeant M & Schwab B *Employment Law: The Essentials* 11ed (Chartered Institute of Personnel and Development 2011) states the following at 130: "… the woman must compare herself to *an actual named male comparator or comparators*, in contrast to the sex discrimination provisions …, where she can compare herself to either an actual comparator or a hypothetical one." Smith I & Baker A *Smith & Wood's Employment Law* 10ed (Oxford University Press 2010) state the following at 332: "Unlike the general prohibition on discrimination, which works on the basis of a comparison between the treatment of the applicant and that of a hypothetical comparator, the equal terms claim is based on a comparison with a named comparator (or comparators). The requirement to identify an actual comparator can be a major hurdle for an applicant, particularly if he or she works for an organization where jobs are de facto segregated along gender lines, as it may be impossible to find an appropriate comparator." Hardy S *Labour Law and Industrial Relations in Great Britain* 3rd revised edition (Kluwer Law International 2007) states the following at 223: "Although the Acts are intended to be read as a code, there is a discrepancy between them, in that the Equal Pay Act requires a comparison to be made with a specific member of the opposite sex in the same employment whereas the Sex Discrimination Act covers situations where there is no comparable member of the opposite sex. i.e. a 'hypothetical' male. This has proved to be a serious limitation on the impact of the Equal Pay Act since, as has been pointed out above, many women work in predominantly female occupations or grades and are thus unable to find a suitable comparator." Pitt G *Employment Law* 6ed (Sweet & Maxwell Limited 2007) states the following at 189:

where a claimant woman has evidence of direct sex discrimination relating to her contractual pay contemplated in section 71 of the Equality Act but there is no comparator engaged in equal work to her which makes the sex equality clause inapplicable, then she can launch a sex discrimination claim using a hypothetical comparator.[178] The Equal Pay Statutory Code of Practice sets out the following example of where section 71(1)-(2) of the Equality Act would be applicable:

> "A woman's employer tells her that she would be paid more if she were a man. There are no men employed on equal work so she cannot claim equal pay using a comparator. However, she could claim direct sex discrimination as the less favourable treatment she has received is clearly based on her sex."[179]

"An important difference between a claim under the EqPA and a claim under the SDA is that for equal pay claims an actual comparator has to be identified by the claimant. It is not enough for a woman to adduce evidence that if a man were employed, he would enjoy better terms and conditions than her." Connolly M *Discrimination Law* 1ed (Sweet & Maxwell Ltd 2006) states the following at 248: "… the Equal Pay Act 1970, unlike the Sex Discrimination Act 1975, demands that the comparator must be a real person." Bowers J *A Practical Approach to Employment Law* 7ed (Oxford University Press 2005) states the following at 119: "There must be a male or female comparator under the Equal Pay Act … There is no place for hypothetical comparators as there is in the case of sex or race discrimination claims." McCrudden C *Equality in Law between Men and Women in the European Community: United Kingdom* (Martinus Nijhoff Publishers 1994) states the following at 42: "Comparisons are confined to parallels which may be drawn on the basis of concrete appraisals of work actually performed by employees of a different sex within the same establishment. There is therefore no possibility of comparisons being drawn with 'hypothetical' men under UK law …"

178 The Equal Pay Statutory Code of Practice at para 61. Romney D *Equal Pay: Law and Practice* (Oxford University Press 2018) states the following at 147: "The EqA introduced a limited provision in which to introduce hypothetical comparators in section 71 of the EqA." Romney D *Equal Pay: Law and Practice* (Oxford University Press 2018) states the following at 148: "The effect of section 71, therefore, is to allow a woman, in very limited circumstances, to bring a discrimination claim arising out of the terms of her employment, something which would be usually prevented by section 70. However, it will only operate in claims of direct, not indirect, discrimination and where there is no modification possible because the sex equality clause cannot take effect. It will not operate in respect of a less favourable term than in a man's contract, whether or not it has been modified, or whether it would have been modified, but for a material factor defence under section 69 of the EqA." Hepple B *Equality: The Legal Framework* 2ed (Hart Publishing 2014) states the following at 122-123 relating to section 71 of the Equality Act: "The second option, which was adopted as an important new provision in the Equality Act, was to allow a claim for … direct sex discrimination to be brought where a term relates to pay but a sex equality clause or rule has no effect. This means that where there are no comparators in the employer's establishment doing the work, the employee can now bring a claim for … direct sex discrimination, which allows a comparison with a hypothetical comparator. For example, where work has been contracted out to another undertaking which pays women less than they were receiving from their former employer, there could be … direct sex discrimination but not a breach of the sex equality clause. The same applies to dual discrimination where one of the protected characteristics is sex, for example where a Black woman is paid less than would be paid to a White man." Connolly M *Discrimination Law* 2ed (Sweet & Maxwell 2011) states the following at 290: "… s.71 of the EA 2010 provides a new exception to the demand for a real comparator."

179 The Equal Pay Statutory Code of Practice at para 61. Romney D *Equal Pay: Law and Practice* (Oxford University Press 2018) states the following at 149: "Paragraph 246 of the Explanatory Notes gives the following example of how section 71 of the EqA is intended to work: An employer tells a female

Nag similarly states that section 71 of the Equality Act applies where there is direct sex discrimination for example a situation where the female claimant can adduce evidence of direct discrimination where the employer has for example stated that it would pay men more or where a policy benefits men only.[180] She further states that section 71 of the Equality Act allows a female claimant to launch her claim notwithstanding that there is no actual male comparator.[181] Romney states that it is clear from section 71(1) of the Equality Act that the section only allows a claim where there is no equal pay claim as a result of the sex equality clause or the sex equality rule not having any effect thereon. She likewise states that a self-evident example is "where there is no comparator."[182] Judge Hand QC has made the following valuable comments relating to section 71 of the Equality Act in *BMC Software Ltd v Shaikh*:[183]

> "Thus s.71 deals with situations where the circumstances set out in s.65 EqA are not present and that has the result that s.66 EqA does not have any effect. Put another way, the equality clause has no effect as there is no 'corresponding term' because there is no actual comparator. There is little academic commentary that I can find relating to s.71 EqA although it is addressed in the Explanatory Notes. I accept Explanatory Notes to a statute are not necessarily an accurate or a reliable guide to statutory interpretation. But where there is little else I think they may be consulted. The Explanatory Note to s.71 EqA, gives this example: 'An employer tells a female employee "I would pay you more if you were a man" …In the absence of any male comparator the woman cannot bring a claim for breach of an equality clause but she can bring a claim of direct sex discrimination … This seems to me to illustrate the territory covered by s.71 EqA. Therefore the section is not an exception to s.70 EqA although it does identify circumstances where a sex discrimination claim can arise out of a term of the contract relating to pay. To my mind far from providing a general exception this reinforces the division made by s.70 EqA between a remedy under the equal pay provisions and sex discrimination. It only

---

employee 'I would pay you more if you were a man' or tells a black female employee 'I would pay you more if you were a white man'. In the absence of any male comparator the woman cannot bring a claim for breach of an equality clause but she can bring a claim of direct sex discrimination or dual discrimination (combining sex and race) against the employer."

[180] Hepple B *Equality: The Legal Framework* 2ed (Hart Publishing 2014) states the following at 123: "… indirect sex discrimination in contractual pay can be challenged only by means of an equality clause. … In theory, a hypothetical comparator is possible in an indirect sex discrimination claim, although in practice where there is an attack on systemic indirect discrimination in a pay structure the need for a comparator does not usually arise. However, there is always a possibility that, in order to show a 'particular disadvantage', reliance would need to be placed on a hypothetical comparison, and this would not be possible under the equality clause."

[181] Nag S "Equality of Terms" in *Tolley's Employment Law Service* (loose-leaf) E7036. IDS Employment Law Guide: The Equality Act 2010 (Income Data Services Limited 2010) states the following at 149: "…S.71(2) specifically allows for a claim of sex discrimination in pay to be brought under the sex discrimination provisions, in limited circumstances. The significance of this is that sex discrimination in pay may, for the first time, be established on the basis of a hypothetical comparison."

[182] Romney D *Equal Pay: Law and Practice* (Oxford University Press 2018) 147.

[183] [2017] IRLR 1074 (EAT).

> appl[i]es where s.70 EqA does not and it allows for a sex discrimination claim limited to direct discrimination and based on the 'treatment of the person.'"[184]

The IDS Employment Law Guide also remarks that it will be rare to find cases where a female claimant would be able to assert that she would have been paid more had she been a man. The Guide argues that the potential use of section 71 of the Equality Act goes beyond this example which is set out in the Equal Pay Statutory Code of Practice above. The Guide further argues that a claimant who is able to prove that a pay differential is caused by direct discrimination will be able to found the remedy in section 71 of the Equality Act in circumstances where the claimant would not have been able to found a remedy under the equal pay legal framework for failing to meet its requirements. The Guide mentions a comparison with a successor, *inter alia*, as being an example thereof. It explains this as follows. The pay which is given to a successor might constitute evidence of direct discrimination against a claimant. This is so, because if an actual comparator can be dispensed with under certain circumstances then it is thus possible to rely on pay discrimination claims based on a successor comparator.[185] The Guide further explains this as follows:

> "… a woman who leaves employment and discovers that her male replacement is paid £10,000 more for exactly the same work will have at least a prima facie case of sex discrimination, which S.71(2) will allow her to bring. Of course, there may well be good, non-discriminatory reasons for the increase in salary – it may be that the employer has recently discovered that the role was underpaid in accordance with the market rate, and so resolved to remedy the imbalance for the incoming employee, regardless of sex. However, these are potentially

---

[184] At para 76. Romney D *Equal Pay: Law and Practice* (Oxford University Press 2018) states the following at 149: "The scenario in paragraph 246 of the Explanatory Notes is unlikely to occur often in the workplace. Only a particularly foolish employer would tell his employee that he would pay her more were she a man or tell a man that he would pay him more were he white. For inspiration as to how section 71 could operate, one must look elsewhere. Some guidance can be found in the union race claims in the United States, where statistical and oral evidence showed a long standing and systematic pattern by a Tennessee company in hiring and promoting only white and not black drivers, or drivers with Spanish-sounding surnames. In *International Brotherwood of Teamsters v US*, [431 US 324] the Supreme Court held that where there is a preponderance of evidence showing a discriminatory pattern, it raises a prima facie case of discrimination; the burden of proof then moves to the employer to explain why it had not hired the black and Hispanic drivers for reasons other than their race. Those principles could equally apply where there is a pay disparity between a man and a woman, even if their jobs are not of equal value and his job, which might be slightly more complex than hers, is disproportionately remunerated in comparison to hers."

[185] IDS Employment Law Guide: The Equality Act 2010 (Income Data Services Limited 2010) 161-162.

> adequate explanations for apparent discrimination, which a fact-finding tribunal is well placed to consider in the context of a direct discrimination claim."[186]

The following guidance can be extracted from the above discussion in order to assist with the research question relating to whether the arguments put forth relating to the use of a hypothetical comparator based on South African law can be supported by the United Kingdom equal pay law as called for in paragraph 13.3. of Chapter 2 of this thesis as stated under paragraph 4.3 above:

A female claimant who has evidence of direct sex discrimination relating to her contractual pay in circumstances where there is no comparator engaged in equal work to her which makes the sex equality clause inapplicable, is allowed under section 71 of the Equality Act to launch a sex discrimination claim relating to pay by using a hypothetical comparator. Based on this, it is submitted that the recognition of the use of a hypothetical comparator under the United Kingdom equal pay law supports and strengthens the arguments put forth relating to the use of a hypothetical comparator under section 6(4) of the EEA in different scenarios based on South African law.

The IDS Employment Law Guide makes a compelling argument for the use of a successor comparator where the pay which is given to a successor constitutes evidence of direct discrimination against a claimant. It argues that if an actual comparator can be dispensed with under certain circumstances then it is possible to rely on pay discrimination claims based on a successor comparator. It provides an example of a woman who leaves her employment and later discovers that her male replacement is paid more than her for exactly the same work and states that this constitutes a *prima facie* case of sex discrimination which will allow the claimant woman to launch a claim under section 71 of the Equality Act. It is submitted that this is a compelling argument because it allows an aggrieved female an avenue to seek redress where she has evidence of pay discrimination in circumstances where she would ordinarily not be able to use such evidence because of the nature of the comparator. Based on this, it is submitted that the

[186] IDS Employment Law Guide: The Equality Act 2010 (Income Data Services Limited 2010) 162.

use of a successor comparator should be allowed under section 6(4) of the EEA where a female claimant produces pay discrimination evidence in the form of comparing her pay situation to that of a successor comparator. It is further submitted that the use of a successor comparator is not limited to a pay discrimination claim being brought on the grounds of sex and should apply to all the listed and unlisted grounds of discrimination. It should also be stated that an equal pay claimant who has left the employer's employ will not be able to launch an equal pay claim using a successor comparator under section 6(4) of the EEA because she would no longer be an employee of the relevant employer. It is thus submitted that the use of a successor comparator in an equal pay claim under section 6(4) of the EEA is confined to where the claimant employee is still in the employ of the relevant employer. This is an important qualification.

4.3.3 Subordinate Comparator

In *Waddington v Leicester Council for Voluntary Services*[187] the Employment Appeal Tribunal heard an appeal against the decision of the Industrial Tribunal which dismissed the appellant's equal pay claim. During May 1973, the appellant was employed as a community worker connected to the Saffron Lane Community Project. She was appointed on salary scale III/IV in the National Salary Scale applicable to social workers. During May 1975, the appellant's chosen comparator was employed as a playleader on salary range 3 laid down by the Joint Negotiating Committee for Youth Leaders and Community Centre Wardens. The work performed daily by both the appellant and the comparator was basically the same and the appellant was in a superior position and responsible for her chosen comparator. Nevertheless, the appellant was paid £3,009 per year and the chosen comparator was paid £3,426 per year. It is not surprising that the appellant was aggrieved by the fact that *her subordinate was being paid more than her*. The appellant tried to get her salary increased but these efforts were unsuccessful. She then launched an equal pay claim before the Industrial Tribunal.[188]

[187] [1997] IRLR 32 (EAT).
[188] At paras 1-2, 4.

The Industrial Tribunal found that the appellant failed to successfully satisfy the test that she was employed on like work with the chosen comparator. It found that the differences between the appellant's work and that of the chosen comparator related to the appellant's work being broader than the comparator, the appellant having more responsibility as well as her overall control. The Industrial Tribunal finally held that the appellant and the comparator were not engaged in the same or broadly similar work. The Employment Appeal Tribunal held that the Industrial Tribunal's finding that the claimant and the comparator were not engaged in the same work or broadly similar work was strange. It held that the Industrial Tribunal failed to consider that the claimant and the comparator were engaged in work that was of a broadly similar nature as it did not recognise that the claimant and the comparator may be engaged in work of a broadly similar nature without being employed on like work. The Employment Appeal Tribunal decided to remit the matter to the Industrial Tribunal in order for it to properly apply section 1(4) of the Equal Pay Act to the case.[189] While the issue in *Waddington* related to whether or not the claimant and comparator were engaged in the same work or broadly the same work neither the Industrial Tribunal nor the Employment Appeal Tribunal took issue with the fact that the comparator chosen by the claimant was her subordinate (who received higher pay than the claimant).

In *Redcar & Cleveland Borough Council v Bainbridge*[190] the crisp issue before the Court of Appeal was whether an equal pay claimant can rely on a work rated as equivalent claim in terms of section 1(2)(b) of the Equal Pay Act in circumstances where the male comparator is placed in a lower grade than the claimant in terms of the job evaluation study but who receives more pay than the claimant. The Employment Tribunal found that the female claimants were allowed to use a comparator with a lower grade to compare their equal pay situation and the Employment Appeal Tribunal agreed with this finding. The respondent argued that both the Employment Tribunal and the Employment Appeal Tribunal had incorrectly applied section 1(2)(b) of the Equal Pay Act and a claimant cannot rely on a comparator who is placed in a lower grade because then the claimant

189 At paras 7-9, 11.
190 [2007] IRLR 984 (CA).

will not be employed on work rated as equivalent with that of the comparator as required by section 1(2)(b) of the Equal Pay Act. The Court of Appeal remarked that it could see no reason why an equal pay claimant could not use an existing job evaluation study to prove that she received less pay than a male comparator who was placed in a lower grade. The Court of Appeal found that in order to give effect to the possibility of a female claimant claiming equal pay in terms of section 1(2)(b) with a comparator who is in a lower grade but who is paid more than her it is necessary to mould section 1(5) of the Equal Pay Act.[191] The Court of Appeal then held that it would thus be appropriate to mould section 1(5) of the Equal Pay Act to read as follows:

> "'A woman is to be regarded as employed on work rated as equivalent with that of any men if, but only if, her job and their job have been given an equal value *or her job has been given a higher value*, in terms of the demand made on a worker under various headings (for instance effort, skill, decision), on a study undertaken with a view to evaluating in those terms the jobs to be done by all or any of the employees in an undertaking or group of undertakings, or would have been given an equal value, *or her job would have been given a higher value*, but for the evaluation being made on a system setting different values for men and women on the same demand under any heading.'"[192]

No issue was taken in *Waddington* with the fact that the comparator chosen by the claimant was her subordinate and in *Redcar* the Court of Appeal expressly allowed for the use of a subordinate comparator. It is submitted that this strengthens the argument put forth relating to the use of a subordinate employee, who is engaged in work of lesser value than the equal pay claimant but who earns higher pay, as a comparator under section 6(4) of the EEA based on South African law.

---

[191] At paras 1, 3, 8, 20, 24-25.

[192] At para 25. Romney D *Equal Pay: Law and Practice* (Oxford University Press 2018) states the following at 64: "If a claim is brought against an employee who does work of lesser value, it is not open to the claimant to argue that she is entitled to more pay than her comparator. The claim is for equality of terms, not better terms, and it does not matter that she is doing work of greater value or is rated higher than he is. There is no power under the EqA to determine the appropriate salary, only to equalize it where section 65 is satisfied."

4.3.4 The Choice of Comparator

In *Ainsworth v Glass Tubes & Components Ltd*[193] the appellant launched an equal pay for like work claim with a comparator who was classified as an inspector of manufactured products. The comparator examined the products and it was then passed to the appellant to re-examine. The Industrial Tribunal substituted the appellant's chosen comparator with another inspector who worked at a different time and simply ignored the comparator which the appellant chose to compare herself with. The Employment Appeal Tribunal held that the Industrial Tribunal erred in substituting the appellant's comparator for its own. It remitted the matter to be heard before a differently constituted Industrial Tribunal.[194] Nag states that the choosing of a comparator in an equal pay claim is left to the claimant.[195] Duggan states that the claimant is the one who will choose her comparator and this means that an Employment Tribunal is not allowed to interfere with the claimant's choice of comparator.[196] Napier states that the freedom of the claimant to choose a comparator

193 [1977] IRLR 74 (EAT). IDS Employment Law Guide: The Equality Act 2010 (Income Data Services Limited 2010) states the following at 154: "The question of who is a valid comparator arose often in case law under the EqPA [Equal Pay Act] and can be expected to do so with similar frequency under the new regime."

194 At paras 2, 3, 5. This is as much information as can be extracted from the case as it only contains 5 paragraphs.

195 Nag S "Equality of Terms" in *Tolley's Employment Law Service* (loose-leaf) E7038. Taylor S & Emir A *Employment Law: An Introduction* 3ed (Oxford University Press 2012) states the following at 338 regarding the choosing of a comparator: "… this is a crucial decision which may well determine the outcome of the action. The choice is for the claimant to make and, once made, cannot subsequently be altered by her or by the tribunal in order to select someone more appropriate." Bowers J *A Practical Approach to Employment Law* 7ed (Oxford University Press 2005) states the following at 119: "The applicant for equal pay may normally choose with whom she is to be compared for the purposes of like work … but must name someone for the application to be valid."

196 Duggan M *Equal Pay – Law and Practice* (Jordan Publishing Limited 2009) states the following at 39: "It is for the claimant to select the comparator of her choice. The Employment Tribunal cannot select the comparator, contrary to the claimant's choice. This was made clear in *Ainsworth v Glass Tubes & Components Ltd* [1977] IRLR 74, ICR 347 where the Tribunal chose a different comparator from that of the claimant then dismissed the claim. The claimant wished the comparator to be an inspector working alongside her whereas the Tribunal chose an inspector working at a different time. This was an obvious misdirection." Connolly M *Discrimination Law* 2ed (Sweet & Maxwell 2011) states the following at 287: "The general rule is that the claimant chooses her comparator, and the tribunal cannot substitute another it considers more appropriate." Honeyball S *Honeyball & Bowers' Textbook on Employment Law* 11ed (Oxford University Press 2010) states the following at 285: "The applicant is still able to choose her comparator and there is no provision to change this if the expert finds a more appropriate man." McCrudden C *Equality in Law between Men and Women in the European Community: United Kingdom* (Martinus Nijhoff Publishers 1994) states the following at 41: "The choice of the relevant comparator is that of the applicant, not the employer or the tribunal. There is no

of her choice is mitigated by the availability of the material factor defence to the employer in terms of section 69 of the Equality Act as well as the Employment Tribunal's power to award costs against the claimant where she exercises her freedom to choose her comparator irresponsibly.[197]

In *Thomas v National Coal Board*[198] one issue dealt with by the Employment Appeal Tribunal was whether there was an implicit requirement in the Equal Pay Act which required that the claimant's chosen comparator must be representative of a group. This issue arose before the Industrial Tribunal because the claimant's chosen comparator was anomalous (he was an odd man out) in that he was the only male canteen worker who received higher wages than those paid to female canteen workers as a result of an anomaly created by a historical local problem which involved difficulties in recruiting and retaining canteen workers. The Employment Appeal Tribunal, in essence, rejected an argument by the respondent that equal pay claimants are not allowed to choose an anomalous comparator who is not representative of a group. It, however, stated that the genuine material defence might not always provide a way out for the employer where the claimant has chosen an anomalous comparator especially where the difference in pay was as a result of a pure accident or oversight but the pay differential was arbitrary.[199] Nag states that there is nothing in the Equality Act which prohibits an equal pay claimant from choosing an anomalous comparator and the very fact that the comparator is anomalous may present the employer with a material factor defence in terms of section 69 of the Equality Act.[200] Duggan, similarly, submits that a claimant cannot be precluded from choosing an anomalous comparator but this is risky due to the material factor defence.[201]

---

requirement that the comparator selected by the applicant should be representative of a group. The applicant may choose which comparator with whom to compare her job."

[197] Napier BW "Division K – Equal Pay" at para 355 in Smith I (gen editor) *Harvey on Industrial Relations and Employment Law* (loose-leaf).

[198] [1987] IRLR 451 (EAT).

[199] At paras 3, 6.

[200] Nag S "Equality of Terms" in *Tolley's Employment Law Service* (loose-leaf) E7038.

[201] Duggan M *Equal Pay – Law and Practice* (Jordan Publishing Limited 2009) 43.

In *Leverton v Clwyd County Council*[202] the House of Lords remarked that Industrial Tribunals should be watchful to prevent claimants abusing equal pay for equal value claims by casting their net too wide and choosing too many comparators. It stated that an extreme example[203] would be where an equal pay claimant claimed equality with A who earns X pounds and with B who earns double what A earns – then in such case a claimant would be hard pressed to complain if an Industrial Tribunal made a finding that the claimant's claim with A, in and of itself, shows that there were no reasonable grounds for choosing B as a comparator. The House of Lords remarked further that, besides this, the most effective protection for an employer against abusive equal pay for work of equal value claims was to initiate its own job evaluation study in terms of the Equal Pay Act and if so done it should provide it with complete protection.[204] Connolly states that the example given in *Leverton* is extreme and will not be helpful for tribunals in order to determine if equal pay claimants have "cast their net too wide". He further states that the lesson that can be taken from this case is that the choosing of too many comparators by an equal pay claimant can amount to an abuse of process.[205]

The following provides guidance for the phrase "employees of the same employer" in section 6(4) of the EEA and should be stated here:

(a) A claimant employee has the prerogative to choose her own comparator and this means that an Employment Tribunal is not allowed to interfere with such choice of comparator by for example substituting such comparator. An irresponsible exercise of such prerogative by the claimant employee can be met with an adverse costs order and/or provide the employer with a defence to the equal pay claim. Unlike the United Kingdom relating to equal pay law, the South African equal pay legal framework does not specifically state that a claimant is free to choose her own comparator and neither does

202 [1989] IRLR 28 (HL).

203 Connolly M *Discrimination Law* 2ed (Sweet & Maxwell 2011) states the following at 307 relating to the extreme example mentioned in *Leverton v Clwyd County Council*: "This "extreme case" is not a helpful guide for tribunals when deciding if claimants have "cast their net too wide". All that can be taken from this dictum is that too many comparators may amount to an abuse of process. Tribunals are well familiar with abuse of process principles and should have no trouble applying them in this context."

204 At para 22.

205 Connolly M *Discrimination Law* 2ed (Sweet & Maxwell 2011) 307.

it state that the Labour Courts (including the CCMA) can substitute a claimant's choice in comparator for its own. Based on this, it is submitted that it should specifically be stated in the Equal Pay Code that an equal pay claimant under section 6(4) of the EEA has the prerogative to choose her own comparator and the Labour Courts (including the CCMA) are not allowed to substitute the claimant's choice of comparator for its own. It is further submitted that it should also be mentioned that an irresponsible exercise of such prerogative by the claimant employee under section 6(4) of the EEA can be met with an adverse costs order and/or provide the employer with a defence to the equal pay claim;

(b) There is no requirement that the chosen comparator must be representative of a group and cannot be anomalous and there is thus nothing to restrict an equal pay claimant from choosing an anomalous comparator (the so-called odd man out) but the fact that the claimant chooses such comparator may present an employer with a defence to an equal pay claim. Unlike the United Kingdom equal pay law, the South African equal pay legal framework does not mention whether an equal pay claimant is restricted from choosing an anomalous comparator and that the comparator chosen must be representative of a group. Based on this, it is submitted that it should specifically be stated in the Equal Pay Code that an equal pay claimant under section 6(4) of the EEA is not restricted from choosing an anomalous comparator but where she does so then it may present an employer with a defence to the equal pay claim; and

(c) A tribunal should be watchful to prevent claimants abusing equal pay for equal value claims by casting their net too wide and choosing too many comparators. Based on this, it is submitted that it should specifically be mentioned in the South African equal pay legal framework that the Labour Courts (including the CCMA) should be vigilant to prevent equal pay claimants from abusing equal pay claims by choosing too many comparators and one way of doing this is by using pre-trial procedures to root out hopeless comparisons. This should be mentioned in the Equal Pay Code.

4.4 Same work/substantially the same work, work rated as equivalent, work of equal value[206]

The Equality Act defines equal work to include like work (same work/substantially the same work), work rated as equivalent and work of equal value.[207] There are thus three causes of action relating to equal pay claims namely: equal pay for like work (same work/substantially the same work), equal pay for work rated as equivalent and equal pay for work of equal value. It is apposite to note that an equal pay claimant is allowed to rely on all three causes of action and is not hamstrung to make an irrevocable choice thereto.[208] The Equal Pay Statutory Code of Practice, likewise, states that an equal pay claimant may use any or all of the three equal pay causes of action.[209] Romney importantly states that an equal pay claim will not get off the ground if the claimant is not able to satisfy one of the three causes of action.[210] It is important to note that an equality

---

[206] This will be discussed under the following headings: 4.4.1 Same work / Substantially the same work (like work) 4.4.2 Work rated as equivalent 4.4.3 Work of equal value.

[207] Section 65(1)(a)-(c) of the Equality Act. Hepple B *Equality: The Legal Framework* 2ed (Hart Publishing 2014) states the following at 126: “The unreformed definition of ‘equal work’ remains complex and unsatisfactory.” Hardy S *Labour Law and Industrial Relations in Great Britain* 3rd revised edition (Kluwer Law International 2007) states the following at 223-224: “The Equal Pay Act entitles a woman to claim equal treatment with a man in three situations. First, it allows a woman the right to equal treatment when employed on work of the same or a broadly similar nature to that of a man in the same employment. … Secondly, a woman is entitled to equal treatment with a man if her job and his have been given an equal value under a job evaluation study (JES). … The third basis of comparison allows a woman to claim equal treatment with a man doing work of equal value.” Pitt G *Employment Law* 6ed (Sweet & Maxwell Limited 2007) states the following at 180: “Under the Equal Pay Act, women and men can claim equal terms with someone of the opposite sex employed “in the same employment” in three situations: like work, work rated as equivalent, and work of equal value.”

[208] *Redcar & Cleveland Borough Council v Bainbridge & Others* [2008] IRLR 776 (CA) at para 250. The Court of Appeal in *Redcar & Cleveland Borough Council v Bainbridge & Others* [2008] IRLR 776 (CA) stated the following at para 250: “Further, it is a case of statute – the 1970 Act – enacting a right to equal pay with three different legal formulations of the content of that general right. There is nothing explicit or implicit in the legislation which requires a claimant to make an irrevocable choice as to one of the three different ways of putting an equal pay claim. The claimants have the right to put their claim in all three of the different ways formulated in the 1970 Act.”

[209] The Equal Pay Statutory Code of Practice at para 49. The Equal Pay Statutory Code of Practice states the following at para 49: “A woman can claim equal pay using any or all of these methods of comparison. For example, a woman working as an office manager in a garage could claim ‘like work’ with a male office manager working alongside her and ‘equal value’ with a male garage mechanic.” Romney D *Equal Pay: Law and Practice* (Oxford University Press 2018) states the following at 65: “A woman may be able to bring alternative claims. She may cite one or more comparators who do like work or she may cite one or more comparators who are rated as equivalent to her. She may cite one or more comparators who do work of equal value.”

[210] Romney D *Equal Pay: Law and Practice* (Oxford University Press 2018) 65. Romney D *Equal Pay: Law and Practice* (Oxford University Press 2018) states the following at 64: “…[S]ection 65 of the EqA

clause cannot operate unless the claimant satisfies one of the three equal pay causes of action.[211] The three causes of action are discussed under separate headings below.

It is also important to note that there is no cause of action which will allow a claimant to claim proportionate pay which goes beyond equal pay, for example, where the claimant does superior work to that of the comparator (who does inferior work), then she can only claim the pay which the comparator enjoys and she cannot claim higher pay than the comparator proportionate to the superiority of her work as compared to that of the comparator.[212] This is so because the equal pay causes of action are aimed at achieving equality of terms not better terms and the fact that the claimant does work of greater value to the comparator is of no moment. This type of complaint is also legally incompetent as a result of there being no power under the Equality Act to determine an appropriate salary as it only contains the power to equalise the relevant term/s, the emphasis being on equalise.[213]

The following guidance, which relates to the same work and substantially the same work, can be extracted from this discussion for the equal pay causes of action in general under section 6(4) of the EEA. Unlike the United Kingdom equal pay law, the South African equal pay law does not explicitly state that there is no equal pay cause of action which will allow a claimant to claim proportionate pay which goes beyond equal pay, in other words, a claimant can never claim higher pay than her chosen comparator proportionate to the superiority of her work as compared to that of the comparator. It is submitted that

---

provides three specific gateways into an equal pay claim. A woman must prove one of the following in relation to her chosen comparator: … that she does like work to the man; … that she does work rated as equivalent to the man; and … that she does work of equal value to the man."

[211] Smith I & Baker A *Smith & Wood's Employment Law* 10ed (Oxford University Press 2010) states the following at 326: "For the equality clause to operate one of the three principal tests must be satisfied: the worker must be employed either on 'like work' with a person of the opposite sex 'in the same employment', or on 'work rated as equivalent' with that person, or on 'work of equal value' to that of that person. Where this is shown, a presumption will be raised that the difference in terms is due to sex discrimination, and the contract will be modified by the equality clause, unless the employer is able to rebut the presumption by showing that the difference in terms is genuinely due to some material factor other than the difference of sex between the applicant and the comparator, ie that the reason for the difference is not tainted by sex discrimination."

[212] Connolly M *Discrimination Law* 2ed (Sweet & Maxwell 2011) 292.

[213] Romney D *Equal Pay: Law and Practice* (Oxford University Press 2018) 64.

this should specifically be stated in the Equal Pay Code in order to make it clear that such complaint is not justiciable under section 6(4) of the EEA.

4.4.1 Same work / Substantially the same work (like work)

Section 65(2) of the Equality Act then goes on to explain that work is like work where the work of A and B is the *same*[214] or is *broadly similar*[215] and if there are differences between their work then these differences are not of practical importance with regard to their work.[216] Romney states that work does not have to be identical in every respect in order

---

214 McCrudden C *Equality in Law between Men and Women in the European Community: United Kingdom* (Martinus Nijhoff Publishers 1994) states the following at 43: "One situation where 'like work' takes place is where the work the woman does is 'of the same … nature' as the man's."

215 Connolly M *Discrimination Law* 2ed (Sweet & Maxwell 2011) states the following at 301 referring to *Capper Pass v Lawton* [1977] Q.B 852 (EAT): "'Broadly similar' simply means that a tribunal 'should not be required to undertake a too minute an examination' of the respective jobs." Pitt G *Employment Law* 6ed (Sweet & Maxwell Limited 2007) states the following at 180: "On the whole a fairly liberal approach has been taken to what is like work …". McCrudden C *Equality in Law between Men and Women in the European Community: United Kingdom* (Martinus Nijhoff Publishers 1994) states the following regarding similar work under the Equal Pay Act at 43-44: "This has been interpreted as requiring consideration of the type of work involved and the skill and knowledge required to do it. A broad judgment ought to be adopted. If it is work of a broadly similar nature, a second question must be considered: are any differences between the things she does and the things the men do 'of practical importance in relation to terms and conditions of employment'? If not, then like work is established. This second limb of the test has been interpreted as meaning that only differences of a kind which one would expect to find reflected in the terms and conditions of employment should be seen as 'of practical importance' sufficient to defeat a claim. Trivial differences, or differences not likely to be reflected in terms and conditions of employment, ought to be ignored."

216 Section 65(2)(a)-(b) of the Equality Act. Romney D *Equal Pay: Law and Practice* (Oxford University Press 2018) states the following at 66: "Like work is defined in section 65(2) of the EqA, which replaces section 1(2)(a) of the EPA …". Lockton DJ *Employment Law* 9ed (Palgrave Macmillan 2014) states the following at 170: "Two things should be noted. First, the work does not have to be identical, merely broadly similar. Second, an employer cannot insert differences in the comparator's contract if in practice these differences never arise." Taylor S & Emir A *Employment Law: An Introduction* 3ed (Oxford University Press 2012) states the following at 340: "Alas, like so much else in the equal pay field, the Equality Act (like the Equal Pay Act) does not give us a clear, crisp definition of what the term 'like work' is supposed to mean. So this has had to be determined by the tribunals and judges as cases have come before them over the years." Lewis D, Sargeant M & Schwab B *Employment Law: The Essentials* 11ed (Chartered Institute of Personnel and Development 2011) states the following at 132: "This is the simplest route to claiming equality of terms – the claimant is claiming that the work she is doing is like that of her comparator. Once the woman has shown that her work is of the same or broadly similar nature as that of her comparator, unless the employer can prove that any differences are of no practical importance in relation to terms and conditions of employment, that person is to be regarded as employed on 'like work'." Pitt G *Employment Law* 6ed (Sweet & Maxwell Limited 2007) states the following at 181: "Where it is alleged that there are differences between what the woman and the man do, the tribunal must consider whether in practice this is the case." Connolly M *Discrimination Law* 1ed (Sweet & Maxwell Ltd 2006) states the following at 257 with regard to differences of practical importance: "The point of the second stage is to remove spurious or theoretical differences, when the jobs are, in reality, broadly the same."

for it to constitute like work because if it did then it would be easy for an employer to avoid its equal pay liability by simply pointing to a minor unimportant difference.[217] The Employment Tribunal should take a wide view both when determining whether the work in question is the same or broadly similar and whether any differences are of practical importance.[218] Section 65(3) of the Equality Act further provides that it is necessary when comparing the work of A and B, for the purpose of determining whether work is like work, to have regard to "the frequency with which differences between their work occur in practice" and "the nature and extent of the differences".[219] Romney provides the following guidance relating to the test to be applied to determine whether work is like work:

> "The test is twofold. First, is the work the same or of a broadly similar nature; and second, whether any differences in the work are of practical, as opposed to minimal, importance. The employment tribunal resolves this question by examining what the man and the woman actually do, what differences there are in what they do and whether those differences matter. Section 65(3) offers assistance in performing this exercise …"[220]

The Equal Pay Statutory Code of Practice states that determining whether work amounts to like work involves a two-stage process.[221] The first stage, looks at whether the claimant and the comparator are employed to perform work that is the same or broadly similar.

---

[217] Romney D *Equal Pay: Law and Practice* (Oxford University Press 2018) 66. Connolly M *Discrimination Law* 2ed (Sweet & Maxwell 2011) states the following at 301 regarding differences of practical importance: "The point of this question is to remove spurious or theoretical differences, when the jobs are, in reality, broadly the same." Connolly M *Discrimination Law* 1ed (Sweet & Maxwell Ltd 2006) states the following at 258: " … where the difference is real, there is a practical difference for the purpose of the Equal Pay Act 1970. The difference may … [be] supervision, responsibility, or skills."

[218] Smith I & Baker A *Smith & Wood's Employment Law* 10ed (Oxford University Press 2010) 327-328.

[219] Section 65(3)(a)-(b) of the Equality Act. Romney D *Equal Pay: Law and Practice* (Oxford University Press 2018) states at 66 that section 1(4) of the EPA has been replaced by section 65(3) of the Equality Act. Hepple B *Equality: The Legal Framework* 2ed (Hart Publishing 2014) states the following at 126: "For example, men and women who do similar work as shelf-fillers in a supermarket will be in 'like work' even though from time to time in practice men carry heavier objects or fill higher shelves. Few cases arise nowadays under this category, which is largely of historical interest." Lockton DJ *Employment Law* 9ed (Palgrave Macmillan 2014) states the following at 171: "On the wording of section 65(3), however, the different responsibility must exist for the whole of the working year and not just at particular times. In *Redland Roof Tiles v Harper* [1977] ICR 349, a man and a woman were doing similar jobs, but the man was paid more because he deputised for the transport manager for five weeks a year. It was held that this did not justify a difference in pay for the whole year – he could be given additional pay when he had the extra responsibility."

[220] Romney D *Equal Pay: Law and Practice* (Oxford University Press 2018) 66.

[221] Connolly M *Discrimination Law* 2ed (Sweet & Maxwell 2011) states the following at 300-301: "Tribunals should approach this question in two stages. First, they should decide if the comparator's work is the same, or of a 'broadly similar nature'. Second, they should consider if any differences are or 'practical importance'".

This necessitates a general consideration of the work together with the skills and knowledge required to perform it (the claimant would need to prove that the work performed is the same or broadly similar). The second stage, provided that the work performed by the claimant and the comparator is shown to be the same or broadly similar and where there are differences between the work, looks at whether those differences are of practical importance having regard to: (a) "the frequency with which any differences occur in practice", and (b) "the nature and extent of those differences."[222] The Equal Pay Statutory Code of Practice states that it behoves the employer to show that there are differences in the work actually performed by the claimant and comparator and that these differences are of practical importance. It states that differences that could be of practical importance are: (a) level of responsibility;[223] (b) skills;[224] (c) the time when the work is

---

[222] The Equal Pay Statutory Code of Practice at para 35. Taylor S & Emir A *Employment Law: An Introduction* 3ed (Oxford University Press 2012) state the following at 341: "It is important to make a distinction here between judgements about whether one person's work is 'the same or broadly similar' to another's, and the question of whether the difference in pay is justified. It is easy to confuse the two because some of the factors that are considered crop up at both stages in a case. … In these types of cases the employer effectively gets two bites at the cherry. It can first deploy the argument that the work of the two people is not 'the same or broadly similar', and if it fails to persuade the tribunal of this, it can go on to try to justify the difference in pay."

[223] Duggan M *Equal Pay – Law and Practice* (Jordan Publishing Limited 2009) states the following at 77: "Where the comparator exercises greater responsibility than the claimant this may amount to a difference of practical importance." Lockton DJ *Employment Law* 9ed (Palgrave Macmillan 2014) states the following at 171: "If a man has more responsibility than a woman doing broadly similar work, this is a difference of practical importance and again will justify a difference in pay."

[224] Duggan M *Equal Pay – Law and Practice* (Jordan Publishing Limited 2009) states the following at 78: "It was held in *Brodie and Another v Startrite Engineering Co* [1976] IRLR 101 that there were differences of practical importance where the claimant and comparator were working alongside each other but the male comparator was able to obtain the correct drill and set his machine then submit the first machined component to the charge hand for approval and, thereafter, to machine the rest. The comparator sharpened his own drills, replaced broken drills and corrected minor mechanical faults that may develop. All of the aforesaid tasks were done by the charge hand for the claimants. The comparator operated the same three drilling machines as the claimants but, in addition, he was also called upon to operate a pulley balancing machine. The comparator's ability to obtain the appropriate jig and drill and set his own machine, coupled with the fact that he was able to sharpen and replace drills and carry out minor repairs meant that he carried through each job entirely on his own, thereby relieving the charge hand of responsibility so that the jobs were different on account of skill."

performed; (d) qualifications;[225] (e) training;[226] (f) physical effort;[227] and (g) additional duties. It further states that a difference in the workload of the claimant and the comparator does not necessarily prevent a like work claim unless the difference in workload evidences a difference in responsibility or some other difference that is of practical importance.[228] Furthermore, a contractual duty on the comparator to perform additional duties which is not actually performed by the comparator will not affect a like work comparison because the focus of a like work comparison is on the work that is performed in practice.[229]

It is important to note that the principles relating to the same or broadly similar work as discussed above are to a large extent set out in the case law relating to the same or broadly similar work and is thus taken therefrom. It, however, remains prudent to discuss the relevant case law briefly in order to better understand these principles. It is convenient

---

[225] Duggan M *Equal Pay – Law and Practice* (Jordan Publishing Limited 2009) states the following at 77: "It was held in *Angestelltenbetriebsrat v Wiener Gebietskrankenkasse* [1999] IRLR 804, [2000] ICR 1134 that where men and women carry out the same work but are recruited on the basis of different training and qualifications and can be asked to perform different tasks, then the two groups may not be engaged on 'like work'. The workers were employed as psychotherapists but there were two groups being those who had trained first as graduate psychologists and those who had first completed their general practitioner training as doctors. The ECJ stated that 'two groups of persons who have received different professional training and who, because of the different scope of the qualifications resulting from that training, on the basis of which they were recruited, are called on to perform different tasks or duties, cannot be regarded as being in a comparable situation'."

[226] Duggan M *Equal Pay – Law and Practice* (Jordan Publishing Limited 2009) states the following at 79: "One of the factors argued in Handels-OG Kontorfunktionaerernes Forbund I Danmark v Dansk Arbejdsgiverforening (acting for Danfoss) [1989] IRLR 532, [1991] ICR 74 which could lead to justifiable pay differences was vocational training. The ECJ stated that as regards vocational training: ' … it cannot be ruled out that it may act to the detriment of female workers insofar as they have fewer opportunities to obtain vocational training which is as advanced as that of male workers, or that they use those opportunities to a lesser extent. However … the employer may justify rewarding specific vocational training by demonstrating that that training is of importance for the performance of the specific duties entrusted to the worker.' If the criterion systematically discriminates against women it will be necessary to show that the training improves the performance of employees in relation to the duties that are carried out."

[227] Duggan M *Equal Pay – Law and Practice* (Jordan Publishing Limited 2009) states the following at 76: "Where a man does work which involves physical strength and effort which a woman is unable to provide the woman will not be employed on 'like work'. An employer must not assume that the woman is unable carry out work involving physical strength but each woman should be assessed individually, taking into account her strength and experience. … The frequency of the heavier work may be of relevance so that where the work is carried out infrequently it is possible that it does not amount to a difference of practical importance."

[228] The Equal Pay Statutory Code of Practice at para 36.

[229] IDS Employment Law Guide: The Equality Act 2010 (Income Data Services Limited 2010) 151.

to rather extract the guidance from the United Kingdom law relating to the same or broadly similar work for the same or substantially the same work under section 6(4) of the EEA after the discussion of the case law and not at this juncture.

In *Dorothy Perkins Ltd v J Dance & Others*[230] the Employment Appeal Tribunal remarked that an Industrial Tribunal must not allow itself to get engaged in "fiddling detail or pernickity examination of differences which set against the broad picture fade into insignificance." It further remarked that it has on many occasions stated that both a job title and job specification may mean nothing or little to determine the same/similar work and common sense should apply. It stressed that it is eager for the Industrial Tribunal to approach questions of equal pay for the same/similar work by using a "very broad commonsense approach."[231] This was also the view of the Employment Appeal Tribunal in *Capper Pass Ltd v Lawton*[232] where the Employment Appeal Tribunal stated that where the work in question is found to be of a broadly similar nature then there will inevitably be differences between the work performed by the claimant and that of the comparator. It further remarked that the Industrial Tribunal should, when considering whether work is of a broadly similar nature, take a broad judgment which is not too pedantic and it should not engage in a minute examination or find itself being constrained to make a finding that the work is not like work due to differences which are insignificant.[233]

In *Dugdale v Kraft Foods Ltd*[234] the Employment Appeal Tribunal held that on a proper application of section 1(4) of the Equal Pay Act the first stage is to ascertain whether the work performed by the appellants and that performed by the comparators were of the same or of a broadly similar nature. It remarked that this stage was not directly answered by the Industrial Tribunal but found that the answer to the question in this stage clearly showed that the work performed by the appellants and that performed by the comparators were at least of a broadly similar nature. The Employment Appeal Tribunal found that this

[230] [1977] IRLR 226 (EAT).
[231] At para 9.
[232] [1976] IRLR 366 (EAT).
[233] At para 10.
[234] [1976] IRLR 368 (EAT).

being so, the next stage was to ascertain whether the differences between the work which the appellants did and the work that the comparators did were of practical importance as it related to the employment terms and conditions.[235] In *Ahmed v BBC*[236] the claimant lodged an equal pay claim claiming that her work performed on Newswatch was like work to that of the work performed by her chosen male comparator, Jeremy Vine, on Points of View. The claimant was paid £440 per programme and she sought to be paid the rate per programme of £3,000 which was paid to the male comparator. The Employment Tribunal referring to *Eaton Ltd v J Nuttall*[237] stated that when determining whether the work performed by a female was like work to that performed by the male comparator then attention should be paid to the work each of them performs and if there are differences in this regard then the nature of the differences, the extent of the differences as well as the frequency with which they occur should be ascertained.[238] The Employment Tribunal, in deciding whether the work performed by the claimant and that performed by the comparator was the same or broadly the same, looked at the work which was actually performed by both of them. It found the following: (a) both the claimant and the comparator presented a pre-recorded programme which was 15 minutes long; (b) both programmes were presenter-led with a magazine format; (c) both programmes discussed the audience opinion relating to BBC programmes with one difference that Newswatch only dealt with the audience comments on news programmes whereas Points of View dealt with audience comments on all BBC programmes; (d) with regard to both programmes, each respective producer made decisions regarding the content of the programme and this was communicated to the presenter in advance; (e) the claimant occasionally recommended topics that could be traversed and some of these suggestions were accepted; (f) both presenters were expected to view some of the programmes; (g) the producers of both programmes wrote the script and did so in a way that suited the programme and the style of the presenter; (h) with regard to both programmes, the script was made available to the presenter prior to recording; (i) the Points of View programme

[235] At para 6. See also the cases of *Waddington v Leicester Council for Voluntary Services* [1997] IRLR 32 (EAT) at paras 7, 9; *Morgan v Middlesborough Council* [2005] EWCA Civ 1432 (CA) at paras 10-11; and *Capper Pass Ltd v Lawton* [1976] IRLR 366 (EAT) at para 11.
[236] Case No: 2206858/2018 (ET).
[237] [1977] IRLR 71 (EAT).
[238] At paras 3, 10, 94, 116.

was light hearted; (j) with regard to both programmes, the producers organised the interviews and recorded the clips or interviews; (k) the comparator spent 3.5 hours in the Broadcasting House whereas the claimant spent 4 hours in the Broadcasting House; (l) both the claimant and the comparator presented the programme using autocue; (m) while the claimant read out the audience opinions, the comparator did not do likewise and this for his programme was done by another person; (n) the claimant often conducted interviews whereas the comparator rarely engaged in same; (o) with regard to both programmes, the questions were settled by the producers; (p) both the claimant and the comparator were allowed to make slight changes to the script but any substantial changes had to be approved by the producers; (q) both the claimant and the comparator were required to make the audience feel that they were on the audience side; and (r) with regard to both programmes, editing was undertaken by the producers and the claimant often made suggestions relating to editing. The Employment Tribunal then held that it was clear from the above that the claimant and the comparator did perform work that was the same or very similar despite the differences between their work which were minor and their work was consequently like work as envisaged in section 65(1) of the Equality Act.[239]

In *E Coomes (Holdings) Ltd v Shields*[240] the Court of Appeal stated that the legal burden of proving that the claimant is employed on like work with a man rests on the claimant. If the claimant is able to do this then an evidential burden of showing differences of practical importance rests upon the employer.[241] The Court of Appeal stated that examples of work that is of the same nature is where males and females serve meals in a restaurant as well as males and females who work as bank cashiers at the same counter. It further stated that examples of work that is of a broadly similar nature is where a female cook prepares meals for the directors whereas the male chefs prepare breakfast, lunch and tea in the canteen for employees and where males and females are employed as shop assistants in the same Department store but different sections.[242]

---

[239] At para 153 and paras 147-149 on pages 29-30 and paras 147-149 on pages 30-31 (paras 147-149 are duplicated in the judgement hence the need to also mention the page numbers).
[240] [1978] IRLR 263 (CA).
[241] At para 65.
[242] At para 29.

In *Capper Pass Ltd v Allan*[243] the Employment Appeal Tribunal stated that the issue regarding whether a female is to be regarded as being performing like work is dependent on the matters set out in section 1(4) of the Equal Pay Act and such a decision is essentially a question of fact. It further stated that whether a difference in responsibility can amount to a difference of practical importance which can prevent the work in question from being like work is a matter for the Industrial Tribunal to decide. The Employment Appeal Tribunal stated that it as an Appeal Tribunal would not easily interfere with the Industrial Tribunal's findings as long as their decision was based on evidence. It then stated that it seemed to it that the Industrial Tribunal assumed that because the respondent and the comparator both handled money that they were performing like work. It stated that this approach by the Industrial Tribunal was incorrect. The Employment Appeal Tribunal further stated that the amount of money handled where it is a larger amount than money handled in another case could very well give rise to a different and higher degree of responsibility. The respondent handled a much lesser amount of money as opposed to the comparator and the comparator was also engaged in stock control. The Employment Appeal Tribunal held that it does not seem possible to state that the respondent and the comparator performed like work within the ambit of the Equal Pay Act. It further held that even though much of the work was broadly similar the differences in the form of extra responsibility for handling larger monies and stock taking responsibility justified the differences in the grading of the respondent and the comparator. It then stated that this would then prevent the respondent's work and the comparator's work from being considered like work. It held that the Industrial Tribunal should have concluded that the respondent and the comparator were not engaged in like work after making a finding that the differences between the pay grades were justified and it committed an error of law by not doing so. The Employment Appeal Tribunal thus allowed the appeal and set aside the Industrial Tribunal's decision.[244]

243 [1980] IRLR 236 (EAT).
244 At paras 13, 15, 17, 20.

In *Eaton Ltd v J Nuttall*[245] the Employment Appeal Tribunal found that it was clear that the Industrial Tribunal made a finding that it will always be irrelevant to ascertain whether the work done by the claimant and the comparator, although the same, may have different consequences if not properly done. The appellant argued that the consequences for the respondent failing to perform properly was less serious as opposed to her comparator because she was responsible to look after 2400 items up to a value of £2.50 whereas the comparator was responsible to look after 1200 items with a value from £5 to £1,000. The Employment Appeal Tribunal found that the Industrial Tribunal was incorrect by stating that it is was irrelevant to consider the consequences attached to not performing their work properly. It stated that while it is important to ascertain what work is done by the claimant and what work is done by the comparator the circumstances under which the work is performed should not be ignored. The Employment Appeal Tribunal stated that the factor of responsibility might be decisive if it is able to place the comparator in a different grade from the claimant. It further stated that an example of this is where there is a senior bookkeeper and a junior bookkeeper who work together and whose work is almost identical but the factor of responsibility may be important in such case. The Employment Appeal Tribunal then remitted the case to be heard before a differently constituted Industrial Tribunal.[246]

In *De Brito v Standard Chartered Bank Ltd*[247] the appellant, graded as a clerical officer Grade 2, brought an equal pay claim and used comparators who are graded as specialist C. The Employment Appeal Tribunal noted that while the general nature of the work performed by the appellant and the comparators was the same, it was self-evident that the employer could place more reliance on the work performed by the comparators due to their experience. The Employment Appeal Tribunal stated that it provided the following example to the appellant in argument: "… a schoolmaster and his pupils might work out the same sum in a mathematics lesson, but no one would put a master and pupils in the same category." It stated that the difference between the appellant and the comparators

[245] [1977] IRLR 71 (EAT).
[246] At paras 8-9, 12.
[247] [1978] ICR 650 (EAT).

was recognised by the employer who graded the comparators as specialist C and the appellant as clerical officer grade 2. The comparators received pay of £2,160 and the appellant received pay of £1,962.[248] The appellant argued, *inter alia*, that it did not matter that he was a trainee/probationer in the trust Department as all that mattered was that he was employed on like work with the comparators. The Employment Appeal Tribunal held that whilst there was some force in this argument, it could not be envisioned that the Equal Pay Act could allow a situation where a trainee who is performing the same work as his supervisor and under her training is entitled to be paid at the same rate as his supervisor. It held that even if it was incorrect in its finding that a probationer can never be employed on like work with his supervisor then the appellant's claim would still fail based on the genuine material factor defence due to the comparators long service, experience and status which explained the pay differential and which was not sex-tainted. It consequently dismissed the appeal.[249]

In *Thomas & Others v National Coal Board*[250] the Employment Appeal Tribunal stated that one of the issues to be decided before it was whether the appellant equal pay claimants were employed on like work with the male comparator. It stated that this issue should be approached in two parts. The first part is whether the work performed by the appellant equal pay claimants and the male comparator were of a broadly similar nature. If the work performed is broadly similar then the second part to decide is whether the differences between the work performed are of practical importance in relation to the employment terms and conditions. The Employment Appeal Tribunal noted that the question relating to whether the appellant equal pay claimants and the male comparator were employed on like work was a difficult question to be decided before the Industrial Tribunal. The majority of the Industrial Tribunal held that the appellant equal pay claimants and the male comparator were not employed on like work because there were differences between the work performed by the appellants and that performed by the male comparator whilst he worked permanently on night shift and these differences were of

248 It is not clear from the case as to whether the amounts of pay was paid per annum or per month but it is assumed that the amounts were paid per annum having regard to the year of the case.
249 At 653B-E, 654G-H, 655A, 655D-E, 656G.
250 [1987] IRLR 451 (EAT).

practical importance in relation to the employment terms and conditions. The Employment Appeal Tribunal noted that there was evidence from many of the appellant equal pay claimants that if they were required to work the night shift then there was an awareness of responsibility and risk which lead to it being unsatisfactory to work alone in the absence of supervision or anyone to assist in the case of an emergency. It noted that there was thus a difference between the work performed by the appellants and that performed by the comparator and such difference was of practical importance. The Employment Appeal Tribunal remarked that the case before it was not one where there was an apparent similarity relating to the work and where the only difference in the work performed related to the time at which it was performed. It further remarked that the Industrial Tribunal was required to look at the circumstances under which the claimed like work was performed. It further stated that performing work at night permanently produced additional responsibilities which results in a difference between the work performed and which was of practical importance. The Employment Appeal Tribunal held that there was no need for it to interfere with the decision of the majority of the Industrial Tribunal on the issue of like work as it was not wholly unreasonable. It consequently dismissed the appeal.[251]

In *Ford v R Weston (Chemists) Ltd*[252] the Employment Appeal Tribunal stated that the issue was whether the Industrial Tribunal was correct in its approach in terms of which it looked broadly at what work was performed by the appellant and what work was performed by the comparator and it found that overall it was clear that the appellant did different work to that of the comparator and it was only if one looked at the period when the appellant stood in for the comparator then only can a different view be possible. It found that the Industrial Tribunal correctly approached the matter in applying section 1(4) of the Equal Pay Act by taking a broad overall picture of the differences between the work performed by the appellant and the work performed by the comparator. The Employment Appeal Tribunal found that this approach was correct and the attendant result complied with the ordinary practice and if the claimant deputises for the comparator then this is

[251] At paras 4-5, 8.
[252] 1977 12 ITR 369 (EAT).

normally reflected in the claimant's pay. It further found that the Industrial Tribunal's decision was correct and it dismissed the appeal.[253]

In *Morgan v Middlesbrough Council*[254] the respondent equal pay claimant, Morgan, claimed that she performed like work to a male comparator, Mr Mell, and that she was paid for performing work during school terms whereas her chosen comparator was paid for performing work during the whole year. The Employment Tribunal found that the respondent did not perform like work to that of the comparator. The respondent aggrieved with this finding appealed the decision to the Employment Appeal Tribunal. The majority of the Employment Appeal Tribunal set aside the Employment Tribunal's decision and remitted the issue of like work to the Employment Tribunal for a re-hearing. The appellant, Middlesbrough Council, appealed the decision of the Employment Appeal Tribunal to the Court of Appeal seeking to reinstate the Employment Tribunal's decision. The Employment Tribunal found that the respondent and the comparator were not employed on the same or broadly similar work because the respondent was engaged in routine work which was lesser work than the strategic and managerial role which was undertaken by the comparator. The majority of the Employment Appeal Tribunal found that the Employment Tribunal did not properly and sufficiently identify the actual facts which took the work performed by the respondent and the comparator out of the realm of broad similarity. It allowed the appeal.[255] The Court of Appeal found that there was sufficient material placed before the Employment Tribunal for it to make its findings. The respondent argued that the Employment Tribunal should have found that the relevant work performed by the respondent and the comparator was like work and the employer would then have to show that there were material differences. The Court of Appeal stated that it did not accept this argument because the Employment Tribunal could properly make the finding that the work performed was not like work based on the differences between the work. The Court of Appeal remarked that care must be exercised when using experience as it can be relevant to take this into account when determining the nature of

[253] At pages 2-3.
[254] [2005] EWCA Civ 1432 (CA).
[255] At paras 2-5, 9, 31.

the job in question. The Court of Appeal found that it was clear from the respondent's job description and accompanying details that her work was not of the same nature as the work done by the comparator. The Court of Appeal finally allowed the appeal.[256]

In *National Coal Board v Sherwin & Another*[257] the Employment Appeal Tribunal stated that it adhered to its previous decision in *Dugdale v Kraft Foods Ltd*[258] where it stated that in determining whether work performed is like work within the meaning of section 1(4) of the Equal Pay Act the time at which the work is done should be ignored if this constitutes the only difference between the work performed by the claimant and that of the comparator. It stated that there are cases where the fact of working different times results in the changed nature of the work but such cases will have to be considered with care. It stated that this is usually found in cases where the fact of working at night attracts additional responsibilities to the extent that it is unreasonable to say that the claimant working during the day and the comparator working at night are performing like work even though they are performing similar physical acts but the reality is that the nature of the work performed at night is different. The Employment Appeal Tribunal remarked that this should not be taken to read that the appellant is not allowed to pay the comparator extra remuneration at night provided that the extra remuneration is justified by the inconvenience. It further stated that even though it is irrelevant to take into account the different times worked if that is the only difference between the work, this does not mean that the appellant cannot rely on the fact of working different times as constituting a material difference under section 1(3) of the Equal Pay Act and this will depend on the facts of the relevant case.[259]

In *Waddington v Leicester Council for Voluntary Services*[260] the Employment Appeal Tribunal held that section 1(4) of the Equal Pay Act is concerned with what work the claimant and the comparator does and the Employment Appeal Tribunal has previously

[256] At paras 34-35, 42, 44-45.
[257] [1978] ICR 700 (EAT).
[258] [1976] IRLR 368 (EAT).
[259] At 703D-F, 704G-H, 705A.
[260] [1997] IRLR 32 (EAT).

held that section 1(4) of the Equal Pay Act requires that regard must be had primarily to what the claimant and the comparator actually does and not primarily to what the employment contract requires them to do unless to the extent that it is done in practice. It further held that it is irrelevant when applying section 1(4) of the Equal Pay Act that the comparator unlike the claimant is under a contractual obligation to perform some other work unless the comparator actually performs that work.[261]

In *Redland Roof Tiles Ltd v Harper*[262] the Employment Appeal Tribunal remarked that a difference in pay was not one of the factors which could properly be taken into account in deciding whether or not the claimant and the comparator are engaged in like work. It stated that in applying section 1(4) of the Equal Pay Act to decide whether work is like work the key question is to ascertain what work does the claimant do and what work does the comparator do and where there is a contractual obligation on the comparator that is not placed on the claimant then the question relates to whether the contractual obligation is enforced, and if it is, what does that enforcement result in the comparator doing which the claimant does not do. The Employment Appeal Tribunal cautioned that this statement should not be read to mean that it is irrelevant to look at the contractual terms because this is the starting point with the primary focus being on what is done in practice.[263]

In *Electrolux Ltd v AM Hutchinson & Others*[264] the Employment Appeal Tribunal stated that it has previously held that where a claimant and a comparator are engaged in work that is the same or of a broadly similar nature then it is not a material difference in their work that the comparator is contractually obliged to perform additional duties which the claimant is not contractually obliged to if the comparator does not actually perform the additional duties to some significant extent.[265]

---

[261] At para 9.
[262] [1977] ICR 349 (EAT).
[263] At 351B, 352H-353A.
[264] [1976] IRLR 410 (EAT).
[265] At para 5.

In *Maidment & Hardacre v Cooper & Co (Birmingham) Ltd*[266] the majority of the Employment Appeal Tribunal remarked that the test to determine like work is a rough test even though it applied it in a common-sense and unpedantic manner. It further remarked that if it is found that the claimant and her comparator are not employed on like work then it is irrelevant if there is any remuneration gap between their work which is not commensurate in relation to the differences of their work. The majority of the Employment Appeal Tribunal further remarked that the Equal Pay Act does not give it the power to narrow any remuneration gap.[267]

The following guidance (principles) can be extracted from the discussion under this paragraph 4.4.1 in order to learn lessons for the same work and substantially the same work under section 6(4) of the EEA as called for in research questions four and five (paragraphs 13.4 and 13.5 of Chapter 2 of this thesis):

(a) Work does not have to be identical in every respect in order for it to constitute like work because if it did then it would be easy for an employer to avoid its equal pay liability by simply pointing to a minor unimportant difference;[268]

(b) An Employment Tribunal should take a wide view both when determining whether the work in question is the same or broadly similar and whether any differences are of practical importance.[269] An Industrial Tribunal must not allow itself to get engaged in "fiddling detail or pernickity examination of differences which set against the broad picture fade into insignificance." A job title and job specification may mean nothing or little to determine the same/similar work and common sense should apply. The Employment Appeal Tribunal stressed that it is eager for the Industrial Tribunal to approach questions of equal pay for the same/similar work by using a "very broad commonsense

266 [1978] IRLR 462 (EAT).
267 At paras 15.
268 Romney D *Equal Pay: Law and Practice* (Oxford University Press 2018) 66 as discussed under para 4.4.1 above.
269 Smith I & Baker A *Smith & Wood's Employment Law* 10ed (Oxford University Press 2010) 327-328 as discussed under para 4.4.1 above.

approach."[270] An Industrial Tribunal should, when considering whether work is of a broadly similar nature, take a broad judgment which is not too pedantic and it should not engage in a minute examination or find itself being constrained to make a finding that the work is not like work due to differences which are insignificant.[271] The issue regarding whether a female is to be regarded as being performing like work is dependent on the matters set out in section 1(4) of the Equal Pay Act and such a decision is essentially a question of fact.[272] The test to determine like work is a rough test even though it is applied in a common-sense and unpedantic manner;[273] and

(c) Determining whether work amounts to like work involves a two-stage process. The first stage, looks at whether the claimant and the comparator are employed to perform work that is the same or broadly similar. This necessitates a general consideration of the work together with the skills and knowledge required to perform it (the claimant would need to prove that the work performed is the same or broadly similar). The second stage, provided that the work performed by the claimant and the comparator is shown to be the same or broadly similar and where there are differences between the work, looks at whether those differences are of practical importance having regard to: (a) "the frequency with which any differences occur in practice", and (b) "the nature and extent of those differences."[274]

It is submitted that the principles listed in (a)-(c) above provides valuable guidance for the Labour Court (including the CCMA) adjudicating equal pay for the same same/substantially the same work claims under section 6(4) of the EEA regarding the

---

[270] *Dorothy Perkins Ltd v J Dance & Others* [1977] IRLR 226 (EAT) at para 9 as discussed under para 4.4.1 above.

[271] *Capper Pass Ltd v Lawton* [1976] IRLR 366 (EAT) at para 10 as discussed under para 4.4.1 above.

[272] *Capper Pass Ltd v Allan* [1980] IRLR 236 (EAT) at para 13 as discussed under para 4.4.1 above.

[273] *Maidment & Hardacre v Cooper & Co (Birmingham) Ltd* [1978] IRLR 462 (EAT) at para 15 as discussed under para 4.4.1 above.

[274] The Equal Pay Statutory Code of Practice at para 35 discussed under para 4.4.1 above. See also the cases of *Dugdale v Kraft Foods Ltd* [1976] IRLR 368 (EAT) at para 6; *Ahmed v BBC* Case No: 2206858/2018 (ET) at para 153 and paras 147-149 on pages 29-30 and paras 147-149 on pages 30-31 (paras 147-149 are duplicated in the judgement hence the need to also mention the page numbers); *Waddington v Leicester Council for Voluntary Services* [1997] IRLR 32 (EAT) at paras 7, 9; *Morgan v Middlesborough Council* [2005] EWCA Civ 1432 (CA) at paras 10-11; and *Capper Pass Ltd v Lawton* [1976] IRLR 366 (EAT) at para 11 discussed under para 4.4.1 above. .

approach that should be taken to determine whether or not work is the same or substantially the same work. To this end, these principles should be listed under regulation 4 of the Employment Equity Regulations.

(d) The legal burden of proving that the claimant is employed on like work with a comparator, rests on the claimant. If the claimant is able to do this, then an evidential burden of showing that there are differences in the work actually performed by the claimant and comparator and that these differences are of practical importance rests upon the employer.[275]

It is submitted that the principle listed in (d) above provides guidance relating to who should prove what and it is submitted that the shift in evidential burden to the employer to show that the differences in the work are of practical importance will make the equal pay for the same/substantially the same work claim under section 6(4) of the EEA effective, and to this end, it should be listed under regulation 4 of the Employment Equity Regulations.

(e) The following are examples of differences that can be of practical importance: (a) level of responsibility; (b) skills; (c) the time when the work is performed; (d) qualifications; (e) training; (f) physical effort; (g) additional duties; and (h) a difference in the workload of the claimant and the comparator where it evidences a difference in responsibility (or some other difference that is of practical importance);[276]

(f) Whether a difference in responsibility can amount to a difference of practical importance which can prevent the work in question from being like work, is a matter for the Industrial Tribunal to decide. The amount of money handled where it is a larger amount (by the comparator) than money handled in another case (by the claimant) could very well give rise to a different and higher degree of responsibility;[277]

---

[275] *E Coomes (Holdings) Ltd v Shields* [1978] IRLR 263 (CA) at para 65 read with the Equal Pay Statutory Code of Practice at para 36 discussed under para 4.4.1 above.

[276] The Equal Pay Statutory Code of Practice at para 36 discussed under para 4.4.1 above.

[277] *Capper Pass Ltd v Allan* [1980] IRLR 236 (EAT) at para 15 discussed under para 4.4.1 above.

(g) While it is important to ascertain what work is done by the claimant and what work is done by the comparator the circumstances under which the work is performed should not be ignored. The factor of responsibility might be decisive if it is able to place the comparator in a different grade from the claimant. An example of this is where there is a senior bookkeeper and a junior bookkeeper who work together and whose work is almost identical but the factor of responsibility may be important in such case;[278]

(h) The Equal Pay Act does not allow for a situation where a trainee who is performing the same work as his supervisor and under her training is entitled to be paid at the same rate as his supervisor. A probationer can thus not be employed on like work with his supervisor;[279]

(i) Performing like work only when deputising for a comparator does not result in the claimant performing like work to that of the comparator;[280] and

(j) A claimant and comparator are not engaged in the same or broadly similar work where the claimant is engaged in routine work which is lesser work than the strategic and managerial role which is undertaken by the comparator.[281]

It is submitted that the list of examples of differences that can be of practical importance as set out in (e) above and those instances referred to in (f)-(j) above provide valuable guidance for the same/substantially the same work cause of action under section 6(4) of the EEA and this list should be stated under regulation 4 of the Employment Equity Regulations.

---

278 *Eaton Ltd v J Nuttall* [1977] IRLR 71 (EAT) at para 9 as discussed under para 4.4.1 above.

279 *De Brito v Standard Chartered Bank Ltd* [1978] ICR 650 (EAT) at 655A, 655E as discussed under para 4.4.1 above.

280 *Ford v R Weston (Chemists) Ltd* 1977 12 ITR 369 (EAT) at pages 2-3 as discussed under para 4.4.1 above.

281 *Morgan v Middlesbrough Council* [2005] EWCA Civ 1432 (CA) at para 9 as discussed under para 4.4.1 above.

(k) The time at which work is done should be ignored if this constitutes the only difference between the work performed by the claimant and that of the comparator but it should not be ignored where working at night attracts additional responsibilities to the extent that it is unreasonable to say that the claimant working during the day and the comparator working at night are performing like work even though they are performing similar physical acts but the reality is that the nature of the work performed at night is different. There is thus a difference between the work performed between the claimant and comparator which is of practical importance.[282]

It is submitted that the principle in (j) above regarding whether the time at which work is performed constitutes a difference of practical importance provides valuable guidance to the Labour Court (including the CCMA) on how to go about determining this aspect for the same/substantially the same work under section 6(4) of the EEA. This should be listed under regulation 4 of the Employment Equity Regulations.

(l) A contractual duty on the comparator to perform additional duties which is not actually performed by the comparator, or where it is performed by the comparator but not to a significant extent, will not affect a like work comparison because the focus of a like work comparison is on the work that is performed in practice. This does not mean that it is irrelevant to look at the contractual terms because this is the starting point with the primary focus being on what is done in practice.[283]

It is submitted that the principle in (l) above relating to the relevance of the contractual duty on the comparator to perform additional duties provides valuable guidance to the Labour Court (including the CCMA) on how to go about dealing with whether contractual duties are performed or not and its impact on determining whether or not the claimant

---

282 *National Coal Board v Sherwin & Another* [1978] ICR 700 (EAT) at 703D-F, 704G-H read with *Thomas & Others v National Coal Board* [1987] IRLR 451 (EAT) at para 5 as discussed under para 4.4.1 above.

283 IDS Employment Law Guide: The Equality Act 2010 (Income Data Services Limited 2010) 151 read with *Electrolux Ltd v AM Hutchinson & Others* [1976] IRLR 410 (EAT) at para 5 and *Redland Roof Tiles Ltd v Harper* [1977] ICR 349 (EAT) at 352H-353A. See also *Waddington v Leicester Council for Voluntary Services* [1997] IRLR 32 (EAT) at para 9 as discussed under para 4.4.1 above.

and comparator are engaged in the same/substantially the same work. This should be mentioned under regulation 4 of the Employment Equity Regulations.

(m) A difference in pay does not constitute a factor which can properly be taken into account in deciding whether or not the claimant and the comparator are engaged in like work;[284] and

(n) Where the work in question is found to be of a broadly similar nature then there will inevitably be differences between the work performed by the claimant and that of the comparator.[285]

It is submitted that the principles in (m)-(n) above provide important guidance for the equal pay for the same/substantially the same work causes of action under section 6(4) of the EEA and should accordingly be mentioned under regulation 4 of the Employment Equity Regulations.

4.4.2 Work rated as equivalent

Romney states that the main difference between equal pay for like work and equal pay for work of equal value as opposed to equal pay for work rated as equivalent is that in the latter cause of action (work rated as equivalent) the employer voluntarily evaluates its employees instead of the Employment Tribunal determining the equivalence as happens in the former causes of action (equal pay for like work and equal pay for work of equal value).[286] Section 65(1)(b) of the Equality Act provides that the work performed by A is equal to the work performed by B if A's work is rated as equivalent to B's work.[287] Section

---

[284] *Redland Roof Tiles Ltd v Harper* [1977] ICR 349 (EAT) at 351B as discussed under para 4.4.1 above.
[285] *Capper Pass Ltd v Lawton* [1976] IRLR 366 (EAT) at para 10 as discussed under para 4.4.1 above.
[286] Romney D *Equal Pay: Law and Practice* (Oxford University Press 2018) 76.
[287] Taylor S & Emir A *Employment Law: An Introduction* 3ed (Oxford University Press 2012) state the following at 342: "Here the jobs of the claimant and her comparator may be of a completely different nature, but have nonetheless been ranked 'as equivalent' in terms of their worth through the use of a job evaluation scheme. In other words, the situation is one in which their employer has completed a job evaluation exercise which values the two jobs equally and thus places them on the same grade or point on a pay spine. At first sight this appears rather puzzling. Surely, if the two jobs have been graded the same the two people concerned will already be being paid the same amount of money, so why would

65(4) of the Equality Act then goes on to state that the work performed by A is rated as equivalent to B's work provided that a job evaluation study:[288] (a) accords equal value to

---

anyone ever need to bring a case of this kind? In fact such cases are not unusual, there being plenty of situations that arise in which a man doing one job is in practice paid more than a woman doing another, despite the fact that the two jobs are graded at the same level in the organization. He may be paid a higher performance-based incentive, or be further up the spine *within* the same grade band for one reason or another. In some organisations, whatever the relative value of the two jobs concerned, a man may be graded more highly because it was deemed necessary to pay more at the time of his appointment in order to attract a better field of candidates. The employer may be able to defend itself in such circumstances, but this does not mean that the case cannot proceed and evidence be presented." Lewis D, Sargeant M & Schwab B *Employment Law: The Essentials* 11ed (Chartered Institute of Personnel and Development 2011) states the following at 133: "This second way in which a woman can claim equality of terms is if her job and that of the male comparator have been rated as equivalent under a job evaluation study which the employer has voluntarily carried out." Pitt G *Employment Law* 6ed (Sweet & Maxwell Limited 2007) states the following at 182: "If the jobs of the woman and the man have been rated as having equivalent value under a job evaluation study, then she is entitled to equal pay. The converse is also true: if the jobs have been rated as unequal, the woman cannot try to claim that they are of equal value." Bowers J *A Practical Approach to Employment Law* 7ed (Oxford University Press 2005) mentions the following example at 128-129 regarding equal pay for work rated as equivalent under the Equal Pay Act: "Alan and Betty work for Crest Stores as a travel agent and butcher respectively. A job evaluation study awards both 30 points, but the employers still pay Alan £3 more per week. An employment tribunal must accept that the two are employed on like work, so that Alan may only be paid more if there is a genuine material difference in the personal equation, e.g. as a result of his longer experience in the store."

[288] Duggan M *Equal Pay – Law and Practice* (Jordan Publishing Limited 2009) states the following at 85: "A JES [job evaluation study] is meant to provide a fair and rational basis for evaluating a range of jobs and evaluating pay on as objective a basis as is possible. … The JES must aim to ensure that the criteria which are applied in valuing the job are as objective as possible." Kelly D, Hammer R, Hendy J & Denoncourt J *Business Law* 3ed (Routledge 2018) state the following at 484: "An applicant may bring an equality claim if her job has been rated as equivalent with that of her male comparator by virtue of a job evaluation scheme. This can only be used where there is in existence a complete and valid scheme, the validity of which has been accepted by the parties who agreed to its being carried out." Connolly M *Discrimination Law* 2ed (Sweet & Maxwell 2011) states the following at 303: "Where an employer has carried out a job evaluation study, a woman may use the results of that study to bring [a] claim of equal pay. So where her job was rated as equivalent to the job of a male employee, she may use that employee as her comparator. He does not have to be doing like work, so long as the work was rated as equivalent under the study, for instance, a shipyard cook could be rated as doing equivalent work to a shipyard painter. The comparator may be doing work of *less* value. A study may also be used by employers when defending an equal pay claim." Lewis D, Sargeant M & Schwab B *Employment Law: The Essentials* 11ed (Chartered Institute of Personnel and Development 2011) state the following at 133: "Job evaluation studies decide the relative importance of different jobs within an organisation. There are a number of different reasons why an employer might carry out such a study. These might include, for example: … employee dissatisfaction with the way jobs are graded … too many job grades … problems with recruitment and retention … equality of terms issues." Smith I & Baker A *Smith & Wood's Employment Law* 10ed (Oxford University Press 2010) state the following at 329-330: "The Act does not lay down detailed requirements for such a scheme. … so that where there has been such a study a tribunal should act upon its recommendations, even if the parties who drafted it are no longer happy with it, once the scheme has been worked out, it will be binding for the purposes of the Act and may be relied on by the claimant, even if the employer has not in fact put it into effect. However, to be binding the job evaluation scheme must be a valid scheme, in the sense that it must be non-discriminatory, objective and capable of impartial application…" Pitt G *Employment Law* 6ed (Sweet & Maxwell Limited 2007) states the following at 182-183: "What is a job evaluation study? It is an attempt to measure the worth of jobs across all or a substantial part of the employer's workforce and may be

the work performed by A and the work performed by B having regard to the demands made on an employee; or (b) where it would accord equal value to the work performed by A and the work performed by B had it not been made on a sex-specific system.[289]

---

used by management essentially as a way of trying to demonstrate to the workforce that differentials are justified." McCrudden C *Equality in Law between Men and Women in the European Community: United Kingdom* (Martinus Nijhoff Publishers 1994) states the following at 45: "The job evaluation scheme must be 'analytical' in order to comply with these provisions, i.e. the jobs of each worker covered by the study must have been valued in terms of the demand made on the worker under various headings. Once a job evaluation study has been undertaken and has resulted in a conclusion that the job of a woman is of equal value with that of a man, then the man and the woman should be paid the same."

[289] Section 65(4)(a)-(b) of the Equality Act. The Equal Pay Statutory Code of Practice at para 44 provides the following: "A woman's work can be treated as rated as equivalent if she can show that the work would have been assessed as being of equal value, had the evaluation not been itself discriminatory in setting different values for the demands being made of men and women." Romney D *Equal Pay: Law and Practice* (Oxford University Press 2018) states the following at 84-85: "It must be emphasized that it is the *work* that is evaluated and not the person performing it. Individual attributes may be taken into account at the material factor stage but they must play no part in the assessment of the work itself. … There is no set methodology for carrying out a JES, as long as the method used conforms with the principles that it should be analytical, thorough and objective." Romney D *Equal Pay: Law and Practice* (Oxford University Press 2018) states the following at 88: "Care should be taken when evaluating or re-evaluating jobs in sensitive situations so that the employer does not lay itself open to an allegation that a comparator's job has been evaluated with knowledge of the, or a potential, claimant's job in order to ensure that it comes out at a higher level, thereby preventing her from claiming that she is rated as equivalent. … Whenever jobs are evaluated under a JES, it is essential that job analysts use the same criteria for each evaluation or comparison will be impossible." Hepple B *Equality: The Legal Framework* 2ed (Hart Publishing 2014) states the following at 126 relating to equal pay for work rated as equivalent: "This presupposes that the employer has voluntarily carried out a job evaluation study, which has been accepted by the employer and any other parties that commissioned it, such as a trade union. The work is rated as equivalent if the study gives an equal value to the two jobs in terms of the demands made on the worker. If a woman's job is rated higher than that of a male comparator under a study, this will not prevent her from claiming equal terms." Duggan M *Equal Pay – Law and Practice* (Jordan Publishing Limited 2009) states the following at 96: "The EqPA 1970 states that a [job evaluation] scheme will be discriminatory if it is made on a system which discriminates on grounds of sex where a difference or coincidence between values set by that system on different demands under the same or different headings is not justifiable, irrespective of the sex of the person on whom these demands are made. This means, for example, that a woman may argue that instead of 'mental concentration' (in her job) being awarded fewer points than 'physical effort' (in a man's job), it should have received the same or more points. Similarly, she may argue that the 'physical effort' (in his job) has been overrated compared with the skill her job requires for 'manual dexterity'. Even where she has received the same or more points than a man under a particular heading, she may still argue that the demands of her job under this heading have been underrated. In addition a study will be discriminatory if it fails to include, or properly take into account, a demand (eg caring demands in a job involving looking after sick or elderly people such as nursing) that is an important element in the woman's job. A study will also be discriminatory if it gives an unjustifiably heavy weighting to factors that are more typical of the man's job." Lockton DJ *Employment Law* 9ed (Palgrave Macmillan 2014) states the following at 171: "The Act does not lay down detailed requirements for a JES but, once it has been carried out, it will be upheld unless the tribunal feels that it was made on a sex-specific system … In other words, subjective views on the value of work are not permissible but objective factors such as seniority are relevant. Relative weightings on 'whole job' comparisons are thus inadequate for this purpose …" Taylor S & Emir A *Employment Law: An Introduction* 3ed (Oxford University Press 2012) states the following at 344: "This means that in principle a woman can bring a tribunal claim and argue that her work should be rated as

Romney states that the burden to prove that the job evaluation study complies section 65(4) of the Equality Act is on the employer.[290] The Equality Act further provides that a job evaluation is based on a sex-specific system where it sets different values for males and females in relation to one or more of the demands made on an employee.[291] The Equal Pay Statutory Code of Practice provides that work is rated as equivalent where the relevant jobs have, under the assessment, scored the same number of points and/or

---

equivalent to that of a male comparator and would have been had the job evaluation scheme being used not *directly* discriminated against women in its operation." Connolly M *Discrimination Law* 2ed (Sweet & Maxwell 2011) states the following at 303: "Section 65(4) provides that work is rated as equivalent if the study "gives an equal value to [the jobs] … in terms of the demands made on a worker". No part of the study should be "sex-specific", that is setting "values for men different from those it sets for women." If, after disregarding the sex-specific parts, the study shows equivalence, the claim should proceed." Lewis D, Sargeant M & Schwab B *Employment Law: The Essentials* 11ed (Chartered Institute of Personnel and Development 2011) state the following at 134 regarding an example given in the Explanatory Notes to the Equality Act: "A job evaluation study rated the jobs of women and their better-paid male comparators as not equivalent. If the study had not given undue weight to the skills involved in the men's jobs, it would have rated the jobs as equivalent. An equality clause would operate in this situation."

[290] Romney D *Equal Pay: Law and Practice* (Oxford University Press 2018) 80 where the learned author makes reference to the following in support of the statement regarding the burden of proof as it relates to section 65(4) of the Equality Act: "The burden of proof is on the employer to show that the JES complies with section 65(4) of the EqA – see Woolf LJ in *Bromley v H & J Quick Ltd*; Employment Judge Malone in *Hartley v Northumbria Healthcare NHS Foundation Trust*, paragraph 579 (the NHS test case on pay); Lord Menzies in *HBJ Claimants v Glasgow City Council*, paragraphs 21, 41."

[291] Section 65(5) of the Equality Act. The Equal Pay Statutory Code of Practice states the following at para 43: "Job evaluation studies must be non-discriminatory and not influenced by gender stereotyping or assumptions about women's and men's work. There has historically been a tendency to undervalue or overlook qualities inherent in work traditionally undertaken by women (for example, caring). A scheme which results in different points being allocated to jobs because it values certain demands of work traditionally undertaken by women differently from demands of work traditionally undertaken by men would be discriminatory. Such a scheme will not prevent a woman claiming that her work would be rated as equivalent to that of a male comparator if the sex-specific values were removed." Romney D *Equal Pay: Law and Practice* (Oxford University Press 2018) states the following at 79-80 relating to section 65(5) of the Equality Act, *inter alia*: "These stipulations are intended to counter a situation where the factors in a JES are weighted towards male attributes, such as physical strength and operation of machinery, particularly where the enterprise's workforce in question has occupational gender segregation. Factors such as physical strength and physical effort, which are predominantly male attributes, can be balanced by those reflecting elements of predominantly female work, like emotional effort and physical dexterity." Hepple B *Equality: The Legal Framework* 2ed (Hart Publishing 2014) states the following at 127: "There is a risk that employers will resort to bogus job evaluation studies in order to thwart claims based on equal value … One potential safeguard against this is that sex-specific systems, setting different values for men to those for women, have to be disregarded. For example, if a study gives undue weight to the physical demands on male physical education teachers when comparing them to female classroom assistants, this should be disregarded." Pitt G *Employment Law* 6ed (Sweet & Maxwell Limited 2007) states the following at 183: "A woman who believes that the study itself is discriminatory may attack its validity, but a tribunal has no power to substitute its own judgment of relative worth and it cannot compel an employer to carry out a new study … This has been the greatest drawback of EqPA, s.1(5), in that it is dependent on the employer being willing to institute a study. Thus it is not surprising to find that only a minority of employers have done so, and that very few equal pay claims are brought under this head."

where the jobs fall within the same job evaluation grade. It further states that a small difference in the jobs may reflect a material difference or it may not reflect a material difference and this will depend on the nature of the job evaluation exercise.[292]

Before proceeding further with the discussion under this heading, it is apposite to state here that section 6(4) of the EEA does not contain a cause of action for an equal pay claim based on a job evaluation study which has rated the work of the claimant and that of the comparator as being equivalent. This position is different in the United Kingdom under section 65(1)(b) read with section 65(4) of the Equality Act which expressly provides for such cause of action. It is submitted that the law surrounding section 6(4) of the EEA constitutes a growing jurisprudence and it does not seem prudent at this stage to make submissions for the inclusion of an equal pay cause of action which is not known in South African equal pay law. This should not be read to mean that it will never be prudent to do so and an argument for the inclusion of such cause of action into South African equal pay law at this stage might amount to an inappropriate transplant of foreign law into domestic law which may result in an abuse of the use of foreign law (as discussed under paragraph 2 above).[293] Notwithstanding this, it is still important to continue the discussion as it places the United Kingdom equal pay legal framework in context.

Section 80(5)(a) of the Equality Act provides that a job evaluation study is a study which evaluates jobs done by all the employees or some of the employees in an undertaking or group of undertakings in relation to the demands made on an employee by having reference to factors such as skill, effort and decision making.[294] The Equal Pay Statutory

---

[292] The Equal Pay Statutory Code of Practice at para 39. Romney D *Equal Pay: Law and Practice* (Oxford University Press 2018) states the following at 86 regarding the job evaluation process: "Ideally, the process should draw up job descriptions (with input from one or more of the jobholders) and assess jobs with reference to various factors which are weighted to reflect the demands of the business. The scores are then usually assigned to grades within agreed points boundaries and the pay level is determined with reference to those grades. Crucially, the assessment must be capable of a rational explanation."

[293] See *Sanderson v Attorney-General Eastern Cape* (CCT10/97) [1997] ZACC 18 at para 26 and Kahn-Freund O "On Uses and Misuses of Comparative Law" *The Modern Law Review* 1974 37(1) 1 at 27 discussed under para 2 above.

[294] Romney D *Equal Pay: Law and Practice* (Oxford University Press 2018) states at 76 that section 80(5) of the Equality Act is almost identical to section 1(5) of the Equal Pay Act which is the predecessor section. Romney D *Equal Pay: Law and Practice* (Oxford University Press 2018) states the following at

Code of Practice further describes a job evaluation study as a method of assessing the value to be accorded to different jobs in a systematic manner. It states that the focus of a job evaluation study is not on the nature of the job but rather on the demands of the job and jobs which may appear to be different may nevertheless be rated as equivalent. The Code provides the following example of this: the job performed by an occupational health nurse may be rated as equivalent to the job performed by a production supervisor when the components of the job relating to skill, effort and responsibility are assessed as being equivalent by a job evaluation scheme which is valid. The Equal Pay Statutory Code of

---

76: "Once, however, it has been accepted by both the employer and the employee, it is binding unless an employee (or occasionally, the employer) can show either that the JES does not comply with the statutory requirements under section 80(5) of the EqA or that the employee can show that it is 'otherwise unreliable' as defined in section 131(6)(b) of the EqA, formerly section 2A(2A) of the EPA. This is the case even if the JES was never actually implemented because the value given by the study determines whether work is rated as equivalent, not whether it is then applied in practice. This can favour the employee when the rating is more favourable than a previous evaluation or it can favour the employer when the rating is less favourable tha[n] the employee's previous evaluation. What matters is whether or not it has been accepted." Romney D *Equal Pay: Law and Practice* (Oxford University Press 2018) states the following at 86: "Section 80(5) of the EqA refers to assessing work 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. Other examples of factors are working conditions, physical effort, mental effort, concentration, physical skills and coordination, interpersonal skills, supervisory skills and responsibility, communication skills, independence and initiative, responsibility for people, responsibility for physical resources, responsibility for financial resources, responsibility for services, and knowledge. The choice of factors is a matter for the architects of the scheme, preferably in agreement with the employees or their representatives. What is important is that the chosen factors are properly balanced to reflect both male and female attributes and that they are fairly interpreted without bias or fixed assumptions. For example, the working conditions (or working environment) factor is usually associated with jobs done outdoors in all weathers or which involve dealing with unpleasant or dangerous matter, such as the contents of dustbins, skips and waste disposal, or working with chemicals. This is undoubtedly a major feature of those jobs and it must be given full weight. However, other jobs can also involve unpleasant conditions, even if they are performed indoors. For example, care of the elderly and infirm involves exposure to bodily fluids and excrement whilst changing incontinence pads, catheters, and stoma bags, dealing with soiled sheets and towels, and washing, bathing, and toileting service users. Working in a kitchen is often hot and steamy when the ovens are at full blast and the hobs are on, and the jobholder has to deal with slippery floors, boiling liquids, and sharp knives. Conversely, working with children, the sick, or the elderly requires interpersonal skills, but so does dealing with the public, for example cemetery staff dealing with bereaved relatives, hospital porters dealing with distressed patients, or desk clerks and receptionists handling angry complaints. Assessments should be approached without stereotypical assumptions about the nature of the job, and regardless of the gender of the person usually performing them. Factors should be weighted to reflect the needs of the business, but again care should be taken to ensure that they are not too favourable to one gender. For example, a study that gives great weight to physical effort and weather conditions and very little weight to physical coordination and emotional effort or interpersonal skills runs the risk of gender bias." Pitt G *Employment Law* 6ed (Sweet & Maxwell Limited 2007) states the following at 183: "Inevitably job evaluation is not an exact science, and there will be value judgments involved both in deciding how jobs rank under the criteria and even more in how the criteria should rank against each other. For this reason, although employers are not required to involve recognised trade unions in carrying out a job evaluation study, as a matter of good industrial relations it is certainly wise to do so."

Practice further states that in order for a job evaluation study to be valid it must comply with the following: (a) it must include both the claimant's job and the comparator's job; (b) its analysis must be thorough and it must be capable of impartial application; (c) it must only take into account those factors that are connected with the requirements of the job as opposed to the person performing the work; and (d) it must assess the components of the respective jobs in an analytical manner as opposed to assessing the overall content of the job.[295]

---

[295] The Equal Pay Statutory Code of Practice at paras 39-41. Romney D *Equal Pay: Law and Practice* (Oxford University Press 2018) states the following at 76-77: "Job evaluation can cover a whole sector, like local authorities and the NHS, or a company or group of companies or simply a division or department. It groups together employees who usually do different work, ranking them in order and paying them in accordance with the grade to which they are assigned. As we shall see, that does not mean that all employees in a grade must be paid the same; a grade may have incremental levels or pay points, or there [may] be some other material factor which the employer can point to justify the pay differential. But prima facie, where a woman is graded the same as, or higher than, her comparator and she can show that they work in the same establishment, in a different establishment with common terms and conditions or for employers with a single source setting the terms and conditions, the presumption is that she is entitled to equal pay unless the employer can show otherwise. This is why, pre-Single Status, carers were able to compare themselves with refuse drivers, cooks with refuse collectors, and cleaners with road sweepers. Their work was completely different but it had been rated as equivalent under the 1987 NJC JES (known as the White Book in England and the Green Book in Scotland). An employer can point to a material factor which might explain a higher rate of pay, such as a productivity bonus, qualifications, experience, or shift work. What an employer cannot do is to maintain that work rated as equivalent is not the same work for the purposes of comparison." Romney D *Equal Pay: Law and Practice* (Oxford University Press 2018) states the following at 87: "It is imperative that a JES is transparent. This has several aspects. First, the scheme must be clear with objective factors; second, the results must be recorded and capable of justification in terms of the decision taken, by whom it was taken, how many iterations it went through, and when and why any original mark was adjusted or changed; and third, records should be retained showing how the process was undertaken. Throughout the process, changes are often made to marks after discussion with others or in terms of ranking as against other jobs; but if that process is not recorded, the employer will find it hard to show that the JES was thorough, analytical, and fair. This is particularly the case if the job analysts no longer work for the organization and may not be available to give evidence and explain how they approached their task." Honeyball S *Honeyball & Bowers' Textbook on Employment Law* 11ed (Oxford University Press 2010) states the following at 282: "A job evaluation scheme is thus an alternative route to equal pay and attempts to be as scientific and objective as possible. Its criteria are commonly agreed between management and unions and are of particular application to white collar staff. Yet its limitations must be appreciated, since it classifies jobs not the people who fill them. It must be followed by a subjective merit assessment of the individual's qualities. A job evaluation study merely provides a building block to indicate the underlying structure of wages on which individual variations may then be built. The chief types of job evaluation schemes generally in use are: (a) Job ranking where each job is considered as a whole and is then given a ranking in relation to all other jobs. (b) Paired comparisons, where points are awarded on a comparison between pairs of jobs and then a rank order produced. (c) Job classification, whereby all other jobs are compared with benchmark grades. (d) Points assessment, the most common system, which breaks down each job into a number of factors – for example, skills, responsibility, physical and mental requirements and working conditions. (e) Factor comparison, which differs from points assessment only in that it uses a limited number of factors based on key jobs with fair wages …"

Romney states that those undertaking job evaluations (job evaluators) must be properly trained in the job evaluation scheme that they are using. She further states that it is preferable that more than one job evaluator performs the job evaluation or that a job evaluation should be cross checked. She states that a job evaluation study should make provision for a right to appeal and an appeal should be conducted in a fair manner.[296]

In *Eaton Ltd v J Nuttall*[297] the Employment Appeal Tribunal remarked that in equal pay proceedings employers should regard it as being their duty to come to the equal pay hearing with all the relevant information which is properly prepared and in an easily understandable manner which includes full details of a job evaluation system which is being used. The Employment Appeal Tribunal further remarked that this type of information can easily be provided by employers at no great cost to them. During the course of the appeal before the Employment Appeal Tribunal it became apparent that there may have been a job evaluation study as contemplated in section 1(5) of the Equal Pay Act but the case before the Industrial Tribunal was not argued in relation to a job evaluation study and neither was the job evaluation study put forward in argument before the Employment Appeal Tribunal. The Employment Appeal Tribunal remarked that it was extraordinary that the whole case could be finalised in the Industrial Tribunal without any reference to the job evaluation study. The Employment Appeal Tribunal stated that section 1(2)(a) and section 1(2)(b) of the Equal Pay Act provides for two distinct causes of action, the former relating to equal pay for like work and the latter to equal pay for work rated as equivalent. It further stated that where a job evaluation study is in existence and an equal pay claimant is employed on equivalent rated work with a comparator then the claimant should proceed with her claim under section 1(2)(b) (equal pay for work rated as equivalent) and not under section 1(2)(a) (equal pay for like work). The Employment Appeal Tribunal stated that it is normal practice for a claimant to only utilise section 1(2)(a) where the requirements set out in section 1(2)(b) and 1(5) have not been met. It stated that section 1(5) of the Equal Pay Act can only apply to a job evaluation study which is valid. It provided the following guidance relating to what would qualify as a valid job

---

[296] Romney D *Equal Pay: Law and Practice* (Oxford University Press 2018) 87.
[297] [1977] IRLR 71 (EAT).

evaluation study: (a) it is a study which is thorough in its analysis and is capable of being applied impartially; (b) by applying the study, it must be possible to locate a specific employee at a specific point in a specific pay grade; and (c) it will be proper for the study to take merit or seniority into account but care should be exercised regarding the taking into account of, in the job evaluation study, matters concerning the work such as responsibility and the like. The Employment Appeal Tribunal further stated that a job evaluation study which required management to subjectively decide the nature of the work before an employee can be placed in the appropriate pay grade would not amount to a valid job evaluation study for the purpose of section 1(5) of the Equal Pay Act.[298]

In *Springboard Sunderland Trust v Robson*[299] the appellant appealed against the decision of the Industrial Tribunal which found that the respondent was employed on equivalent rated work with the comparator in terms of a job evaluation study. The Industrial Tribunal also found that the phrase "rated as equal" in section 1(5) of the Equal Pay Act means rated equally in terms of the way the numerical results are translated into grades in the appellant's pay scheme. The respondent was employed as an induction officer whereas the comparator was employed as a team leader. The Employment Appeal Tribunal noted that there was an accepted job evaluation study which was neutral in terms of gender. The evaluation of the respondent and the comparator's jobs resulted in two differences in points that were allocated to numerous factors. The sum total of the first evaluation, the panel evaluation and the appeal was that the respondent's points was 410 and the comparator's points was 428. The appellant argued that one has to look at the points evaluation and the attendant results of the analysis in terms of the points whereas the respondent argued that what should be done is to look at the entire job evaluation scheme and to also take into account that the job evaluation scheme involves several processes which includes the process of points conversion to a grade or scale. The majority of the Industrial Tribunal found that the respondent's work was rated as equivalent to that of the comparator because the job evaluation scheme concerned included "a conversion of

[298] At paras 2, 5-6, 13. Romney D *Equal Pay: Law and Practice* (Oxford University Press 2018) states the following at 81: "In *Eaton v Nuttall*, Phillips J gave what is still seen as the definitive explanation of the importance of an analytical scheme."

[299] [1992] IRLR 261 (EAT).

points to salary grades" and it was of the view that the banding system had to be accepted as part and parcel of the job evaluation scheme. The minority view of the Industrial Tribunal was that the ordinary literal meaning of "'rated as equivalent with that of any men'" meant that the values assigned in terms of the job evaluation scheme should be taken into account and the subsequent conversion of values into banding should not be taken into account. The Employment Appeal Tribunal stated that the critical question in these matters was whether the respondent's job and the comparator's job had been accorded equal value in terms of the job evaluation scheme which had been undertaken in terms of section 1(5) of the Equal Pay Act.[300]

The Employment Appeal Tribunal noted that the arguments in favour of the wider view of having regard to the scale or grade which is at the end of the evaluation process was identified as being a precise and clear yardstick for both the employer, employees and the union. The appellant accepted that the narrow view of merely adding the points as well as the matters on which the points are based and looking no further results in numerous variations which are required to be treated separately but the appellant submitted that the literal construction of section 1(5) of the Equal Pay Act only allows for the narrow view. The respondent argued that the job evaluation schemes were not a mathematical science which was precise but rather an art and the correct manner is to look at the results arrived at in the job evaluation scheme as opposed to looking at the mathematics. The Employment Appeal Tribunal held that it is essential to have reference to the complete results of the job evaluation scheme in order to ascertain whether a job evaluation scheme accords an equal value to the jobs in question and this includes a scale at the end of the score sheets. It remarked that referring to the terms of the demands made on the employees under various headings with attendant illustrations is the correct manner of structuring a job evaluation scheme. The Employment Appeal Tribunal held that the argument made by the respondent regarding the meaning of section 1(5) of the Equal Pay Act is practical and preferable more so in light of the fact that it is in line with

[300] At paras 1-2, 4, 6-7, 10, 12-13.

the majority decision of the Industrial Tribunal. It finally dismissed the appeal.[301]

In *England v Bromley London Borough Council*[302] the respondent Council implemented a job evaluation scheme which was an adaptation of the so-called London Scheme, which allowed for the adding of extra job evaluation points described as special factors. According to the job evaluation study the comparators were awarded 526 points plus 5 special factors totalling 531 points whereas the appellant employee was awarded a total of 528 points with no additional special factor points. The difference between the points of the appellant and the comparators placed the comparators in a different grade which consequently meant that they received a higher wage. During September 1975, the appellant employee's job was re-evaluated and his points changed from 528 points to 526 points with the attendant result that he continued in a lower pay grade than his chosen comparators.[303]

The Employment Appeal Tribunal stated that where an equal pay claim is made based on work rated as equivalent under section 1(2)(b) of the Equal Pay Act, the claimant is required to show that there is a job evaluation study which satisfies the requirements of section 1(5) of the Equal Pay Act and which has furthermore been accepted. The Employment Appeal Tribunal held that it is important for those who wish to rely on a job evaluation study (this includes claimants) to prove that the relevant job evaluation study is a study upon which it is reasonable to regard as being the job evaluation which regulates the employment of employees at the relevant time. It further stated that a job evaluation study which is used at the material time allows both the employees and employers to place reliance on it. The appellant employee argued that he would have received the same rate of pay etc as the comparators if the London Scheme had been adopted without any variation. The appellant's claim is that the job evaluation study was not properly carried out but the reality is that the appellant had to take the study as it was

---

[301] At paras 14-19. Romney D *Equal Pay: Law and Practice* (Oxford University Press 2018) states the following at 77 before discussing this case: "Once a woman has been rated as equivalent to her comparator and has been assigned a grade, it is irrelevant that she and her comparator were given different points during the evaluation process. Rated as equivalent means just that – equivalent."

[302] 1977 ICR 1 (EAT).

[303] At 2D, 2H, 3E-3H, 4A-4C.

and his claim would thus stand or fall by it. The Employment Appeal Tribunal held that his claim of equal pay for work rated as equivalent under section 1(2)(b) of the Equal Pay Act could thus not succeed. The Employment Appeal Tribunal held that the appellant employee was not allowed to use the job evaluation scheme in question for his claim under section 1(2)(b) of the Equal Pay Act because his job and the job of the comparators were not rated equally, as the comparators jobs were allocated more points than his job. It further held that the appellant employee could not place reliance on a job evaluation scheme which adopted the London Scheme unamended because there was no such job evaluation study in existence and this did not help his case. The Employment Appeal Tribunal referred to section 1(5) of the Equal Pay Act and stated that the appellant employee has to use a job evaluation study which "produces the result that the jobs which he seeks to compare have been given an equal value". It remarked that experience showed that job evaluation studies are not totally scientific in their application despite the study being a good one and the scheme being applied in a sensitive and conscientious manner. It further remarked that it cannot be expected that there must be scientific correspondence between the job evaluation study results and the Industrial Tribunal's views. The Employment Appeal Tribunal finally dismissed the appeal.[304]

In *O'Brien & Others v Sim-Chem Ltd*[305] the three appellant employees launched equal pay claims before the Industrial Tribunal that their jobs have been accorded an equal rating in terms of a job evaluation study with those done by their comparators but they were nevertheless still receiving less pay than that paid to their comparators. The respondent employer undertook the job evaluation study in order to remove sex discrimination. During March 1976, the job evaluation study placed the appellant employees on a new grade with an increase in pay on that grade. Notwithstanding this

[304] At 4C-4D, 4F, 5A-5C, 6D-6E, 6H, 7A-7B, 9B-9D. Romney D *Equal Pay: Law and Practice* (Oxford University Press 2018) states the following at 78: "Job evaluation is not a science. Different job analysts will come up with different results using the same scheme for the same employees, and different schemes will produce different results for those same employees. … A job evaluation scheme should give the employee a right of appeal but, if the appeal fails, the employment tribunal is not entitled to rewrite the results at the employee's request simply because he or she is dissatisfied with the outcome. The employment tribunal is not to be used as a further level of appeal. … In any event, the employment tribunal has no power under the EqA to conduct its own job evaluation and in effect to remark on the employee's score."

[305] [1980] IRLR 373 (HL).

and due to the Government incomes policy, the appellant employees were not paid the higher rate of pay in accordance with the new grade and they continued to receive the lower pay that they received prior to the job evaluation study. The Industrial Tribunal dismissed the appellant employees equal pay claims but they were successful before the Employment Appeal Tribunal. The Employment Appeal Tribunal was of the view that it is not a requirement that a job evaluation scheme must be applied (used in practice) in order for the Equal Pay Act to apply and for the appellant employees to start receiving the increased pay according to the new grade. The matter then went to the Court of Appeal and it overruled the decision of the Employment Appeal Tribunal and restored the decision of the Industrial Tribunal. The appellant employees then appealed the matter to the House of Lords. The House of Lords stated that a job evaluation study cannot be undertaken without agreement by the relevant parties. The House of Lords held that where a job evaluation study has been undertaken and results in the job of the woman being accorded an equal rate to that of a job with the man, then a decision can be made to increase her rate of pay to that of the man. Once this has been done then section 1(2)(b) relating to equal pay for work rated as equivalent comes into play immediately. The House of Lords noted that the respondent employer's pay structure was not adjusted in accordance with the outcome of the job evaluation study and its reason was that that was the case because of a conflict with the Government pay policy. The respondent employer argued that section 1(2)(b) relating to equal pay for work rated as equivalent is not operative where no adjustment has been made to pay structures resulting from the job evaluation study. The respondent employer further argued that it was not under a legal obligation to participate in the job evaluation and it can therefore not be compelled by the resultant job evaluation study. The House of Lords rejected this line of argument and held that section 1(2)(b) of the Equal Pay Act comes into operation once there is a job evaluation study which is available and which may show discrimination. The House of Lords allowed the appeal and restored the order of the Employment Appeal Tribunal.[306]

[306] At page 373, paras 12, 16-17, 19, 21.

In *EC Greene & Others v Broxtowe District Council*[307] the appellant employees launched an appeal to the Employment Appeal Tribunal against the decision of the Industrial Tribunal which found that the appellant employees equal pay claims should be considered under section 1(2)(a) of the Equal Pay Act which refers to equal pay for like work and not to section 1(2)(b) of the Equal Pay Act which refers to equal pay for work rated as equivalent based on its view that both the employer and the union were not happy with the results of the job evaluation study. The Employment Appeal Tribunal held that the Industrial Tribunal misdirected itself by stating that it is the general position to deal with an equal pay claim as one for work rated as equivalent under section 1(2)(b) of the Equal Pay Act where a job evaluation study exists but an exception to this was the case before it because the job evaluation study was not wholly accepted by the respondent employer and the union and this meant that the appellant employees claims should be considered under section 1(2)(a) of the Equal Pay Act which refers to equal pay for like work. The Employment Appeal Tribunal stated that where there is a properly constituted job evaluation study as contemplated in section 1(5) of the Equal Pay Act then the Industrial Tribunal is obliged by section 1(2)(b) read with section 1(5) of the Equal Pay Act to consider the equal pay claims in terms of the job evaluation study. It further stated that a job evaluation study can only be challenged on a narrow ambit where it is proved that there is a fundamental error in the study or a plain error on the face of it. The Employment Appeal Tribunal stated that where the validity of a job evaluation study is placed in dispute then the probe should be limited to whether or not there was a fundamental error in the job evaluation study. The Employment Appeal Tribunal stated that the Industrial Tribunal misdirected itself by simply putting aside the job evaluation study on the ground that neither the employer nor the unions liked the outcome of the job evaluation study.[308] Napier states that this case should be treated with caution in light of the decision in *Arnold v Beecham Group Ltd*.[309]

307 [1977] IRLR 34 (EAT).
308 At pages 34-35, paras 1-4, 6, 8.
309 Napier BW "Division K – Equal Pay" at para 269 in Smith I (gen editor) *Harvey on Industrial Relations and Employment Law* (loose-leaf).

In *Arnold v Beecham Group Ltd*[310] the Industrial Tribunal dismissed the appellant's equal pay claim for work rated as equivalent as it found that she could not rely on the outcome of the 1980 job evaluation study because it had not been accepted by either the respondent or the union. The appellant argued that the decision of the Industrial Tribunal was incorrect because the application of section 1(2)(b) of the Equal Pay Act is not dependent on the acceptance of the job evaluation study by the employer and employees (union) and it relied on *O'Brien & Others v Sim-Chem Ltd*[311] for this argument. The Employment Appeal Tribunal stated that it did not agree with the appellant's argument. The respondent argued that before section 1(2)(b) of the Equal Pay Act can be relied on there must be a completed job evaluation study. The Employment Appeal Tribunal stated that the question is whether a job evaluation can be regarded as being complete unless the parties involved have accepted it as being valid. It further stated that this question was not dealt with in the *O'Brien* case as *O'Brien* dealt with an accepted job evaluation study which had not been implemented. The Employment Appeal Tribunal stated that there was authority in the Employment Appeal Tribunal which held that there was no job evaluation study contemplated in section 1(5) of the Equal Pay Act until and unless the job evaluation study had been accepted or was adopted or was in force. It further stated that this authority was also in line with its common-sense view to be taken in this matter.[312] Napier states that the difficulty with this judgment is the finding that the validity of the job evaluation study should be determined by the employer and the union and this finding is not in accordance with the decision of the House of Lords in *O'Brien*. He further states that the Employment Appeal Tribunal's statement in this case to the effect that, it was in accordance with industrial common sense that a job evaluation cannot be complete if it has not been accepted by the relevant parties whose relationship the job evaluation seeks to regulate, is not in line with the purpose of equality legislation which is to remove so called normal good industrial relations because these have traditionally been based on sex discrimination. He argues that the better view which is opposed to the judgment in

---

310 [1982] IRLR 307 (EAT). Romney D *Equal Pay: Law and Practice* (Oxford University Press 2018) states at 89 that this case is a good example of the binding effect of a job evaluation study in circumstances where it had not been implemented.
311 [1980] IRLR 373 (HL).
312 At paras 9-15.

Arnold is to approach the validity of a job evaluation study on an objective basis even though a job evaluation study is not an exact science and the question of validity must ultimately be decided by the tribunals and the courts and not by the employer and the unions.[313]

In *Paterson & Others v London Borough of Islington & Others*[314] the Employment Appeal Tribunal found that section 1(5) of the Equal Pay Act requires that the applicants jobs and the job of the comparator had to be undertaken by the same job evaluation study. It further found that the departure from the job evaluation study in assessing the comparator's job resulted in the job of the comparator and the jobs of the applicants not being assessed under the same job evaluation study.[315] In *Home Office v Bailey & Others*[316] the Employment Appeal Tribunal stated that section 1(2)(b) of the Equal Pay Act is clear and precise when read with section 1(5) of the Equal Pay Act. It stated that what is required is that the claimant's job and her comparator's job must have been given an equal value accorded to it in terms of a job evaluation study. The Employment Appeal Tribunal held that it is not correct to alter the complete job evaluation study as a result of a concession by the Prison Service relating to the group one claimants in the case of Ms Ford and Ms Fox to find that the differences in scores between them and their comparators were not significant to the extent that their work is to be given the same value as that of their comparators.[317].

4.4.3 Work of equal value

Section 65(6)(a)-(b) read with section 65(1)(c) of the Equality Act provides that A performs work of equal value to that of B's work if A's work is not like B's work and neither rated

---

[313] Napier BW "Division K – Equal Pay" at paras 277, 279, 281-300 in Smith I (gen editor) *Harvey on Industrial Relations and Employment Law* (loose-leaf).

[314] UKEAT/0347/03/DA (EAT).

[315] At paras 21, 24.

[316] [2005] IRLR 757 (EAT).

[317] At para 33. Romney D *Equal Pay: Law and Practice* (Oxford University Press 2018) states the following at 78 before discussing this case: "… if a woman scores less than her comparator but neither is not given a pay band, she is not rated as equivalent and cannot argue that had there been pay bands, they would have been rated as equivalent."

equivalent to that of B's work but A's work is notwithstanding equal to the work of B based on the demands made on A with regard to factors which includes skill, effort as well as decision-making.[318] Nag states that the right to parity (equal pay for work of equal value) arises where the claimant's work is of equal value to the comparator in terms of the demands made on her by reference to the factors in section 65(6)(b) of the Equality Act.[319]

---

[318] Romney D *Equal Pay: Law and Practice* (Oxford University Press 2018) states the following at 98: "What distinguishes equal value from like work and work rated as equivalent is that the determination is made by an employment tribunal after the parties and the independent expert, should one be appointed, have gone through a detailed process. This involves information gathering, interviews with claimants and comparators, inspection of the work premises, hearings to determine any job facts in dispute, and expert reports from the independent expert and perhaps party experts. The employment tribunal may permit parties to call their own experts as well as hearing from the independent expert. Nevertheless, it is for the employment tribunal to make the determination of whether two jobs are of equal value and it is certainly not bound to follow the independent expert." Kelly D, Hammer R, Hendy J & Denoncourt J *Business Law* 3ed (Routledge 2018) state the following at 484 relating to the claim of equal pay for work of equal value: "This head of claim originated from a case brought by the European Commission against the UK Government for failing to comply with Art 119 (now Art 141) of the EU Treaty and Directive 75/117, in that there was no provision in UK law for claims of equality where jobs were of equal value. This was highlighted by the fact that there was no right on the part of the employee to compel an employer to carry out a job evaluation scheme under s 1(2)(b) (see Commission v United Kingdom (1982)). As a result, the UK was forced to amend the EPA 1970 by inserting a provision on equal value. This had the effect of making the equality law available to a greater number of claimants." Lewis D, Sargeant M & Schwab B *Employment Law: The Essentials* 11ed (Chartered Institute of Personnel and Development 2011) state the following at 134 with regard to job evaluation studies and an equal pay for work of equal value claim: "… employers have no legal requirement to carry out such studies. If an employer has not done so, an employee wishing to compare her terms to a man carrying out a different but comparable job would have no means of comparison. For this reason there is a third way of presenting an equal terms claim – namely, the woman claiming that her job is of *equal value* to that of her male comparator. As with work rated as equivalent, this category of case is used to compare quite different sorts of jobs …" Hardy S *Labour Law and Industrial Relations in Great Britain* 3rd revised edition (Kluwer Law International 2007) states the following at 224: "The equal value provisions have been successfully used to establish entitlement to equality of pay between a female canteen worker and three skilled manual workers in a shipyard, female ship packers and a male labourer and a house-mother and a house-father." McCrudden C *Equality in Law between Men and Women in the European Community: United Kingdom* (Martinus Nijhoff Publishers 1994) states the following at 45-46: "Unlike under 'work rated as equivalent', where the employer is required to implement a job evaluation scheme which has been (in legal terms) voluntarily introduced by the employer, the new head of 'equal value' provides that a woman may claim to be doing work of equal value to a man, and ensure that their jobs are evaluated, where the employer has not voluntarily carried out a job evaluation scheme. Except where the particular man with whom the woman seeks to compare herself is employed on like work, or work rated as equivalent, or where there is an existing valid non-discriminatory analytical job evaluation scheme, the woman may call in aid the legal process to require that a job evaluation scheme be carried out evaluating her job and the job she is arguing is of equal value to hers, in terms of the demands made on her. The EqPA specifies that the demands are to be assessed 'for instance under such headings as effort, skill and decision'. Thus, where an applicant makes an equal value complaint to an industrial tribunal, unless there is an existing non-discriminatory analytical job evaluation scheme which covers the applicant's job and the comparator's job …., the tribunal is required to refer the issue to an independent expert … The expert is required to draw up a report, using a non-discriminatory analytical job evaluation scheme, determining whether the applicant and the comparator are doing work of equal value …"

[319] Nag S "Equality of Terms" in *Tolley's Employment Law Service* (loose-leaf) E7051.

It is important to note that the demands made on the claimant under the various headings such as, skill, effort and decision making, should be assessed on a qualitative basis as opposed to a quantitative basis.[320] Pitt states that an equal pay for work of equal value claim actually requires a mini-job evaluation study to be undertaken regarding the comparative value of the work in question and this evaluation is generally undertaken by an independent expert who is appointed by the Employment Tribunal.[321]

Napier describes an equal pay for work of equal value claim as the last throw of the dice because it only applies where the work in question is not covered by like work and work rated as equivalent.[322] Nag states that it is clear, by virtue of section 65(6) of the Equality Act, that an equal pay for work of equal value claim is to be brought where equal pay for like work and work rated as equivalent claims are not applicable. She further states that the obvious advantage to this approach is that equal pay for like work and work rated as equivalent claims will directly proceed to the main hearing and the "complex, time-consuming and costly procedure applicable to equal value cases can thus be avoided".[323]

An equal pay for work of equal value claim is the broadest category of equal pay claims because it allows a comparison to be made between two kinds of work that are unalike.[324]

---

[320] *Leverton v Clywd County Council* [1989] IRLR 28 (HL) at para 11. Nag S "Equality of Terms" in *Tolley's Employment Law Service* (loose-leaf) E7051.

[321] Pitt G *Employment Law* 6ed (Sweet & Maxwell Limited 2007) 183-184.

[322] Napier BW "Division K – Equal Pay" at para 311 in Smith I (gen editor) *Harvey on Industrial Relations and Employment Law* (loose-leaf). Hardy S *Labour Law and Industrial Relations in Great Britain* 3rd revised edition (Kluwer Law International 2007) states the following at 224: "The equal value provisions were intended to be a residual claim, only operative if neither 'like work' nor 'work rated as equivalent' were applicable."

[323] Nag S "Equality of Terms" in *Tolley's Employment Law Service* (loose-leaf) E7053.1. Hepple B *Equality: The Legal Framework* 2ed (Hart Publishing 2014) states the following at 127 relating to equal pay for work of equal value: "This is the residual category, introduced in 1983. It requires an analysis in terms of the demands made on the worker by reference to factors such as effort, skill and decision-making. There is a complex and slow procedure for the determination of 'equal value' by an employment tribunal, which can involve the appointment of an independent expert. In practice, despite reforms in 2004, the procedural obstacles have been yet another nail in the coffin of equal pay legislation."

[324] IDS Employment Law Guide: The Equality Act 2010 (Income Data Services Limited 2010) 152. Taylor S & Emir A *Employment Law: An Introduction* 3ed (Oxford University Press 2012) state the following at 345: "If, and only if, a claimant is not employed to do 'like work' or 'work rated as equivalent' can she bring a claim based on equal value. The situation is thus one in which the claimant carries out work which is different in nature from that of her chosen male comparator and in which no analytical job evaluation scheme (free of sex bias) has been used to grade their respective jobs, but where nonetheless she believes her work to be of equal value to his."

This allows jobs that are different to be regarded as being of equal value having regard to "the nature of the work performed, the training or skills necessary to do the job, the conditions of work and the decision-making that is part of the role."[325] Smith and Baker states that the equal pay for work of equal value cause of action places an Employment Tribunal in the difficult task of assessing value which involves the mysteries of job evaluation in circumstances where an Employment Tribunal is not equipped to deal with it. They further state that in order to compensate for this difficulty the Employment Tribunal makes heavy use of an independent expert to provide an opinion on the value of the work.[326]

Section 131(2) read with section 131(8)(a) of the Equality Act provides that if a question arises in equal pay proceedings as to whether the claimant's work is of equal value to the comparator's work then a tribunal may before deciding the question of equal value request a report on the question of whether the respective work is of equal value from an expert of the panel of independent experts designated as such by the Advisory, Conciliation and Arbitration Service (ACAS). The referral to an independent expert is a normal practice for a tribunal in an equal pay for work of equal value claim.[327] A tribunal may, however, withdraw the referral to the independent expert but where it does not withdraw the referral then it cannot decide the question of equal value until it has received the report.[328] Napier states that it is normal for it to be an issue before the Employment Tribunal as to whether the tribunal should obtain a report from an independent expert on the equal value issue or whether it is able to decide this issue without the benefit of an independent expert report. He further states that where an Employment Tribunal decides to deal with an equal pay for work of equal value claim without requiring a report from an independent expert on the issue then the tribunal should afford the parties before it an opportunity to present their own expert evidence relating to the equal value issue.[329]

---

325 The Equal Pay Statutory Code of Practice at para 47.

326 Smith I & Baker A *Smith & Wood's Employment Law* 10ed (Oxford University Press 2010) 331. See *Potter & Others v North Cumbria Acute Hospitals NHS Trust* [2009] IRLR 22 (EAT) which dealt with the date at which an independent expert should prepare his/her equal value report.

327 *Hovell v Ashford & St Peter's Hospital NHS Trust* [2009] IRLR 734 (CA) at para 15.

328 Section 131(3)-(4) of the Equality Act.

329 Napier BW "Division K – Equal Pay" at para 315 in Smith I (gen editor) *Harvey on Industrial Relations and Employment Law* (loose-leaf). Kelly D, Hammer R, Hendy J & Denoncourt J *Business Law* 3ed

Where a claimant launches an equal pay for work of equal value claim in circumstances where her work and the comparator's work have been accorded different values according to a job evaluation study[330] then the Employment Tribunal must find that the claimant's work is not of equal value to that of the comparator unless it has reasonable grounds to suspect that the job evaluation was based on a discriminatory system or it is unreliable.[331] Section 131(7) of the Equality Act states that a job evaluation system will discriminate based on sex if the difference 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."[332] An example of when a job evaluation study will be unreliable for the purposes of section 131(6)(b) of the Equality Act would be where an equal pay

---

(Routledge 2018) state the following at 485: "Tribunals may determine the question of equal value themselves rather than refer to an independent expert." Taylor S & Emir A *Employment Law: An Introduction* 3ed (Oxford University Press 2012) state the following at 345: "The first question the tribunal has to consider is whether or not the claim is strong enough to proceed. It can decide for itself at the outset that the job of the claimant and that of her comparator are clearly not of equal value and can thus dismiss the case at the first hearing. … Unless a case is obviously hopeless, the tribunal will not exercise its right to dismiss it on the general grounds that it is 'weak'. Moreover, where a tribunal takes such a course, the applicant may exercise her right to ask that the hearing be adjourned rather than concluded, so that she may commission a job evaluation study to prove the tribunal wrong."

[330] Section 131(9) of the Equality Act states that a job evaluation study has the meaning as set out in section 80(5) of the Equality Act. Section 80(5) of the Equality Act defines a job evaluation study as follows: "A job evaluation study is 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, or (b) in the case of the armed forces, by some or all of the members of the armed forces."

[331] Section 131(5)-(6) of the Equality Act provides as follows: "(5) Subsection (6) applies where—(a) a question arises in the proceedings as to whether the work of one person (A) is of equal value to the work of another (B), and (b) A's work and B's work have been given different values by a job evaluation study. (6) The tribunal must determine that A's work is not of equal value to B's work unless it has reasonable grounds for suspecting that the evaluation contained in the study—(a) was based on a system that discriminates because of sex, or (b) is otherwise unreliable." Napier BW "Division K – Equal Pay" in Smith I (gen editor) *Harvey on Industrial Relations and Employment Law* (loose-leaf) states the following at para 319: "Where a valid job evaluation study has assessed the jobs of claimant and comparator as unequal, and there is no good reason to believe that it is tainted by sex discrimination, an employment tribunal should not require an independent expert to prepare a report. It should dismiss the claim." Kelly D, Hammer R, Hendy J & Denoncourt J *Business Law* 3ed (Routledge 2018) state the following at 485: "… job evaluations are presumed to be reliable unless there are reasonable grounds for suspecting that they have been conducted in a discriminatory way."

[332] IDS Employment Law Guide: The Equality Act 2010 (Income Data Services Limited 2010) states the following at 194: "If there has been a job evaluation study (JES) in relation to the work involved that has found that the claimant's work is not of equal value to the work of the comparator, the tribunal can only determine that the work is of equal value if it has reasonable grounds for suspecting that the job evaluation was discriminatory or otherwise unreliable – S.131(5) and (6). … For the above purposes, a JES is regarded as discriminating because of sex if a difference (or coincidence) between values placed on different demands is not justifiable regardless of the sex of the person on whom the demands are made – S.131(7)."

claimant is able to prove that the job evaluation study is outdated and does not take account of changes in the work as a result of new technology.[333]

In *Pickstone & Others (respondents) v Freemans PLC (appellants)*[334] the respondent equal pay claimant was employed as a warehouse supervisor by the appellant employer and she claimed that the work which she performed was of equal value to that of a male comparator employed as a checker warehouse operative in the same establishment and who received £4.22 more than her per week. There was a male in the same employ as the claimant employed as a warehouse operative and who was engaged in the same work as her. The appellants argued that because there was a male who was engaged in the same work as the claimant she was not allowed to claim equal pay for work of equal value with the checker warehouse operative in terms of section 1(2)(c) of the Equal Pay Act even if she could prove that her work was of equal value to that of her chosen comparator as well as prove that the pay differential was due to discrimination based on sex. The question to be decided was whether section 1(2)(c) of the Equal Pay Act was intended to mean that if an employer can show that there is a man who is employed by it on like work with the female equal pay claimant falling under section 1(2)(a) of the Equal Pay Act or employed on work which is rated as equivalent under section 1(2)(b) of the Equal Pay Act then the female claimant is precluded from claiming equal pay for work of equal value with another man under section 1(2)(c) of the Equal Pay Act. The House of Lords stated that even if an employer could point to another man engaged in the same work or work rated as equivalent this could not preclude an equal pay claimant from pursuing an equal pay for work of equal value claim with another male comparator. The

---

[333] IDS Employment Law Guide: The Equality Act 2010 (Income Data Services Limited 2010) states the following at 194: "The following example of this is given in the Explanatory Notes to the Act (para 439): … a woman claims that her job is of equal value to that of a male comparator. The employer produces a job evaluation study to the tribunal in which the woman's job is rated below her comparator's job. The employer asks the tribunal to dismiss the woman's claim but the woman is able to show that the study is unreliable because it is out of date and does not take account of changes in the jobs resulting from new technology. The tribunal can disregard the study's conclusion and can proceed to decide if the work of the claimant and comparator are of equal value." See *Avon County Council v Foxall & Webb* [1989] IRLR 435 (EAT) which dealt with whether a stay of proceedings can be ordered where an equal pay for work of equal value claim has already been launched in order to allow an employer to embark on a job evaluation study.

[334] [1988] IRLR 357 (HL).

House of Lords stated that to hold otherwise would be to allow an employer to simply avoid a potential equal pay for work of equal value claim by a group of female employees who are paid less than a group of male employees engaged in work of equal value by employing a "token man" to perform the same work as them and who is paid the same rate as them. The House of Lords finally dismissed the appeal.[335]

In *Leverton v Clywd County Council*[336] the House of Lords made the following comments relating to equal value claims. It remarked that if the question relating to whether the work is of equal value in an equal value claim contemplated in section 1(2)(c) of the Equal Pay Act is referred to an independent expert to prepare a report thereon then this process is detailed and extensive as well as being expensive. The House of Lords stated that this being the case the Industrial Tribunal should as far as they possibly can, not allow an abuse of the equal pay for work of equal value claims procedure by equal pay claimants seeking to compare their work with several comparators. It further stated that an example of this would be where an equal pay claimant claims equal pay for work of equal value with comparator A who earns X pounds and also with comparator B who earns double the amount that A earns, then if an Industrial Tribunal does not allow the comparison with comparator B on the basis that there are no reasonable grounds of prospects then there will no grounds on which the claimant can successfully attack this exclusion. The House of Lords then stated that notwithstanding its comments above, the most effective safeguard which an employer can have in its arsenal against abusive (oppressive) equal pay for work of equal value claims is to embark on a comprehensive job evaluation study which complies with section 1(5) of the Equal Pay Act and once this is properly done then it will provide the employer with complete protection against abusive equal pay for work of equal value claims.[337]

---

[335] At paras 5-7, 9-10, 42, 48-49.

[336] [1989] IRLR 28 (HL).

[337] At para 22. This case is more fully discussed under para 4 of this Chapter. McCrudden C *Equality in Law between Men and Women in the European Community: United Kingdom* (Martinus Nijhoff Publishers 1994) states the following at 41: "The number of comparators permitted is, however, subject to judicial supervision."

In *Tennants Textile Colours Limited v Todd*[338] the questions before the Northern Ireland Court of Appeal were as follows: (a) whether the Industrial Tribunal committed an error of law by finding that the content of the independent expert's report was binding on both the appellant employer and the respondent employee once it was admitted into evidence; (b) whether the Industrial Tribunal committed an error of law by finding that the appellant employer was under the burden of proof to show that the independent expert's report should be rejected; and (c) whether the Industrial Tribunal committed an error of law by finding that it was only able to reject the independent expert's report if there was evidence which showed that the report was patently wrong to an extent that it could not be accepted. The appellant employer argued that the case on appeal was only concerned with the status of the independent expert's report as well as the Industrial Tribunal's approach to it. The appellant employer further argued that the Industrial Tribunal had abdicated its judicial responsibility (function) of deciding the equal value issue in the case in favour of the independent expert. The appellant employer argued that the Industrial Tribunal Rules did not prevent a party from presenting argument and evidence which contradicts the findings of the independent expert or obstruct the Industrial Tribunal itself from querying the report and asking questions and neither did it make the findings of the independent expert's report binding on both the appellant employer and respondent employee. The appellant employer relied on the suggestion that in European Community law to hand over the responsibility of deciding the equal value issue to the independent expert and to place a burden on the employer to challenge the independent expert's findings would be to in effect deprive the employer and employee of having their case decided before and by a judicial process. The appellant employer argued that the independent expert's report merely constituted expert evidence and did not attract any further special legal status and the Industrial Tribunal had erred by according lesser value to the employer's expert evidence presented as compared to the higher status which it accorded the independent expert's report.[339]

[338] [1988] NI 1 (CA).
[339] At 3C-D, 10G-H, 11A-B, 11G-H, 12A.

The respondent largely agreed with the arguments put forth by the appellant and conceded that the questions in (a) and (c) above before the Court of Appeal should be answered in the affirmative. The respondent, however, argued that in light of the scheme of the legislation the report by the independent expert was to attract a status which was above that of ordinary expert evidence since the expert was appointed by the Industrial Tribunal to provide an independent report which did not advance a cause for either of the parties and who was under a duty to act fairly. The respondent lastly argued that there is an onus on the party who seeks to challenge the independent expert's report to demonstrate that the report was incorrect. The Court of Appeal found the appellant employer's arguments relating to questions (a)-(c) above to be correct and it thus answered the questions in (a)-(c) above in the affirmative and remitted the matter to be decided before a differently constituted Industrial Tribunal.[340] Napier states that even though this case dealt with the Equal Pay (Northern Ireland) Act and its Rules, the principles decided in the case applies *mutatis mutandis* to the English equal pay laws.[341]

In *Dibro Ltd v Hore & Others*[342] the Employment Appeal Tribunal held that it was open to an employer to embark on a job evaluation study to be relied on as evidence at any stage until the final hearing of the matter as the main aim is to ensure that employees performing jobs of equal value receive equal pay. It further held that as long as a job evaluation study is analytical and complies with section 1(5) of the Equal Pay Act and is related to the issues before the Industrial Tribunal, then it does not matter whether the job evaluation study came into being after the commencement of the proceedings as long as it has relevance to the facts and circumstances which existed when the proceedings were initiated.[343] Nag states that it is arguable that this case has been incorrectly decided because the case allows an employer to rely on a job evaluation study which has been

---

[340] At 10F-G, 12B-F.

[341] Napier BW "Division K – Equal Pay" at para 324 in Smith I (gen editor) *Harvey on Industrial Relations and Employment Law* (loose-leaf).

[342] [1989] IRLR 129 (EAT).

[343] At paras 28, 31. Duggan M *Equal Pay – Law and Practice* (Jordan Publishing Limited 2009) states the following at 94: " … where a JES has been carried out, this may be conclusive and the Employment Tribunal may dismiss an equal value claim. If the employer uses an analytical JES the employer needs to be able to show that the scheme has been designed and implemented in such a way that it does not discriminate on grounds of sex. It will be seen that a JES which attributes different values to the jobs of the claimant and comparators will be the best possible defence, provided that the JES is valid."

embarked on after an equal pay claim for work of equal value has been instituted with the aim of using it as a knock-out defence. She further states that the incentive for employers to embark on a job evaluation study before equal pay claims are instituted will be diminished and the case encourages employers to deal with equal pay "as an issue which can be resolved on a fire-fighting basis".[344]

In *Wood & Others v William Ball Ltd*[345] the appellant employees launched equal pay proceedings before the Employment Tribunal claiming equal pay for work of equal value with their chosen comparators due to receiving less pay than their comparators. The appellant employees were employed as cleaner/packers and their chosen comparators were employed as picker/packers. The Employment Tribunal did not refer the question of equal value to an independent expert for a report as it found that there were no reasonable grounds for determining that the work performed by the appellant employees were of equal value to the work performed by their comparators. The Employment Tribunal then decided that the equal pay claims could not be postponed for an expert's report to be prepared and it dismissed the claims. The appellant employees appealed against this decision to the Employment Appeal Tribunal. The Employment Appeal Tribunal stated that it was contemplated by the Industrial Tribunal Regulations that where an Employment Tribunal is initially of the view that a report by an independent expert should not be sought because there are no reasonable grounds to obtain such report then the Employment Tribunal might have to continue and hear the case substantively.[346]

The Employment Appeal Tribunal stated that it appeared to it that the Employment Tribunal went from considering whether a report from an independent expert was needed to deciding the claim without affording the appellant employees and the respondent employer the opportunity to present their own expert evidence if they wanted to. The Employment Appeal Tribunal held that this was a procedural irregularity. It further found that it seemed that the Employment Tribunal's view that no expert evidence would make

[344] Nag S "Equality of Terms" in *Tolley's Employment Law Service* (loose-leaf) E7052.
[345] [1999] IRLR 773 (EAT).
[346] At paras 1-3, 11-12.

a difference to their decision was tantamount to a finding that the equal pay proceedings were vexatious or frivolous and in those circumstances the Employment Tribunal was under an obligation to inform the parties before it as to what it was considering doing. It further held that natural justice required that the Employment Tribunal inform the appellant employees that their equal pay claims would be fully decided in circumstances where the appellant employees failed to convince the Employment Tribunal to refer the question of equal value to an independent expert. The Employment Appeal Tribunal finally allowed the appeal and stated that the matter must be referred for a hearing before a fresh Employment Tribunal.[347]

In *Middlesbrough Borough Council v Surtees & Others*[348] the issue before the Employment Appeal Tribunal was the Employment Tribunal's refusal to admit expert evidence from the appellant employer. The respondent employees claimed equal pay for work of equal value with two male comparators. The appellant employer argued that the respondent employees were not performing work of equal value to that of the comparators. The Employment Tribunal appointed an independent expert to prepare a report on the equal value issue but refused to admit the appellant employer's own expert evidence. The appellant employer appealed to the Employment Appeal Tribunal against this decision. The Employment Appeal Tribunal referred to, *inter alia*, rule 11(4) of the Employment Tribunal Regulations which provides that where an Employment Tribunal has requested an independent expert to prepare a report on the equal value issue, then such Employment Tribunal must not allow the evidence of another expert to be given unless the evidence relates to the facts relating to the question. It stated that the Employment Tribunal, however, decided that the Employment Tribunal Regulations did not afford it the power to allow the evidence of the appellant employer's expert and if it was wrong on this score then it would not exercise the discretion to admit the report into evidence.[349]

[347] At paras 14, 20, 23.
[348] [2007] IRLR 981 (EAT).
[349] At paras 1-6, 13.

The appellant employer argued that the Employment Tribunal had the power to admit the evidence of its expert in terms of rule 11(4) of the Employment Tribunal Regulations. The appellant employer further argued that the Employment Tribunal's approach to the evidence of the appellant employer's expert was incorrect because whilst the Employment Tribunal Regulations limited such evidence to the relevant facts it, however, allowed the appellant employer to produce such evidence. The appellant employer also argued that it does not make sense to constrain an Employment Tribunal from considering expert evidence which criticises the evidence of the independent expert. The appellant employer argued that this constraining would infringe a party's right to a fair trial because they would in effect be denied the right to cross-examine the independent expert on their own expert's criticism of it because they would not be allowed to support such cross examination by calling on their expert's evidence. The Employment Appeal Tribunal held that a proper reading of rule 11(4) of the Employment Tribunal Regulations does not lead to an Employment Tribunal being deprived of the power to admit the expert evidence of the parties but rather restricts the reach of such parties' expert evidence. It further held that a party's expert is not allowed to give evidence challenging the facts which have already been found by the Employment Tribunal. The Employment Appeal Tribunal stated that such expert would be allowed to challenge the methodology used by the independent expert. It held that the Employment Tribunal did have the power to receive the evidence of the appellant employer's expert. It finally allowed the appeal and ordered that the appellant employer's expert evidence be admitted in evidence before the Employment Tribunal.[350]

In *Hovell v Ashford & St Peter's Hospital NHS Trust*[351] the issue before the Court of Appeal was whether the Employment Tribunal committed an error of law by dismissing an application brought by the appellant employee to the effect that the tribunal should withdraw its decision to appoint an independent expert to provide a report on the equal value issue in an equal pay for work of equal value claim. The Court of Appeal stated that the law allows an Employment Tribunal to call for an expert's report to assist it in

350 At paras 14-15, 17, 20-21, 28-29.
351 [2009] IRLR 734 (CA). This case is further discussed under para 6.2 of this Chapter.

determining whether the work in question is of equal value. The Employment Tribunal Regulations also allows the Employment Tribunal to withdraw the request made to the expert to prepare a report at any stage of the proceedings. The Court of Appeal noted that it was this power which the Employment Tribunal did not find appropriate to exercise. It noted that both the appellant employee and the respondent employer requested the Employment Tribunal to obtain a report from an independent expert relating to the value of the work in question and the Employment Tribunal made such an order. The Court of Appeal further noted that prior to the appointment of the independent expert, the appellant employee brought an application requesting the Employment Tribunal to withdraw the order made requesting a report from an independent expert, but the appellant did not state that circumstances had materially changed from when it requested and agreed to the obtaining of the expert report. The Employment Tribunal dismissed the application and this refusal was taken on appeal before the Employment Appeal Tribunal who dismissed the appeal. The appellant employee further appealed the matter to the Court of Appeal. The Court of Appeal held that the Employment Tribunal was correct in finding that it would obtain benefit from the independent expert's report and it was consequently correct by not withdrawing the referral to the expert. It remarked that the withdrawal of the expert was sought in circumstances where the Employment Tribunal ordered the report of the expert by consent of both parties and this made it more difficult for the appellant employee to successfully challenge. The Court of Appeal remarked that the decision whether or not to refer the equal value issue to an independent expert is ultimately in the discretion of the Employment Tribunal as to whether it will be assisted thereby. It further remarked that the fact that in some cases it may be possible for the Employment Tribunal to properly decide the question of whether the work is of equal value in the absence of an expert's report on the issue cannot place it under an obligation to decide the equal pay for work of equal claim without the benefit of the expert's report if it finds that same is needed. The Court of Appeal consequently dismissed the appeal.[352]

[352] At paras 1, 9-10, 15-17, 44-46.

In *McGregor & Others v General Municipal Boilermakers & Allied Trades Union*[353] the Employment Appeal Tribunal held that the section 1(3) defence of the Equal Pay Act can be relied on by an employer at the stage when the Industrial Tribunal is deciding whether or not to refer the matter to an independent expert on the issue of equal value or it can be relied on by an employer at any other subsequent hearing after the independent expert's report including his oral evidence (if possible) has been placed before the Industrial Tribunal. The Employment Appeal Tribunal found that the Industrial Tribunal did not commit an error of law by deciding the equal pay for work of equal value claim without first referring the issue of equal value to an independent expert. It dismissed the appeal. This was the majority view of the Employment Appeal Tribunal. The minority view of the Employment Appeal Tribunal was that the Industrial Tribunal did commit an error of law by deciding the equal value issue without referring it to an independent expert for an expert opinion on the matter. The minority view of the Employment Appeal Tribunal went further and stated that where the section 1(3) defence relies on the difference in pay being genuinely due to particular experience and skills exceeding those required for the basic demands of the work then it is not appropriate for an Industrial Tribunal to make a finding on the defence without having an independent expert's evaluation of the work in question. The minority view also stated that the Industrial Tribunal was not equipped to engage in job evaluation exercises and without the opinion of the independent expert the Industrial Tribunal was bound to make mistakes. The minority view lastly stated that the Industrial Tribunal committed an error of law in determining the appellant employees equal pay for work of equal value claims in the way in which it did.[354]

The purpose of the above discussion relating to the equal pay for work of equal value cause of action is to place the United Kingdom equal pay legal framework in context with no specific guidance being sought for South African equal pay law on this aspect. It is, however, worth repeating here that the author has argued elsewhere that the Employment Equity Act[355] ("EEA") should be amended to include a provision which will allow the courts

[353] [1987] ICR 505 (EAT).
[354] At 512G, 515E-G, 517A-B, 517D.
[355] 55 of 1998.

(including the CCMA), like the Employment Tribunal in the United Kingdom, to request a report from an independent expert (job evaluation specialist) on the question of the values of the jobs. It has further been argued that the legal framework for determining an equal pay for work of equal value claim in terms of the EEA will remain inadequate until such a provision is introduced.[356]

5. ONUS AND ACCESS TO PAY RELATED INFORMATION

The guidance sought from the United Kingdom equal pay law for the research questions relating to the onus in section 11(1) of the EEA as called for in paragraph 13.7.1 of Chapter 2 of this thesis is as follows: (a) Whether the argument that section 11(1) only requires an equal pay claimant to produce sufficient evidence, which is more than making a bald (mere) allegation and less than establishing a *prima facie* case, in order to raise a credible possibility that unfair pay discrimination has taken place and if she succeeds in doing so then the onus is on the employer to prove its defence on a balance of probabilities as required by section 11(1) can be supported by the United Kingdom equal pay law; and (b) Whether there are any lessons for the onus provision in section 11(1) of the EEA than can be learnt from how the onus in equal pay is dealt with under the United Kingdom equal pay law. The guidance sought from the United Kingdom law for the research questions relating to access to pay related information as called for in paragraph 13.8 of Chapter 2 of this thesis is as follows: (c) Whether there are any lessons that can be learnt from the United Kingdom equal pay law on the aspect of access to pay related information for South African equal pay law on this score.

The onus and access to pay related information will be analysed under separate headings below with submissions relating to any guidance that can be extracted, as sought for, being made at the end of the discussion of each heading as deemed appropriate.

---

[356] Ebrahim S "Equal Pay for Work of Equal Value in Terms of the Employment Equity Act 55 of 1998: Lessons from the International Labour Organisation and the United Kingdom" *PER* 2016(19) at 22-23.

5.1 Onus

Section 136 of the Equality Act provides for the burden of proof applicable to equal pay proceedings, *inter alia*. Section 136(2) read with section 136(6)(a) of the Equality Act states that where there are facts based on which a court can find that there has been a contravention of the equal pay provisions, and if there is no explanation from the employer, then the Employment Tribunal or court must find in favour of the claimant. Section 136(2) of the Equality Act does not apply in circumstances where the employer succeeds in proving that it did not infringe the equal pay provisions.[357]

The Explanatory Notes to the Equality Act states that section 136 of the Equality Act provides that where a claimant alleges discrimination (this will include unequal pay for like work, work rated as equivalent and work of equal value) then the burden of proof is on the (equal pay) claimant and it is only when the claimant has proved sufficient facts (in the absence of any other explanation) that points to a breach of the provisions of the Act (equal pay provisions) then the burden shifts to the employer to prove that it did not infringe the provision/s in question.[358] The Equal Pay Statutory Code of Practice, likewise, states that an equal pay claimant must prove facts from which an Employment Tribunal can make a decision as to whether she receives less pay than her chosen male

---

[357] Section 136(3) of the Equality Act.

[358] Equality Act 2010: Explanatory Notes 8 April 2010 at para 443. Para 2 of the Equality Act 2010: Explanatory Notes 8 April 2010 states the following, *inter alia*: "The notes need to be read in conjunction with the Act. They are not, and are not meant to be, a comprehensive description of the Act. …" Para 1 of the Equality Act 2010: Explanatory Notes 8 April 2010 states the following, *inter alia*: "These explanatory notes relate to the Equality Act 2010 which received Royal Assent on 8 April 2010. … Their purpose is to assist the reader in understanding the Act. They do not form part of the Act and have not been endorsed by Parliament." In *Snoxell v Vauxhall Motors Ltd* [1977] IRLR 123 (EAT) the EAT stated the following at para 35 with regard to the employer's burden of proof under section 1(3) of the Equal Pay Act: "The onus of proof under s.1(3) is on the employer and it is a heavy one. Intention, and motive, are irrelevant …" Duggan M *Equal Pay – Law and Practice* (Jordan Publishing Limited 2009) states the following at 113: "In an equal value claim, it is for the claimant to prove this element of the claim … and this remains so whether the assertion of indirect discrimination is put on the basis of statistics or otherwise." Honeyball S *Honeyball & Bowers' Textbook on Employment Law* 11ed (Oxford University Press 2010) states the following at 284: "The burden of proof that there has been discrimination lies on the employee, and the test is whether there is good reason to suppose that any comparative value set by the system on any demand or characteristic ought to have been given a more favourable value if those determining the values had not consciously or unconsciously been influenced by consideration of the sex of those on whom the demands would chiefly be made. There would be sufficient reason if a traditionally female attribute were undervalued (*Neil v Ford Motor Co. Ltd* (1984))."

comparator for performing the same work, work rated as equivalent or work of equal value and if she manages to do this (including where the employer denies the allegations) then it behoves the employer to prove that the pay differential is based on a reason other than sex and if the employer proves this then the claimant's claim will fail.[359] The equal pay claimant must thus establish a *prima facie* case in order to put the employer on its defence.[360]

Napier states that an equal pay claim remains extremely complicated and the complications facing an equal pay claimant should not be underestimated. He further states that the general principle is that the burden of proof in an equal pay claim is on the equal pay claimant. Napier goes further and explains that if the claimant cannot prove that she performs the same work, work rated as equivalent or work of equal value to that of her chosen comparator but receives less pay, then she would have failed to establish a *prima facie* case of pay discrimination and the employer will only have a case to answer (being put on its defence) if the claimant sets up a *prima facie* case of pay discrimination.[361]

---

359 The Equal Pay Statutory Code of Practice at para 128. In *BMC Software Ltd v Shaikh* [2019] EWCA Civ 267 (CA) the Court of Appeal stated the following at para 18: "It is important not to overlook, as Judge Hand arguably comes close to doing, that the burden is on the employer to prove (by sufficiently cogent and particularised evidence) that the factor relied on explains the difference in pay complained of." IDS Employment Law Guide: The Equality Act 2010 (Income Data Services Limited 2010) states the following at 197-198: "Section 136 of the Equality Act 2010 harmonises the burden of proof provisions across the equality strands, albeit with some small changes to the former wording. Under the antecedent discrimination legislation, in most cases the burden of proof shifted onto the respondent once the claimant had established a prima facie case of discrimination. This means that the claimant had established facts from which, in the absence of a non-discriminatory reason, the tribunal could conclude that discrimination had occurred and it then fell to the employer to provide such a non-discriminatory reason."

360 Lewis D, Sargeant M & Schwab B *Employment Law: The Essentials* 11ed (Chartered Institute of Personnel and Development 2011) state the following at 125: "… in order to make it less difficult to prove that discrimination has occurred, the rule under section 136 EA 2010 is that the employee merely has to produce sufficient evidence from which a court or tribunal *could* decide that there has been discrimination. In legal parlance this is known as a *prima facie* case. Once such evidence has been produced it is for the employer to *disprove* that discrimination has occurred, and if the employer cannot do so then the tribunal must find in favour of the employee. This is usually, therefore, a two-stage process – namely: Stage 1 The employee has to prove facts from which the tribunal *could* decide, in the absence of an adequate explanation from the employer, that the employer has committed discrimination. This is a *prima facie* case, a case for the employer to answer. Stage 2 If the employee has proved a *prima facie* case, the tribunal must uphold the claim unless the employer proves it did not commit discrimination – ie proves that there was an innocent explanation for these facts."

361 Napier BW "Division K – Equal Pay" at paras 185, 187, 202 in Smith I (gen editor) *Harvey on Industrial Relations and Employment Law* (loose-leaf). Napier BW "Division K – Equal Pay" in Smith I (gen editor)

In *Calmac Ferries Ltd v Wallace*[362] the Employment Appeal Tribunal held that sections 65 and 66 of the Equality Act give rise to a *prima facie* presumption that the pay differential is due to sex discrimination where the claimant proves that she receives less pay than her male comparator for the same work, work rated as equivalent or work of equal value. The employer must then prove a material factor defence under section 69(1) of the Equality Act.[363]

In *Nelson v Carillion Services Ltd*[364] the Court of Appeal noted that the appellant's argument to the effect that in an indirect pay discrimination claim the burden of proof lies on the employer, as all that is required of the claimant is to put forth a credible suggestion of disproportionate adverse impact, was surprising and one that was not sustainable. The Court of Appeal held that the burden of proof is on the claimant to prove the disparate adverse impact that the matter has on female employees. It further held that it is strange, as the appellant has argued, to place a burden on an equal pay claimant to establish a *prima facie* case of direct pay discrimination for the purpose of showing that she is paid less than a male comparator because of her sex but to not require her to prove a *prima facie* case of indirect discrimination when she attempts to counter her employer's reason for the lower pay which is apparently genuine and based on a reason unrelated to sex. The Court of Appeal held that the burden of proving disproportionate adverse impact in an indirect pay discrimination case is on the equal pay claimant and it will not be sufficient for the claimant to merely put forth a credible suggestion to the effect that if the relevant and valid statistics were provided then these statistics might show the disproportionate

---

Harvey on Industrial Relations and Employment Law (loose-leaf) states the following at para 205: "Of course, an employment tribunal will not take too legalistic a view of the burden of proof, in the sense that it may wish to hear the whole of the evidence on both sides before deciding whether a prima facie case has been made out. But, having heard the evidence, it must decide the issues in the correct sequence, and it is only when it has either been decided (or, as is far more often the case, assumed) that the work done by the woman is equal to the work done by the man that any question arises whether the discrimination can be justified under the material factor defence found in EqA 2010 s 69."

362 [2014] EqLR 115 (EAT).

363 At para 7. Napier BW "Division K – Equal Pay" in Smith I (gen editor) *Harvey on Industrial Relations and Employment Law* (loose-leaf) states the following at para 517: "As far as the burden of proof is concerned, it is for the employer to identify the factor he says justifies the difference in pay, and he must show that it is not a sham or a pretence. Further he must show that it is causative of the difference in pay, that it is material (in the sense of being significant and relevant: *Rainey v Greater Glasgow Health Board [1987] AC 224*) and that it does not involve direct or indirect sex discrimination."

364 [2003] IRLR 428 (CA).

adverse impact and this will not shift the burden to the employer to provide an explanation.[365]

Based on the above discussion it is submitted that no guidance can be extracted from the United Kingdom equal pay law relating to the onus in section 11(1) of the EEA (research question 6, paragraph 13.7.1 of Chapter 2) for the following reasons: (i) The United Kingdom equal pay law requires an equal pay claimant to establish a *prima facie* case of pay discrimination before the burden of proof can shift to the employer and this does not assist with the argument made as stated in (a) under paragraph 5 above to the effect that a claimant is only required to produce sufficient which is less than establishing a *prima facie* case; and (ii) the Court of Appeal in *Nelson* specifically rejected an argument that evidence that is less than at a *prima facie* level is sufficient to place the employer on its defence and held that a claimant has to establish a *prima facie* case which also does not assist the argument made as stated in (a) under paragraph 5 above.

5.2 Access to Pay Related Information

The Equality Act like the EEA does not contain a provision which affords a claimant the right to obtain information from her employer which is relevant to her claim for equal pay. The Equality Act does, however, in section 77(1)-(4) allow employees the freedom to discuss their pay with each other and protects them from any victimisation by the employer as a result thereof. There is also a non-statutory voluntary regime in place in terms of the ACAS Asking and Responding to Questions of Discrimination in the Workplace - Guidance for Job Applicants, Employees, Employers and Others Asking Questions about Discrimination related to the Equality Act 2010 ("ACAS Guide") which can assist employees who are of the view that they might be discriminated against, to ask

[365] At paras 19, 28-31, 35-36. The Equal Pay Statutory Code of Practice states at para 129 that where an equal pay claimant alleges that the material factor relied on by the employer to justify the pay differential constitutes indirect discrimination then there is a burden on her to produce evidence to substantiate the allegations in the form of statistics or other evidence. If the claimant discharges this evidential burden then it behoves the employer to objectively justify the pay differential by proving that the material factor relied on is a proportionate means of achieving a legitimate aim.

questions relating to this and to guide employers on how to respond to such a request.[366] Section 77(1)-(4) of the Equality Act and the ACAS Guide will accordingly be discussed below.

5.2.1 Section 77 of the Equality Act

Section 77(1) of the Equality Act provides that any term which seeks to prevent or restrict an employee from disclosing or seeking to disclose information relating to pay (known as a relevant pay disclosure) is unenforceable against such employee. Section 77(2) of the Equality Act, on the other hand, provides that any term which seeks to prevent or restrict an employee from seeking a disclosure of information relating to pay from a colleague (including a former colleague) is unenforceable against such employee. These terms are usually referred to as gagging or secrecy clauses.[367] A relevant pay disclosure essentially covers pay discussions between employees that are aimed at establishing whether or not there is pay discrimination.[368] The Equality Act also protects both an employee seeking a relevant pay disclosure as well as the one making such disclosure from victimisation by the employer.[369] It should be noted that whilst the Equality Act allows an employee to seek pay related information from a colleague, any assistance in this regard from the colleague will be voluntary as he/she is not under an obligation to provide such information. The pay discussions contemplated in section 77 does, however, have the potential to assist an employee by constituting a source of information concerning a comparator's earnings.[370]

---

[366] Napier BW "Division K – Equal Pay" at para 24 in Smith I (gen editor) *Harvey on Industrial Relations and Employment Law* (loose-leaf). Nag S "Equality of Terms" in *Tolley's Employment Law Service* (loose-leaf) E7081.

[367] The Equal Pay Statutory Code of Practice at para 103.

[368] Section 77(3) of the Equality Act read with para 107 of the Equal Pay Statutory Code of Practice.

[369] Section 71(4) of the Equality Act read with para 109 of the Equal Pay Statutory Code of Practice.

[370] Romney D *Equal Pay: Law and Practice* (Oxford University Press 2018) 279. Romney D Equal Pay: Law and Practice (Oxford University Press 2018) provides the following examples at 281-282 of what would fall within the ambit of section 77 of the Equality Act: "On the other hand, the following would fall within the ambit of the section: … Elaine asking Fergus how much he is paid because they are the same grade, and she suspects that Fergus gets a bonus whereas she does not. … Gina asking Howard how much he is paid because he did her job before he was promoted, and she suspects that he was paid more than she is because he is a man. … Ian, a trade union official, asking John, one of his members, about his pay because he has been asked to do so by Kitty, another of his members, who suspects discrimination affects her pay. In these circumstances, Elaine, Gina, Ian, and Kitty cannot be

The right afforded by section 77 of the Equality Act to employees to discuss their pay and the protection against victimisation is contained in South African law under section 78(1)(b) and 78(2) of the Basic Conditions of Employment Act[371] ("BCEA") as discussed under paragraph 9.1 in Chapter 2 of this thesis. Section 77 of the Equality Act supports the argument made under paragraph 9.1 in Chapter 2 of this thesis to the effect that reference to the right of employees to discuss their terms and conditions of employment together with the protection of this right as contained in section 78(1)(b) read with 78(2) of the BCEA should specifically be mentioned in the EEA.

5.2.2 The ACAS Guide

In the past an equal pay claimant was able to obtain equal pay information from his/her employer by using a statutory questionnaire procedure which was aimed at assisting the claimant to obtain information relating to equal pay which would place him/her in a position

---

penalized for asking for the information and Fergus. Howard, and John cannot be penalized for giving it. They are exchanging information in exactly the circumstances envisaged by the section. If the employer chooses to take disciplinary proceedings, or to impose any other form of penalty (for example, withholding a bonus or a promotion), all of them can claim victimization in an employment tribunal with the potential to receive unlimited compensation. It would make no difference if these enquiries showed that the level of the woman's pay had nothing to do with any protected characteristic. The enquiry is protected if it is aimed at eliciting whether, or to what extent, pay was influenced by a protected characteristic." Hepple B Equality: The Legal Framework 2ed (Hart Publishing 2014) states the following at 132: "The Act does not appear to protect a request for information unless it is made by a colleague. If a union wants to avoid this legal obstacle it should ensure that the request is made by a trade union equality representative who is a colleague of the employee, and not by an external official." IDS Employment Law Guide: The Equality Act 2010 (Income Data Services Limited 2010) states the following at 179 regarding what is and what is not protected under section 77 of the Equality Act: "The Explanatory Notes illustrate what is and is not protected thus: … 'A female employee thinks she is underpaid compared with a male colleague. She asks him what he is paid, and he tells her. The employer takes disciplinary action against the man as a result. The man can bring a claim for victimisation against the employer for disciplining him. … A female employee who discloses her pay to one of her employer's competitors with a view to getting a better offer could be in breach of a confidentiality clause in her contract. The employer could take action against her in relation to that breach.'" Lewis D, Sargeant M & Schwab B *Employment Law: The Essentials* 11ed (Chartered Institute of Personnel and Development 2011) state the following at 138: "Section 77 aims to protect a person who tries to find out from discussions with colleagues if he or she has a difference in pay due to discrimination. The section makes unenforceable terms in the contract – known colloquially as 'gagging clauses' – that prevent or restrict people from disclosing their pay, or asking colleagues about their pay if this is done with a view to finding out if differences exist that are related to a protected characteristic. Any action taken against them by the employer as a result of their doing so is treated as victimisation … But this is only if the purpose of the disclosure or the enquiry is to find out if there is discrimination occurring. If the disclosure is for some other reason, the contract term will be enforceable."

[371] 75 of 1997.

to make a decision as to whether a not to launch an equal pay claim. The statutory questionnaire procedure was, however, abolished by the Enterprise and Regulatory Reform Act of 2013. Despite this, there is a non-statutory voluntary regime in place in terms of the ACAS Guide.[372] The ACAS Guide states that discrimination issues (equal pay issues) can be complicated and to this end a written questions and answer procedure can assist in avoiding claims and resolving disputes. It further states that the aim of the Guide is to assist those employees who are of the view that they might be discriminated against, to ask questions relating to this and to guide employers on how to respond to such a request. The ACAS Guide states that a mere question and answer can result in a dispute being resolved, a misunderstanding being cleared up or reveal that there is pay discrimination and be accompanied by an offer by the employer to correct this.[373]

The ACAS Guide states that an employee should first exhaust his/her employer's internal dispute processes, if any, before launching an equal pay claim to the Employment Tribunal or court. It provides a three-step approach for a potential equal pay claimant to

---

[372] Napier BW "Division K – Equal Pay" at para 24 in Smith I (gen editor) *Harvey on Industrial Relations and Employment Law* (loose-leaf). Nag S "Equality of Terms" in *Tolley's Employment Law Service* (loose-leaf) E7081. Napier BW "Division K – Equal Pay" in Smith I (gen editor) *Harvey on Industrial Relations and Employment Law* (loose-leaf) states the following at para 24: "Between 2003 and 2014 there existed a questionnaire procedure that assisted potential claimants in recovering from their employers information helpful in making a decision whether or not to bring an equal pay claim. That procedure has now been abolished by the ERRA 2013, as from April 2014. The statutory procedure has been replaced by a voluntary regime. ACAS has issued guidance ('Asking and Responding to Questions of Discrimination in the Workplace') as to what is good practice, but there is now no legal obligation on an employer to reply to questions which a potential claimant may wish to have answered." Romney D *Equal Pay: Law and Practice* (Oxford University Press 2018) states the following at 275-276: "Before 2014, potential litigants were able to ask wide-ranging questions through statutory questionnaires, but the government abolished them by section 66(1) of the Enterprise and Regulatory Reform Act 2013 (ERRA), repealing section 138 of the EqA. However, section 66(2) of the ERRA provides that section 138 of the EqA still has effect for proceedings that relate to a contravention occurring before the section came into force on 6 April 2014." Romney D *Equal Pay: Law and Practice* (Oxford University Press 2018) states the following at 276: "Paragraph 445 of the ERRA Explanatory Notes says that a potential complainant may still seek information from a potential respondent without the statutory procedure, and a court or tribunal may consider any relevant questions and answers as part of the evidence in a case. ACAS published guidance on this in a document available online. …"

[373] ACAS Asking and Responding to Questions of Discrimination in the Workplace - Guidance for Job Applicants, Employees, Employers and Others Asking Questions about Discrimination related to the Equality Act 2010 (ACAS Guide) at 2. Romney D *Equal Pay: Law and Practice* (Oxford University Press 2018) states the following at 275: "Claimants often have surprisingly few documents, but clearly any document should be scrutinized carefully, including of course the contract of employment, terms and conditions, employer's handbook, letter of appointment, appraisals, any letters concerning pay rises, and so on. Obviously, detailed instructions about the nature of her work and that of her comparators should be sought from her and from any colleagues (or former colleagues) willing to support her."

follow in order to ascertain whether there is pay discrimination or not. The first step relates to the employee providing details of her chosen comparator who must be working for the same employer and who performs the same work, work rated as equivalent, or work of equal value to the work performed by her but who receives higher pay/enjoys better terms and conditions of employment than her. The comparator must be an actual person but in the event that there is no actual comparator then the Equality Act provides for a direct pay discrimination claim provided that the employee is able to prove that she would have received higher pay/better terms and conditions had she been of a different sex.[374] An employee is also allowed to enquire from other employees regarding their employment and pay package in order to obtain information but the colleagues are not obliged to provide this information. It is apposite to note that an employee will be protected under the Equality Act in the event that the employer decides to take punitive action against her for trying to obtain pay related information from her colleagues.[375]

The second step relates to the employee explaining the basis on which she and the comparator performs the same work, work rated as equivalent or work of equal value. The employee can do this by showing how the work of the comparator is the same, or where she relies on the work being rated as equivalent that her job and that of the comparator has been rated as being equivalent in terms of a job evaluation study, or where she relies on the work being of equal value that the respective jobs require similar skills. The third step relates to the employee asking further questions relating to how the employer determines pay for the employees and what is contained in the comparator's job that could explain the pay differential between her pay and that of the comparator.[376]

The ACAS Guide states that an employer should reply to the employee's questions within a reasonable period and that the employer should either agree with the employee that there is pay discrimination and take appropriate measures to cure this, or the employer can challenge the appropriateness of the comparator, or the employer can set forth a

[374] The ACAS Guide at 4, 17.
[375] The ACAS Guide at 17. Section 77(1)-(4) of the Equality Act.
[376] The ACAS Guide at 17-18.

ground of justification to explain and justify the pay differential. It further states that there may be instances where it is appropriate for an employer to review the employee's pay package in order to correct any unintended pay discrimination and there may be other instances where the employer can justify the pay differential due to a material factor.[377] The ACAS Guide states that an employer to whom an employee has directed pay related questions to under the Guide is not under a legal obligation to answer those questions but a non-response may be a contributory factor which is taken into account by an Employment Tribunal when it makes its overall decision regarding the employee's pay discrimination claim.[378]

The nub of the ACAS Guide is to allow employees the opportunity to pose questions to their employer regarding their pay and to allow an employer to respond to such questions. A fruitful engagement between the employee and employer in this regard constitutes a source of pay related information. South African law does not have a voluntary question and answer procedure as contained in the ACAS Guide. It is submitted that the question and answer procedure as contained in the ACAS Guide should be mentioned in the South

[377] The ACAS Guide at 18-19.

[378] The ACAS Guide at 1, 5, 11. Pollitt PL, Rocco G, Burnip V, Donaldson L & Beck S "Disclosing and Accessing Information" in *Tolley's Employment Law Service* (loose-leaf) state the following regarding the ACAS Guide at D5067: "The guidance points out that although a tribunal will not be able to draw an inference of discrimination from an employer's failure to reply to a question or from an evasive or equivocal answer, a tribunal will be able to consider whether and how an employer has answered questions as a contributory factor in making their overall decision on the discrimination claim. It also points out that a tribunal may order an employer to provide such information as part of legal proceedings in any event." Napier BW "Division K – Equal Pay" in Smith I (gen editor) *Harvey on Industrial Relations and Employment Law* (loose-leaf) states the following at para 24 with regard to an employer not being under a legal obligation to answer the questions posed by its employee: "That does not mean, however, that it would be wise for an employer to disregard such requests; as the ACAS guide points out, a failure to reply or an inadequate reply would be part of the evidence which a court or tribunal could take into account in deciding whether an discrimination (or equal pay) claim was made out. But the removal of the statutory procedure does mean that there are no longer strict time limits to be observed." Romney D *Equal Pay: Law and Practice* (Oxford University Press 2018) states the following at 276: "The employer can either answer the questions or else risk the employment tribunal drawing inferences of discrimination from the failure to answer." Romney D *Equal Pay: Law and Practice* (Oxford University Press 2018) states at 277 that a public sector employee can use the Freedom of Information Act 2000 in order to make a Freedom of Information Request. She further states the following at 278 relating to such a request: "The Information Commissioner's Guide says: In determining whether it is reasonable to disclose the information, you must take into account all of the relevant circumstances, including: … the type of information that you would disclose; … any duty of confidentiality you owe to the other individual; … any steps you have taken to seek consent from the other individual; whether the other individual is capable of giving consent; and … any express refusal of consent by the other individual."

African Equal Pay Code with reference thereto being made in the EEA. The inclusion of such procedure improves an employee's access to pay related information and is thus beneficial. The written questions and answer process would also be voluntary and it should specifically be mentioned that a non-response may be a contributory factor which is taken into account by the Labour Court (including CCMA) when it makes its overall decision regarding the employee's pay discrimination claim. This is relevant to answer research question 7 (paragraph 13.8 of Chapter 2) with regards to the access to pay related information.

6. GROUNDS OF JUSTIFICATION

The guidance sought from the United Kingdom equal pay law for the research questions relating to the grounds of justification to equal pay claims as called for in paragraph 13.9 of Chapter 2 of this thesis is as follows: (a) To test the arguments made based on South African law to the effect that affirmative action and the inherent requirements of the job as contained in section 6(2) of the EEA are not suitable grounds of justification to equal pay claims. It is important to state here that the case law discussed below does not refer to affirmative action and/or the inherent requirements of the job operating as grounds of justification to equal pay claims and this strengthens the argument that affirmative action and the inherent requirements of the job are not suitable grounds of justification to equal pay claims; (b) To ascertain what the position is under the United Kingdom equal pay law regarding the progressive realisation of the right to equal pay for the benefit of the argument made based on South African law to the effect that it will be difficult to refuse to recognise the progressive realisation of the right to equal pay as a ground of justification, falling under regulation 7(1)(g) of the Employment Equity Regulations, where it is genuine and in circumstances where it gives effect to section 27(2) of the EEA; (c) What the position under the United Kingdom equal pay law is regarding the factor of responsibility operating as a ground of justification to an equal pay claim before a submission can be made as to whether or not this factor should fall under regulation 7(1)(g) of the Employment Equity Regulations as a ground of justification; (d) What the position under the United Kingdom equal pay law is regarding the factor of different wage

setting structures resulting in a pay difference operating as a ground of justification to an equal pay claim before a submission can be made as to whether or not this factor should fall under regulation 7(1)(g) of the Employment Equity Regulations as a ground of justification; and (e) Any further lessons that can be learnt from the United Kingdom equal pay law for the South African equal pay law relating to the grounds of justification to equal pay claims.

The grounds of justification to equal pay claims will be analysed under various headings below with submissions relating to any guidance that can be extracted, as sought for, being made at the end of the discussion of each heading as deemed appropriate.

6.1 Material Factor Defence (Specific Factors)

The Equal Pay Statutory Code of Practice states that an employer may rely on the following defences to resist an equal pay claim: (a) the claimant and her chosen comparator are not engaged in the same/similar work, work rated as equivalent or work of equal value; (b) the comparator is not a permissible comparator in law; or (c) the pay differential between the claimant and the comparator is due to a material factor which is not related to the sex of the claimant.[379] This last defence is known as the material factor defence. Section 69 of the Equality Act provides for the material factor defence in relation to an equal pay claim. Section 69(1)(a) of the Equality Act, in essence, provides that an employer can resist an equal pay claim if it can prove that the pay differential shown by the claimant (including a difference between terms and conditions of employment) is due

---

[379] The Equal Pay Code at para 74. Napier BW "Division K – Equal Pay" in Smith I (gen editor) *Harvey on Industrial Relations and Employment Law* (loose-leaf) states the following at para 501 with regard to equal pay defences and the material factor defence under section 69 of the Equality Act: "An employer faced with an equality of terms claim may seek to show that the woman and her chosen comparator are not doing like work, or that the comparator chosen is not valid for one reason or another. These defences, if made out, will negate one or more of the elements which have to be established by the claimant. But a third line of defence, which is the subject of this section, assumes that the claimant has done enough to show the equality clause is engaged. The clause, however, does not operate to produce a change in the claimant's contract, because of circumstances shown to exist by the employer which explain the difference between the woman's and the man's pay."

to a material factor which has nothing to do with the claimant's sex.[380] Napier states that the material factor which the employer seeks to rely on in order to explain the pay differential as required by section 69 of the Equality Act can be factors such as for example, seniority, greater experience, greater skill and greater merit. He further states that a material factor for the purpose of section 69 of the Equality Act can be any factor which shows that one is not comparing like with like when comparing the equal pay claimant with her chosen comparator and such comparison does not involve the difference in their sex.[381] The specific factors that can amount to the material factor defence in terms of section 69 of the Equality Act will be discussed below.

Before proceeding to discuss the specific material factors it is necessary, at this point, to extract guidance relating to the grounds of justification. Whilst it might seem self-evident that an employer will establish a ground of justification to an equal pay claim brought in terms of section 6(4) of the EEA where it is able to prove that the claimant and her chosen comparator are not engaged in the same/similar work or work of equal value or that the comparator is not a permissible comparator in law, the Equal Pay Statutory Code of Practice in the United Kingdom specifically refers to this as amounting to grounds of justification to an equal pay claim. Based on this, it is submitted that regulation 7 of the Employment Equity Regulations should specifically mention these two grounds of justification.

6.1.1 Seniority

In *Wilson v Health & Safety Executive*[382] the nub of the appeal before the Court of Appeal related to fundamental questions concerning equal pay where a service-related criterion is used to determine pay. The questions related to whether an employer is under an

---

[380] The Equal Pay Code states the following at para 75: "Once a woman has shown that she is doing equal work with her male comparator, the equality clause will take effect unless her employer can prove that the difference in pay or other contractual terms is due to a material factor which does not itself discriminate against her either directly or indirectly because of her sex."

[381] Napier BW "Division K – Equal Pay" at para 508 in Smith I (gen editor) *Harvey on Industrial Relations and Employment Law* (loose-leaf).

[382] [2010] IRLR 59 (CA).

obligation to prove objective justification for the manner in which it uses a service-related criterion and if it is under such an obligation, under what circumstances is it obliged to do so. It noted that service-related pay scales which are pay scales that increase pay according to an employee's length of service are commonplace. It further noted that it is well grounded that generally an employer is not under an obligation to provide justification for the adoption of a service-related pay scale because the law acknowledges that length of service (experience) allows an employee to work better. The Court of Appeal stated that to reward length of service (experience) is thus a legitimate aim of a service-related pay scale. It noted that the Equality and Human Rights Commission which was admitted in the appeal stated that service-related pay scales will generally adversely impact female employees because they are unlikely to be in a position like male employees to maintain unbroken employment due to their family responsibilities.[383] The Court of Appeal stated that the European Court of Justice has held in relation to an equal pay claim involving a service-related pay scale, that there is no obligation on an employer to objectively justify the pay differential resulting from a service-related pay scale unless the equal pay claimant is able to tender evidence that raises serious doubts regarding the appropriateness of the pay scale to achieve the aim of rewarding experience.[384]

The Court of Appeal agreed with the respondent employee's argument that an equal pay claimant can challenge both the adoption and use of a service-related pay scale. It rejected the appellant employer's argument to the effect that an equal pay claimant can only challenge the adoption of a service-related pay scale and not mount a challenge to the use thereof. It held that to allow a distinction between the adoption and the use of a service-related pay scale would be to allow an employer to apply a service-related pay scale arbitrarily without a court of law being in a position to intervene and this is an absurd situation. It further held that it would not make sense for a court to on the one hand find that an equal pay claim is found in circumstances where the adoption of the service-related pay scale is inappropriate but on the other hand no such claim can be found if the use of the service-related pay scale is inappropriate. The Court of Appeal further stated

[383] At paras 1-2.
[384] At paras 1-2, 17.

that the appellant employer's contention that there should be no remedy for an equal pay claimant in circumstances where she challenges the use of a service-related pay scale is unfair and illogical and would create a legal black hole if upheld. It held that an employer can be placed under an obligation, in an equal pay claim, to provide objective justification for the adoption as well as the use of a service-related pay scale.[385]

The Court of Appeal also dealt with when an employer is under an obligation to justify the adoption and/or use of a service-related pay scale. It stated that this involved the burden of proof in the sense of what an equal pay claimant should prove in order to shift the burden of proof to the employer to show that its adoption and/or use of the service-related pay scale was appropriate. The Court of Appeal noted that the European Court of Justice has required an equal pay claimant to show serious doubts before the burden of proof will shift to the employer but it did not explain what would constitute serious doubts. The Court of Appeal held that an equal pay claimant should show that there is evidence from which, if established before a court/tribunal, it can properly be found that the general rule that an employer is not obliged to justify the adoption and/or use of a service-related pay scale does not apply. It further held that it agreed with the Employment Appeal Tribunal that it was not sufficient for the equal pay claimant to show that the evidence is capable of giving rise to serious doubts but he/she has to convince the tribunal of such doubts. The Court of Appeal stated that there has to be a basis to infer that the adoption and/or use of the service-related pay scale was disproportionate but the onus of proof relating to the proportionality is not placed on the equal pay claimant. It further stated that this test set out by it does not remove the protection given to employers against frivolous claims because the general rule relating to them not being under an obligation to objectively justify pay differentials resulting from a service-related pay scale is only displaced when an equal pay claimant shows that there are serious doubts in relation to the adoption and/or use thereof.[386]

[385] At paras 24-26, 33, 35-36.
[386] At paras 37, 48-49.

The following guidance (principles) can be extracted from the above case in order to assist with the research question relating to the grounds of justification (paragraph 13.9 of Chapter 2):

(a) Service-related pay scales which are pay scales that increase pay according to an employee's length of service are commonplace and an employer is generally not under an obligation to provide justification for the adoption of a service-related pay scale because the law acknowledges that length of service (experience) allows an employee to work better;

(b) There is no obligation on an employer to objectively justify the pay differential resulting from a service-related pay scale unless the equal pay claimant is able to tender evidence that raises serious doubts regarding the appropriateness of the pay scale to achieve the aim of rewarding experience; and

(c) An equal pay claimant can challenge both the adoption and use of a service-related pay scale and this can result in an employer having to provide objective justification for the adoption as well as the use of a service-related pay scale.

Based on the above, it is submitted that the listing of the factor of seniority operating as a ground of justification to an equal pay claim in regulation 7(1)(a) of the Employment Equity Regulations is strengthened by its use in the United Kingdom equal pay law.

It is further submitted that the approach in South African law to the use of seniority as a ground of justification to an equal pay claim is to a large extent in accordance with the approach under the United Kingdom equal pay law because South African law also regards seniority as a ground of justification to an equal pay claim without the need for further justification provided that it does not give rise to indirect unfair pay discrimination as set out in regulation 7(2) of the Employment Equity Regulations.[387]

[387] See paragraph 10.2 of Chapter 2 of this thesis.

To this end, it is submitted that the principles set out in (a)-(b) above should be mentioned under regulation 7 of the Employment Equity Regulations in relation to the factor of seniority. It is submitted that the principle mentioned in (c) above to the effect that an equal pay claimant can challenge both the adoption and use of a service-related pay scale and this can result in an employer having to provide objective justification for the adoption as well as the use of a service-related pay scale is not dealt with in South African equal pay law and thus provides important guidance for the operation of the factor of seniority as a ground of justification to an equal pay claim. Based on this, it is submitted that the principle listed in (c) should be mentioned under regulation 7 of the Employment Equity Regulations in relation to the factor of seniority.

6.1.2 Productivity

In *Cumbria County Council v Dow & Others*[388] the Employment Appeal Tribunal held that the Industrial Tribunal correctly found that there was no link between the bonus scheme and increased productivity and there was no attempt to properly monitor productivity. It further held that based on this there was no room to find that the bonus scheme was an appropriate means to use in order to achieve a legitimate reason (productivity). The Employment Appeal Tribunal held that the Industrial Tribunal adopted the correct approach by seeking to ascertain whether there was an increase in productivity as a result of the bonus scheme. It held that the Industrial Tribunal's finding was not perverse as it was making the point that the bonus scheme at inception did achieve an increase in productivity but this achievement ceased when the scheme was not properly applied and it resulted in the scheme losing its effect on productivity with the result that the bonus payments had become an automatic addition to the basic salary. The Employment Appeal Tribunal found that the Industrial Tribunal was correct in finding that the appellant employer had not established an objective justification for the pay differential. It remarked that improving productivity can be a legitimate aim but the means used to achieve the aim must be proportionate. It further remarked that where a productivity scheme is not being

[388] [2008] IRLR 91 (EAT).

applied properly then it cannot achieve its aim and it also cannot be regarded as proportionate to pay bonuses to achieve increased productivity if the objective of achieving increased productivity is not being realised. The Employment Appeal Tribunal then held that an employer is in principle allowed to prove that a portion of the pay differential is due to the bonus-productivity scheme in circumstances where it is not able to prove that the whole of the pay differential is due to it and this is no different from the defence of market forces on this score.[389]

In *Council of the City of Sunderland v Brennan & Others*[390] the Court of Appeal noted that the appellant's case before the Employment Tribunal and before it was to the effect that the link between the bonus scheme and productivity existed until the bonus scheme was abolished. The Court of Appeal further noted that the nub of the Employment Tribunal's decision was that notwithstanding that the factor of productivity constituted a significant consideration when the bonus scheme was first implemented in the 1970's the bonus scheme had since the 1990's been divorced from productivity and the bonus payments were thus seen as forming part of the salary. It stated that the real question was whether the Employment Tribunal was permitted to make the findings, *inter alia*, that the there was no proper monitoring of the bonus scheme for the years in question and that the withdrawal of the bonus scheme did not result in a decrease being suffered in productivity based on the evidence before it. The Court of Appeal held that it was not necessary for it to deal with the correctness of the Employment Appeal Tribunal skipping the stage to ascertain whether the genuine material factor defence raised by the appellant council was not sex tainted and moving directly to ascertain whether there was an objective justification for the pay differential as this was not sustainable in light of the finding that the link between the bonus scheme and the productivity factor had ceased during the period in question. The Court of Appeal stated that this case involved an *Enderby* type of indirect pay discrimination[391] which can only be justified by objective justification. It held

[389] At paras 130, 133, 135-136, 140.
[390] [2012] IRLR 507 (CA).
[391] The European Court of Justice held the following in *Enderby v Frenchay Health Authority & Secretary of State for Health* C-127/92 [1993] IRLR 591 (ECJ) at para 19: "… where significant statistics disclose an appreciable difference in pay between two jobs of equal value, one of which is carried out almost exclusively by women and the other predominantly by men, Article 119 of the Treaty requires the

that the Employment Appeal Tribunal was thus not incorrect by proceeding directly to determine whether there was objective justification to the *Enderby* type of indirect pay discrimination. It stated that the appellant council could not discharge the burden of showing objective justification for the pay differential in circumstances where it was found that the link between the bonus scheme and the productivity factor had ceased. The Court of Appeal consequently dismissed the appeal.[392]

The following guidance (principles) can be extracted from the above case law regarding the grounds of justification (paragraph 13.9 of Chapter 2):

(a) It is submitted that the listing of the factor of performance (quantity or quality of work) operating as a ground of justification to an equal pay claim in regulation 7(1)(c) of the Employment Equity Regulations is strengthened by its use in the United Kingdom equal pay law, *albeit*, in the form of productivity;

(b) An employer is allowed to prove that a pay differential is due to a bonus productivity scheme and this amounts to a material factor defence;[393]

(c) Where there is a bonus scheme in place which rewards productivity then the correct approach is to seek to question whether there is an increase in productivity as a result of the bonus scheme;[394]

(d) Where an employer cannot prove that the whole of the pay differential is due to the bonus productivity scheme then it is allowed to prove that a portion of the pay differential is due to the bonus productivity scheme, if it is able to do so;[395] and

---

employer to show that that difference is based on objectively justified factors unrelated to any discrimination on grounds of sex."

392 At paras 23-24, 27, 37-39, 41-44.

393 See *Cumbria County Council v Dow & Others* [2008] IRLR 91 (EAT) read with *Council of the City of Sunderland v Brennan & Others* [2012] IRLR 507 (CA) as discussed above.

394 See *Cumbria County Council v Dow & Others* [2008] IRLR 91 (EAT) as discussed above.

395 See *Cumbria County Council v Dow & Others* [2008] IRLR 91 (EAT) as discussed above.

(e) An employer will not be able to prove a material factor defence as well as objective justification for the pay differential in circumstances where it is found that the link between the bonus scheme and the productivity factor has ceased.[396]

It is submitted that the principles extracted in (b)-(e) above should be mentioned under this ground of justification relating to performance (quantity or quality of work) in regulation 7 of the Employment Equity Regulations.

6.1.3 Administrative Efficiency (existence of a shortage of relevant skill)

In *Rainey v Greater Glasgow Health Board*[397] the House of Lords stated that it was clear from the facts before the Industrial Tribunal that the new prosthetic service which the respondent wanted to operate directly would not have materialised if it was not able to recruit an adequate number of prosthetists who were employed by the private contractors and to this end the respondent offered to remunerate the prosthetists at the rate they received from the private contractors and which rate was more than the rate received by the appellant. It noted that all the prosthetists which the respondent recruited from the private contractors were male. The House of Lords stated that the question to be decided was whether these circumstances constituted a genuine material factor defence as contained in section 1(3) of the Equal Pay Act. The appellant relying on the decision in *Fletcher v Clay Cross (Quarry Services) Ltd*[398] argued that these circumstances could not constitute a material factor defence because it was not related to issues such as experience, skill or training (the personal circumstances of the appellant and the comparator). The House of Lords held that section 1(3) of the Equal Pay Act is not restricted to factors which rely on the personal circumstances of the claimant and the comparator in order to explain the pay differential but it includes factors which are not related thereto provided that it is material in the sense of being significant and relevant. It further held that some factors relied on to explain a pay differential may be significant and

[396] See *Council of the City of Sunderland v Brennan & Others* [2012] IRLR 507 (CA) as discussed above.
[397] [1987] IRLR 26 (HL).
[398] [1978] IRLR 361 (CA).

relevant in circumstances where they are not related to personal circumstances. It held that in a case where there is no direct or indirect pay discrimination, as in the case before it, then a pay differential which is caused by economic factors related to the efficient running of the employer's business may be relevant.[399]

The House of Lords then held that the European Court of Justice has not excluded the reliance on grounds of justification which are not economic grounds such as grounds of administrative efficiency where the business is not involved in commerce. It held that, *in casu*, the fact that the appellant was a female and the comparator was a male was a coincidence. The House of Lords held that it was an objectively justified ground for the respondent to offer the comparator the rate of pay which he received from the private contractor and which was higher than that paid to the appellant in order to attract the comparator and other prosthetists in the same position so that they could staff the new prosthetic service. It further held that the proper enquiry was not why the appellant was being paid less than the comparator but why the comparator was being paid more and it stated that he received higher pay than the appellant because of the respondent's need to attract him and others like him in order to form the core of the new prosthetic service. The House of Lords held that the explanation/grounds put forth by the respondent regarding the pay differential was capable of constituting a genuine material factor as required by section 1(3) of the Equal Pay Act and such explanation was furthermore objectively justified. It consequently dismissed the appeal.[400]

The following guidance regarding the grounds of justification can be extracted from the above case:

(a) It is submitted that the listing of the factor of the existence of a shortage of relevant skill operating as a ground of justification to an equal pay claim in regulation 7(1)(f) of the Employment Equity Regulations is strengthened by the United Kingdom equal pay law

[399] At paras 9-12, 14.
[400] At paras 20, 22-24, 26-30.

which has recognised it, *albeit*, as administrative efficiency which is the need to attract employees in order for the business to run efficiently.

(b) The United Kingdom equal pay law provides guidance for the factor of the existence of a shortage of relevant skill as a ground of justification under regulation 7(1)(f) of the Employment Equity Regulations by stating that in a case where there is no direct or indirect pay discrimination then a pay differential which is caused by economic factors related to the efficient running of the employer's business may be relevant as a ground of justification to an equal pay claim. It is submitted that this is important guidance which should be mentioned in regulation 7 of the Employment Equity Regulations; and

(c) The United Kingdom equal pay law states that the proper enquiry to be undertaken concerning a ground of justification of administrative efficiency is not why the claimant is being paid less than the comparator but rather why the comparator is being paid more. This provides further guidance for the factor of the existence of a shortage of relevant skill as a ground of justification under regulation 7(1)(f) of the Employment Equity Regulations and should thus be mentioned under regulation 7 of the Employment Equity Regulations.

6.1.4 Market Forces

In *Fletcher v Clay Cross (Quarry Services) Ltd*[401] the Court of Appeal found that the appellant claimant had succeeded in making out a *prima facie* case of unfair pay discrimination. It held that the respondent employer had not succeeded in proving a genuine material factor defence for the pay differential between the appellant claimant and the comparator by relying on extrinsic circumstances which were, that the comparator would not accept employment with it unless he was paid the higher wage. The Court of Appeal stated that it is irrelevant whether the employer by paying the claimant less and the comparator more did not thereby intend to discriminate against the claimant if the consequence of his actions is that the claimant suffers unfair pay discrimination as a result

[401] [1978] IRLR 361 (CA).

thereof. It held that an Industrial Tribunal should only consider the personal equation of an equal pay claimant and a comparator and should not pay attention to extrinsic circumstances which was the reason for the comparator being remunerated at a higher rate. It held that the personal equation related to for example, superior qualifications, greater length of service, better productivity and this could justify a pay differential between the claimant and the comparator. The Court of Appeal stated that it is contrary to the Equal Pay Act to allow an employer to justify a pay differential by simply stating that it paid the male comparator a higher wage because he asked for it or he paid the female claimant a lesser wage because she was willing to work for less. It further stated that if an employer were allowed to rely on these explanations as grounds of justification then the Equal Pay Act will be rendered redundant.[402]

In *Rainey v Greater Glasgow Health Board*[403] the House of Lords disagreed with the statements in *Fletcher v Clay Cross (Quarry Services) Ltd*[404] relating to the irrelevance of extrinsic circumstances (for instance economic circumstances) which are beyond the personal equation of the claimant and the comparator when determining the genuine material factor defence. The House of Lords stated that the statements in *Fletcher* were unduly restrictive of the interpretation to be accorded to section 1(3) of the Equal Pay Act. It held that the consideration of the claimant's case will of necessity involve all the circumstances relevant to her case and these circumstances may go beyond the personal equation of the claimant and comparator. It stated that there may be circumstances which are relevant and significant and which have no bearing on the personal equation of the parties. The House of Lords stated that it found support for its view from the European Court of Justice. It held that a genuine material factor defence for the purpose of section 1(3) of the Equal Pay Act can relate to extrinsic circumstances which goes beyond the personal equation of the claimant and the comparator provided that it is significant and material.[405]

---

[402] At paras 5-6, 11-13, 19, 28.
[403] [1987] IRLR 26 (HL). This case is more fully dealt with under para 10.1.1 of this Chapter.
[404] [1978] IRLR 361 (CA).
[405] At paras 13-14, 18.

In *Ratcliffe & Others v North Yorkshire County Council*[406] the House of Lords on appeal had to decide whether the respondent council had failed to prove a genuine material factor defence. The respondent council paid female employees less than male employees for work rated as equivalent because they had to compete with private catering companies for the provision of school lunches and argued that market forces and a need to be competitive necessitated the pay differential. The House of Lords found that the Industrial Tribunal was entitled to reject the respondent council's defence to the pay differential. It found that the respondent council remunerated female employees at a lesser rate than male employees and this was because of the sex of the female employees and it constituted pay discrimination which could not be justified on grounds which were not sex tainted. The House of Lords stated that once the job evaluation study had stated that the appellants were being remunerated at a lower rate than that paid to male comparators for work rated as equivalent then it was no longer open to the respondent council to rely on a genuine material factor defence (such as being more competitive) which was unrelated to sex. It stated that the Industrial Tribunal did not misdirect itself to the extent that its decision could not stand. It stated that it appreciated the difficult position facing employers when they seek to compete for a tender with rival tenderers (market forces) but to reduce a female's wages to a rate below that of comparator male employees was the kind of pay discrimination which the Equal Pay Act sought to remove.[407]

In *Cumbria County Council v Dow & Others*[408] the appellant council appealed against the Industrial Tribunal's rejection of its genuine material factor defence based on market forces, *inter alia*. The appellant council based its appeal on the grounds that the Industrial Tribunal did not deal fairly with its defence of market forces (including procedural failures relating thereto) and the rejection of its market forces defence was perverse and not in accordance with the evidence presented before the Industrial Tribunal. The Employment Appeal Tribunal found that the Industrial Tribunal rejected the appellant council's reliance on market forces as its material factor defence on its recollection of the evidence which

---

406 [1995] IRLR 439 (HL).
407 At paras 16, 22-23, 26-28.
408 [2008] IRLR 91 (EAT).

was unreliable. It further found that in these circumstances the appellant council is entitled to have its genuine material factor defence based on market forces determined on the basis of a consideration of all the evidence. The Employment Appeal Tribunal stated that as the procedure adopted by the Industrial Tribunal in dealing with the market forces defence was defective the matter had to be remitted to the Industrial Tribunal to deal with this issue properly. It then stated that it is both just and desirable to allow a reliance on a market forces defence to be fully ventilated in circumstances where it can properly be advanced to provide an explanation for either the whole or part of the pay differential.[409]

The Employment Appeal Tribunal stated that it agreed with the respondent that there was not enough evidence before the Industrial Tribunal from which it could properly find what the market rate relied on by the appellant council was. It further stated that it is not sufficient for the appellant council to prove that some pay differential is justified without providing the Industrial Tribunal with a sufficient evidential basis in order for it to determine whether the whole or only part of the pay differential is justified. The Employment Appeal Tribunal held that it was the responsibility of the employer to prove that the market demanded the higher pay and it was not the responsibility of the respondent employees to prove that the comparators pay was too high. It further held that this resulted in the Industrial Tribunal being left in the dark as to what the market rates were. The Employment Appeal Tribunal then held that if it had not found that the market forces defence had to be remitted to the Industrial Tribunal then it would have rejected the appellant council's appeal that the Industrial Tribunal had committed an error of law by rejecting its market forces defence.[410]

In *Walker v Co-operative Group Limited & Another*[411] the appellant claimant was employed by the respondent and claimed equal pay with her chosen comparators before the Employment Tribunal. The Employment Tribunal found that the work performed by the appellant claimant and that performed by her comparators were rated as equivalent

[409] At paras 55-56, 92-93, 95.
[410] At paras 105-107.
[411] [2020] EWCA Civ 1075.

but it rejected the respondent's material factor defence. The respondent appealed to the Employment Appeal Tribunal against the decision of the Employment Tribunal on the equal pay issue (the material factor defence). The Employment Appeal Tribunal allowed the appeal. The appellant claimant appealed the Employment Appeal Tribunal's decision relating to the equal pay issue to the Court of Appeal. The appellant claimant was promoted to the role of Group Chief HR Officer during February 2014 and her base salary was £215,000 per annum. After extensive discussions with the Group Remuneration and Appointments Committee an agreement was reached to the effect that the salary for the appellant claimant would be increased to £400,000 per annum which showed that the appellant was new to the role of being an executive. The appellant's salary was however later increased to £425,000 per annum. The relevant comparator to which the market forces defence related to was Mr Asher who was employed as the Group General Counsel. The appellant and Mr Asher were both executives placed in the tier 4 band which ranged from £350,000 – £550,000 per annum. The respondent argued that Mr Asher's salary had been set at a high market rate for general counsel, which was higher than the market rate for the appellant's post, taking into account his legal experience of 30 years which included working as a senior partner in Allen & Overy.[412]

The Court of Appeal stated that the vital question was whether the material factor defence relating to market forces which was found by the Employment Tribunal to explain the pay differential between the appellant claimant and Mr Asher during February 2014 continued to explain the pay differential in February 2015. It held that there was no finding made that the market forces defence which explained why a commercial lawyer of Mr Asher's experience had to be paid at a higher rate in order to be attracted to work for the respondent employer had at any point ceased. In a separate concurring judgment, Lord Justice Males, stated that if the Employment Tribunal had asked itself what the reason for the pay differential between the appellant claimant and Mr Asher was during February 2015 then the only possible answer would be that it was due to market forces. Lord Justice Males further stated that when executive salaries were set during February 2014 Mr Asher's salary was set at the top rate for general counsel and this placing was not sex

[412] At paras 1-11.

tainted. His Lordship stated that there was nothing which suggested that the reason why Mr Asher was paid at the top market rate had ceased to operate one year later and the reason was thus not historical. The appellant's appeal was accordingly dismissed.[413]

The following guidance can be extracted from the above case law regarding the grounds of justification:

(a) It is submitted that the listing of the factor of market value in a particular job classification including the existence of a shortage of relevant skill (market forces) operating as a ground of justification to an equal pay claim in regulation 7(1)(f) of the Employment Equity Regulations is strengthened by its use in the United Kingdom equal pay law;

(b) It is contrary to equal pay law to allow an employer to justify a pay differential by simply stating that it paid a male comparator a higher wage because he asked for it or it paid a female claimant a lesser wage because she was willing to work for less.[414] It is submitted that this is important guidance which should specifically be mentioned under regulation 7 of the Employment Equity Regulations;

(c) The reducing of a female's wages to a rate below that of a comparator male employees wages in order to compete for a tender with rival tenderers does not amount to a material factor defence based on market forces.[415] This provides important guidance and should accordingly be mentioned under regulation 7 of the Employment Equity Regulations;

(d) It is just and desirable to allow reliance on a market forces defence to be fully ventilated in circumstances where it can properly be advanced to provide an explanation for either the whole or part of the pay differential.[416] This provides valuable guidance which should be mentioned under regulation 7 of the Employment Equity Regulations;

---

[413] At paras 11, 42, 50, 62, 64-65.
[414] See *Fletcher v Clay Cross (Quarry Services) Ltd* [1978] IRLR 361 (CA) discussed above.
[415] See *Ratcliffe & Others v North Yorkshire County Council* [1995] IRLR 439 (HL) discussed above.
[416] See *Cumbria County Council v Dow & Others* [2008] IRLR 91 (EAT) discussed above.

(e) It is the responsibility of the employer to prove that the market demanded the higher pay and it is not the responsibility of the claimant employee to prove that the comparator's pay was too high.[417] This should be mentioned under regulation 7 of the Employment Equity Regulations; and

(f) Unless a market forces defence can be shown to have ceased operating in the sense of being historical it continues to operate as a material factor defence.[418] This should likewise be mentioned under regulation 7 of the Employment Equity Regulations.

6.1.5 Red-Circling

In *Snoxell & Davies v Vauxhall Motors Ltd*[419] the appeal before the Employment Appeal Tribunal was concerned with the correct approach to the practice known as red-circling. The Employment Appeal Tribunal stated that it might be necessary at times to protect the wages of an employee or employees who were transferred from a higher paying job to a worse paying job as a result of the higher paying job no longer being available. It further stated that it is customary to circle these employees in red on a wage table in order to show that their pay is protected and this gives rise to the phrase red-circling.[420] The Employment Appeal Tribunal stated that it is important to ascertain whether the red-circling in question is of a permanent nature, a temporary nature, whether it is being phased out and if the origin of the red-circling is rooted in sex discrimination. It is further important to ascertain whether the group of employees who are red-circled constitute a closed group of employees and whether the red-circling has been negotiated at the workplace with the employees' views being taken into account. The Employment Appeal Tribunal noted that the red-circling of the male comparator group did not have a set time limit and it did not have a phasing out provision and as a result these male inspectors would continue to enjoy the higher rate of pay until they retire, die or are transferred out

---

417 See *Cumbria County Council v Dow & Others* [2008] IRLR 91 (EAT) discussed above.
418 See *Walker v Co-operative Group Limited &* Another [2020] EWCA Civ 1075 discussed above.
419 [1977] IRLR 123 (EAT). The EAT in the same case also dealt with another appeal of *Charles Early & Marriott (Witney) Ltd v Smith & Ball* but the discussion here will deal primarily with the appeal in *Snoxell*.
420 At paras 2, 4.

of the red circle. The appellant claimants argued that they would also have been paid the higher rate enjoyed by the male comparator group had they not been women. The respondent employer did not properly challenge this argument and the Employment Appeal Tribunal found that it could be said that the appellant claimants would have also been in the red-circle had they not been women.[421]

The Employment Appeal Tribunal stated that the solution to the issue depended on whether in analysing the history relating to the differential treatment between the appellant claimants and the male comparator group one should stop at the point when the red-circle was formed or whether one should look further back to ascertain the reason why the appellant claimants were not within the red-circle.[422] It stated that an employer cannot be permitted to successfully establish under section 1(3) of the Equal Pay Act that the pay differential between the equal pay claimant and the comparator is genuinely due to a material difference in circumstances where past sex discrimination has contributed to the pay differential. It stated that such an explanation was clearly inconsistent with the Equal Pay Act. It then held that the respondent employer had failed to prove its genuine material factor defence based on red-circling and the appellant claimants must therefore succeed.[423]

The Employment Appeal Tribunal held that “there is no such thing as a ‘red circle answer’ to a claim” because the pay differential must be explained by reference to section 1(3) of the Equal Pay Act. It stated that the fact that the male comparators have been red-circled is an important factor but it is also important to know all the circumstances. It stated that it is essential to examine the origin of the red-circle and to ascertain whether in other aspects the red-circling is non-discriminatory and to also ascertain whether the employer has discharged its defence under section 1(3) of the Equal Pay Act.[424] The Employment Appeal Tribunal also made the following comment:

---

[421] At paras 9, 24-26.
[422] At para 35.
[423] At paras 35-36.
[424] At para 43.

> "… it seems to us to be desirable where possible for red circles to be phased out and eliminated, for they are bound to give rise to confusion and misunderstanding. One of the difficulties seems to be that although understood and accepted as fair when first introduced, with the passage of time memory dims, the reason for their institution is forgotten, and they are seen as examples of discrimination."[425]

In *Outlook Supplies Ltd v Parry*[426] the Employment Appeal Tribunal remarked that the Industrial Tribunal did not have the benefit of the Employment Appeal Tribunal's decision in *Snoxell & Davies v Vauxhall Motors Ltd*[427] when it made its decision. The Employment Appeal Tribunal thought it helpful to amplify on its decision in *Snoxell*. It stated that a genuine material factor defence cannot be decided by simply attaching a label of red-circling to it because it is essential to consider all the circumstances of the case. It stated that the red-circling of wages which is done for good reasons causes a lot of misunderstanding which intensifies with the length of time and it is thus desirable to make arrangements to phase out the red-circling. It further stated that it is desirable to have joint consultation when a practice of red-circling is introduced and where it is sought to be continued. The Employment Appeal Tribunal also stated that when deciding whether an employer has proved a genuine material factor defence based on red-circling it is relevant for the Industrial Tribunal to take into account the time that has expired since the red-circling was first introduced and whether the employer by continuing with the red-circling has acted in line with good industrial practice. It stated that the decision of an Industrial Tribunal relating to a genuine material factor defence under section 1(3) of the Equal Pay Act is one to be based on fact taking all the relevant circumstances into account.[428]

---

[425] At para 42. The EAT held the following at para 41: "… the correct approach for an Industrial Tribunal, confronted with a claim by an employer under s.1(3) that a variation is genuinely due to such a material difference, is to elicit and analyse *all* the circumstances of the particular case; and it is unwise and likely to lead to error merely to say that a particular case is a 'red circle' case. In practice, most cases involve several features, and it is probably only rarely that a 'red circle' situation arises in its purist form. But, supposing that it does, and that there is a case where it can be demonstrated that there is a group of employees who have had their wages protected for causes neither directly nor indirectly due to a difference of sex, and assuming that the male and female employees doing the same work who are without the red circle are treated alike, we see no reason why the employers should not succeed in their answer. In such circumstances it would seem to us that the variation in pay is genuinely due to a material difference (other than the difference of sex) between the woman's case and the man's case."

[426] [1978] IRLR 12 (EAT).

[427] [1977] IRLR 123 (EAT).

[428] At paras 7, 10-11.

The Employment Appeal Tribunal stated that in *Snoxell* it may have treated a question of fact as a question of law when it implied that the continuation of red-circling indefinitely could not constitute a general material factor defence. It stated that it is for the Industrial Tribunal to determine whether it is satisfied that the employer has proved its genuine material factor defence under section 1(3) of the Equal Pay Act. It further stated that if there is a long period of red-circling which goes against good industrial practice then this may in all the circumstances lead to a doubt as to whether the employer has been able to prove its genuine material factor defence. It further stated that the length of time that the red-circling was in operation was short and in the absence of any other circumstances it could not agree with the Industrial Tribunal's finding on this point. The Employment Appeal Tribunal, however, found that it had to allow the appeal and remit the matter to a differently constituted Industrial Tribunal to rehear the matter as the respondent claimant's version was not heard by the Industrial Tribunal below.[429]

In *United Biscuits Ltd v Young*[430] the Employment Appeal Tribunal stated that the consideration to be applied in equal pay cases involving a genuine material factor defence based on red-circling was set out in the case of *Snoxell*. It held that it stated in *Snoxell* that where there is a group of employees whose wages have been red-circled and the reasons therefore were not sex tainted in circumstances where there were male and female employees who were outside the red-circle and who were engaged in the same work and were treated alike then an employer may be able to succeed with a genuine material factor defence based on red-circling for the pay differential. The Employment Appeal Tribunal stated that it will furthermore not make any difference if the red-circling continued on an indefinite basis.[431] It held that it was of the view that where an employer wishes to prove a genuine material factor defence by relying on red-circling then he must prove this in relation to every employee who it claims is within the red-circle. It held that the employer should further prove that the higher rate of pay of the comparator employee was based on considerations unrelated to sex at the time when the employee was allowed

[429] At paras 1, 11-12.
[430] [1978] IRLR 15 (EAT).
[431] At para 4.

into the red-circle. The Employment Appeal Tribunal stated that there are cases where an employer can place reliance on a presumption that those considerations which apply to employees within the red-circle also applied to later employees who were allowed into the red-circle.[432]

In *Methven & Musiolik v Cow Industrial Polymers Ltd*[433] the Court of Appeal stated that it agreed with the respondent's argument relating to section 1(3) of the Equal Pay Act and the only issue before it was whether the respondent employer had shown that the pay differential was due to the comparator's age and infirmity. The Court of Appeal remarked that this issue was unnecessarily complicated by the use of the concepts of red-circling or protected wages which have sought to be viewed as propositions of law whereas they are factual concepts which denote no more than a short description of a certain state of affairs. The Court of Appeal noted that the Industrial Tribunal was satisfied that the respondent employer red-circled the wages of the comparator as well as his predecessors in the post of press shop clerk because of their infirmity and old age and it was entitled to do so. It further noted that the Industrial Tribunal found that the issue would have been different if the respondent employer had awarded the comparator and his predecessors an excessive wage and it further found that the respondent employer was entitled to remunerate the comparator at a higher wage than the appellant claimants. The Court of Appeal found that it was clear that the Industrial Tribunal correctly considered the matter under section 1(3) of the Equal Pay Act.[434]

In *Redcar & Cleveland Borough Council v Bainbridge & Others*[435] the Court of Appeal stated that Redcar was aware that the bonuses paid to the male comparators which gave rise to the historical discrimination and which were abolished was protected in terms of the pay protection scheme and this meant that the female claimants would not be included in the pay protection scheme because they never enjoyed the bonuses previously in

[432] At para 7.
[433] [1980] IRLR 289 (CA).
[434] At paras 12, 18-20.
[435] The rest of the parties are: *Surtees & Others v Middlesbrough Borough Council*; *Redcar & Cleveland Borough Council v Bainbridge & Others* (No.2) [2008] IRLR 776 (CA).

circumstances where they should have and they would again suffer unfair pay discrimination. It found that the decisions of both the Employment Tribunal and the Employment Appeal Tribunal to reject Redcar's reliance on the pay protection scheme as a ground of justification was correct. The Court of Appeal finally dismissed Redcar's appeal.[436] With regard to the appeal in the Middlesbrough matter relating to the Middlesbrough pay protection scheme, the Court of Appeal stated the following, *inter alia*. The Court of Appeal stated that whether an employer's pay protection scheme unfairly discriminates against female employees is a matter to be dealt with objectively as a question of fact. It further stated that matters relating to whether or not the employer knew that it was discriminating against the female claimant employees was irrelevant. It however stated that issues of knowledge, intention and motive are relevant at the justification stage but are irrelevant at the stage of determining whether the pay protection scheme was *prima facie* discriminatory.[437]

In *Fearnon & Others v Smurfit Corrugated Cases (Lurgan) Ltd*[438] the Court of Appeal stated that the employer bears the onus of proving that there is a genuine material factor which explains the pay differential and which is not sex tainted. It noted that the Industrial Tribunal relied on *Snoxell* for its finding that the elapsing of time from when the red-circling was implemented for the comparator's salary did not affect the red-circling continuing to operate as a genuine material factor defence for the pay differential which was not sex tainted. The Court of Appeal stated that it disagreed with the Industrial Tribunal's reading of *Snoxell* to the extent that the effluxion of time relating to a pay differential which continues due to red-circling is irrelevant to the question as to whether red-circling can continue to operate as a genuine material factor defence. The Court of Appeal held that in order for an initial genuine material factor defence to qualify as a concurrent genuine material factor defence to an equal pay claim, an examination of the defence must be made at the time when the pay differential is being challenged. It held that if this is not the case then it would open the door for unscrupulous employers to continue

[436] At paras 136-137, 140.
[437] At paras 136-137, 140, 158.
[438] [2009] IRLR 132 (NICA).

implementing a pay differential in circumstances where the initial reason for the pay differential has ceased. The Court of Appeal held that the Industrial Tribunal was under the incorrect view by requiring the appellant claimants to prove that the red-circling, which was a genuine material factor defence untainted by sex when it was implemented, had since then lost its classification as a genuine material factor defence. The Court of Appeal further held that the onus of proving a genuine material factor defence rests on the employer at all times who must prove that the genuine material factor defence continues to exist.[439]

The Court of Appeal held that it is incorrect to assume that the indefinite continuation of red-circling is justified solely because the implementation thereof was justified and the reasons for its continued application is important to justify its continued application. It stated that the following important aspects were not considered by the Industrial Tribunal: (a) why the respondent employer was of the view that the red-circling of the comparator's pay should continue; (b) there was no information as to why the continued application of the red-circling was in line with good industrial practice; and (c) there was no mention of whether the red-circling could be phased out or why the appellant claimants wages could not be increased to that of the comparator. The Court of Appeal held that the Industrial Tribunal simply accepted the employer's *ipse dixit* unsupported by evidence that the red-circling implementing reasons continued to apply and this approach was incorrect in law. The Court of Appeal in allowing the appeal stated that the Industrial Tribunal was not allowed in law to find that the genuine material factor defence of red-circling was not limited in time.[440]

The following guidance (principles) can be extracted from the above cases relating to the grounds of justification:

---

[439] At paras 10-13.

[440] At paras 15-17. See also *Bury Metropolitan Borough Council v Hamilton & Others* [2011] IRLR 358 (EAT) and *Glasgow City Council v Unison Claimants & Others* [2017] IRLR 739 (CS) which dealt with red-circling.

(a) It might be necessary at times to protect the wages of an employee or employees who are transferred from a higher paying job to a worse paying job as a result of the higher paying job no longer being available. It is customary to circle these employees in red on a wage table in order to show that their pay is protected and this gives rise to the phrase red-circling;[441]

(b) The correct approach to the practice known as red-circling is as follows: (i) It is important to ascertain whether the red-circling in question is of a permanent nature, a temporary nature, whether it is being phased out and if the origin of the red-circling is rooted in sex discrimination; (ii) It is further important to ascertain whether the group of employees who are red-circled constitute a closed group of employees and whether the red-circling has been negotiated at the workplace with the employees' views being taken into account; (iii) An employer cannot be permitted to successfully prove that a pay differential between the equal pay claimant and the comparator is genuinely due to a material difference in circumstances where past sex discrimination has contributed to the pay differential;[442] (iv) When deciding whether an employer has proved a material factor defence based on red-circling it is relevant for the Industrial Tribunal to take into account the time that has expired since the red-circling was first introduced and whether the employer by continuing with the red-circling has acted in line with good industrial practice; (v) If there is a long period of red-circling which goes against good industrial practice then this may in all the circumstances lead to a doubt as to whether the employer has been able to prove its material factor defence;[443] (vi) An employer who wishes to prove a material factor defence by relying on red-circling must prove this in relation to every employee who it claims is within the red circle. Such employer should further prove that the higher rate of pay of the comparator employee was based on considerations unrelated to sex at the time when the employee was allowed into the red-circle. Where appropriate an employer can place reliance on a presumption that those considerations which apply to employees within the red-circle also applied to later employees who were allowed into

---

441 *Outlook Supplies Ltd v Parry* [1978] IRLR 12 (EAT) as discussed above.
442 *Snoxell & Davies v Vauxhall Motors* Ltd [1977] IRLR 123 (EAT) as discussed above.
443 *Outlook Supplies Ltd v Parry* [1978] IRLR 12 (EAT) as discussed above.

the red-circle;[444] (vii) Whether an employer's pay protection scheme unfairly discriminates against female employees is a matter to be dealt with objectively as a question of fact; (viii) Whether or not the employer knew that it was discriminating against the female claimant employees was irrelevant. Issues of knowledge, intention and motive are relevant at the justification stage but are irrelevant at the stage of determining whether the pay protection scheme is *prima facie* discriminatory;[445] (ix) In order for an initial material factor defence to qualify as a concurrent material factor defence to an equal pay claim, an examination of the defence must be made at the time when the pay differential is being challenged. If this is not the case, then it will open the door for unscrupulous employers to continue implementing a pay differential in circumstances where the initial reason for the pay differential has ceased; (x) The onus of proving a material factor defence rests on the employer at all times who must prove that it continues to exist. It is incorrect to assume that the indefinite continuation of red-circling is justified solely because the implementation thereof was justified and the reasons for its continued application is important to justify its continued application;[446] and

(c) The red-circling of wages which is done for good reasons causes a lot of misunderstanding which intensifies with the length of time and it is thus desirable to make arrangements to phase out the red-circling. It is desirable to have joint consultation when a practice of red-circling is introduced and where it is sought to be continued.[447]

Based on the above, it is submitted that the listing of the factor of an employee being demoted as a result of organisational restructuring of for any other legitimate reason without a pay reduction and the fixing of such employee's pay at this level until the remuneration of other employees in the same job category reaches the same level, commonly referred to as red-circling, operating as a ground of justification to an equal pay claim in regulation 7(1)(d) of the Employment Equity Regulations is strengthened by

---

444 *United Biscuits Ltd v Young* [1978] IRLR 15 (EAT) as discussed above.

445 *Redcar & Cleveland Borough Council v Bainbridge & Others* (No.2) [2008] IRLR 776 (CA) discussed above.

446 *Fearnon & Others v Smurfit Corrugated Cases (Lurgan) Ltd* [2009] IRLR 132 (NICA) discussed above.

447 *Snoxell & Davies v Vauxhall Motors* Ltd [1977] IRLR 123 (EAT) and *Outlook Supplies Ltd v Parry* [1978] IRLR 12 (EAT) as discussed above.

its use in the United Kingdom equal pay law. It is further submitted that the principles set out in (a)-(c) above should be mentioned under regulation 7 of the Employment Equity Regulations in relation to the factor of red-circling. These principles are sorely needed under regulation 7 as South African law has not dealt with the defence of red-circling in relation to an equal pay claim and there are no principles that can be extracted from the South African equal pay law in this regard.

6.1.6 Union Hostility/Intransigence

In *Coventry City Council v Nicholls*[448] one of the issues before the Employment Appeal Tribunal was whether the appellant employer could rely on union hostility/intransigence as a genuine material factor to explain unequal pay. The appellant argued that had the unions been cooperative regarding the accomplishing of a single status pay arrangement then any inequality resultant from the differing pay arrangements would have been corrected at an earlier stage. The appellant argued that notwithstanding that the pay difference had originally been based on sex the union hostility/intransigence to reaching an agreement which would correct this constituted an intervening factor which overtook the pay discrimination based on sex. The Employment Tribunal rejected this argument by the appellant as it found it wholly unsustainable due to it not being capable in law of falling within the ambit of a genuine material factor defence. The Employment Appeal Tribunal agreed with the Employment Tribunal that the type of argument relied on by the employer as a defence to unequal pay was not sustainable and there was no place for such an argument to constitute a material factor defence in the equal pay law jurisprudence. The Employment Appeal Tribunal held that in 1999 female employees of the appellant were paid less because of their sex and this reason was not overtaken by the union's hostility to reach an agreement which would correct the unequal pay. It, however, stated that while the union's hostility could not amount to the reason causing the unequal pay the high-water mark for it was that it could explain why the appellant had not corrected the pay discrimination earlier. It held that union hostility/intransigence did not replace the original

[448] [2009] IRLR 345 (EAT).

explanation for the pay inequality which was discrimination based on sex. The Employment Appeal Tribunal held that the union's intransigence in the matter could not provide an independent reason to explain the pay inequality but it rather amounted to an explanation regarding why the pay discrimination continued and had not been corrected.[449]

The Employment Appeal Tribunal stated that the appellant was ultimately responsible for correcting the unequal pay and did not need the agreement of the union to do so and this was in fact evidenced by the fact that it unilaterally corrected the unequal pay in 2005. It remarked that it likewise doubted whether the threat of industrial action could provide a ground of defence to not correct unequal pay in circumstances where the unequal pay was caused by sex discrimination. The Employment Appeal Tribunal held that union hostility/intransigence is not capable in law of providing a new cause for the unequal pay in circumstances where the cause of the unequal pay is rooted in sex discrimination. It further held that the appellant by relying on union hostility as a genuine material factor defence to the unequal pay was in effect relying on its own omission to correct the pay inequality unilaterally as it had the power in law to do so. The Employment Appeal Tribunal held that if this type of argument was allowed to constitute a material factor defence then it would undermine the equal pay laws as employers could simply avoid addressing and correcting unequal pay by "hiding behind the unions' skirts". The Employment Appeal Tribunal in dismissing the appeal stated that the Employment Tribunal had accurately captured the true nature of this type of argument when it stated that an explanation by an employer as to why it has not corrected pay inequality does not deal with whether the pay differential is based on sex but rather seeks to explain why the pay discrimination has not been corrected and thus amounts to a plea in mitigation and no more.[450]

The non-listing of union hostility/intransigence (good industrial relations) in regulation 7 of the Employment Equity Regulations and its absence in South African case law is

[449] At paras 15-17, 25-29.
[450] At paras 30-33, 35-36.

strengthened by this case which in essence states that the reliance on union hostility/ intransigence (good industrial relations) by an employer as a defence to unequal pay is not sustainable and there is no place for such argument to constitute a material factor defence in the equal pay law jurisprudence.

6.1.7 Collective Agreements

6.1.7.1 Single Collective Agreement

In *British Airways Plc v Grundy (No.2)*[451] the Court of Appeal noted that the respondent equal pay claimant belonged to a group of predominantly female employee flight attendants who were known as support cabin crew whose terms and conditions were regulated by a collective agreement. The Industrial Tribunal was of the view that the pay practice of not extending increments to the support cabin crew operated to the detriment of a larger proportion of female employees than male employees. The Industrial Tribunal thus turned to whether the appellant employer could justify the pay differential. The appellant employer relied on the collective bargaining process and the incremental scale for its material factor defence. The appellant argued that the terms and conditions relating to the support cabin crew was agreed to by collective bargaining and it could not be amended without further negotiations and a consequent collective agreement with the union. The Industrial Tribunal held that the mere fact that a collective agreement was agreed to by the appellant employer and trade union cannot in itself provide objective justification for the pay differential nor can the fact that it impacts on the employment relations justify such pay differential. It found that the aim of the collective bargaining process was to provide terms and conditions of employment to the support cabin crew which were less favourable than that enjoyed by their full-time comparators which was in the form of a lack of increments for the support cabin crew. It thus found that the non-extension of increments to the respondent claimant amounted to unfair pay discrimination.[452]

[451] [2008] IRLR 815 (CA).
[452] At para 2.

The appellant employer argued that the Industrial Tribunal had erred in its assessment of the genuine material factor defence to the equal pay claim because it had omitted in its assessment that the pay differential was brought about by a collective agreement. The Court of Appeal found that the Industrial Tribunal did not commit an error in its assessment as it correctly did not allow itself to be influenced by the fact that the pay differential had its origin in a collective agreement. It then remarked that there may be several reasons why, in the negotiations of collective bargaining, one group of employees are to be treated less favourably than another, but the Equal Pay Act requires collective bargaining negotiators to pay attention to the fact that pay differentials can have a disparate impact on employees who belong to one gender. The Court of Appeal then further remarked that if the collective bargaining negotiators omit to pay attention to this then where a group of employees' equal pay rights are breached then the negotiators omission/oversight will not be capable of objectively justifying the pay differential by relying on the resultant collective agreement. The Court of Appeal agreed with the Employment Appeal Tribunal's finding that the collective agreement was intended to afford the support cabin crew less favourable terms and conditions of employment and as such it could not successfully be relied on as a material factor defence. It consequently dismissed the appellant employer's appeal on its ground of justification.[453]

The following principles can be extracted from the above case as far as the grounds of justification are concerned:

(a) It is submitted that the non-listing of collective agreements in regulation 7 of the Employment Equity Regulations is strengthened by its rejection as a ground of justification to pay discrimination in the United Kingdom equal pay law;

(b) An Employment Tribunal should not allow itself to be influenced by the fact that the pay differential in question has its origin in a collective agreement; and

[453] At paras 7, 11, 17-20.

(c) The Equal Pay Act requires collective bargaining negotiators to pay attention to the fact that pay differentials can have a disparate impact on employees who belong to one gender. If the collective bargaining negotiators omit to pay attention to this then where a group of employees' equal pay rights are breached then the negotiators omission/oversight will not be capable of objectively justifying the pay differential by relying on the resultant collective agreement.

6.1.7.2 Separate Collective Agreements

In *British Coal Corporation v Smith & Others*[454] the Industrial Tribunal had to decide whether the appellant council was capable of showing a genuine material factor defence in terms of section 1(3) of the Equal Pay Act by relying on separate wage structures. It stated that the mere presence of separate pay structures was not capable in and of itself of constituting a genuine material factor defence because it still had to be determined whether the separate pay structures arose due to a difference in sex. The Industrial Tribunal found that the appellant corporation had not succeeded in proving a genuine material factor defence by relying on separate wage structures. The Employment Appeal Tribunal, however, held that there was no sign that the pay differential was sex tainted or that there was pay discrimination based on sex. The appellant corporation then launched an appeal to the Court of Appeal. The Court of Appeal found that whilst, historically, the pay differentials were due to separate bargaining processes which were not sex tainted, there still remained the question regarding whether or not at the relevant date the appellant corporation had established that the pay differential was justified objectively on a material factor which was not sex tainted. The Court of Appeal then found that the Industrial Tribunal did not err in law by finding that the appellant corporation had not successfully proved the genuine material factor defence.[455]

The appellant corporation then appealed the matter to the House of Lords. The appellant challenged the Court of Appeal's finding that it failed to prove the genuine material factor

---

[454] [1996] IRLR 404 (HL).
[455] At paras 8, 16, 20, 22, 27-28, 31.

defence by failing to prove that the pay differential between the respondent claimants and the chosen comparators which originated from separate bargaining structures was at the relevant date not due to a difference in sex. The House of Lords was of the view that the determination as to whether the appellant corporation had proved its genuine material factor defence was an issue of fact for the Tribunal to decide. The House of Lords stated that it agreed with the Industrial Tribunal's finding that the mere existence of different pay structures as well as different negotiating machinery were not in and of itself capable of constituting a genuine material factor defence for the pay differential.[456]

In *British Road Services Ltd v Loughran & Others*[457] the appellant launched an appeal before the Northern Ireland Court of Appeal ("NICA") against a decision of the Industrial Tribunal. The respondent claimants and their chosen comparators terms and conditions of employment including their pay was determined by separate collective bargaining processes which culminated in the respondents being regulated by an agreement which was called the AMC agreement whereas the comparators were regulated by an agreement called the Mallusk agreement. The appellant employer sought to rely on the separate collective agreements as a genuine material factor defence to the respondents equal pay claims. The Industrial Tribunal held that the appellant employer had failed to establish the genuine material factor defence and the appeal before the NICA only related to the reliance by the appellant employer on the separate collective agreements as a genuine material factor defence to the respondents equal pay claims. The appellant employer argued that it had succeeded in proving its genuine material factor through the separate collective agreements.[458]

The NICA stated that it was of the view that the European Court of Justice decision in *Enderby*[459] does not allow for an employer to defeat a *prima facie* case of pay discrimination by merely relying on separate pay structures where the claimants group comprised of a significant number of females but not exclusively or almost exclusively of

---

456 At paras 56-57, 69.
457 [1997] IRLR 92 (NICA).
458 At paras 1, 8-10, 15, 17-18.
459 *Enderby v Frenchay Health Authority & Secretary of State for Health* C-127/92 [1993] IRLR 591 (ECJ).

females. It held that an employer should not succeed with its reliance on separate pay structures in circumstances where the claimants group consists of a significant number of female employees. The NICA held that it was clear from *Enderby* that the existence of two separate collective agreements which are on their own not discriminatory will not on its own prevent a finding of *prima facie* pay discrimination and this finding is important in order to prevent employers from circumventing the principle of equal pay. The NICA consequently dismissed the appeal.[460]

In *Redcar & Cleveland Borough Council v Bainbridge & Others*[461] the Court of Appeal stated that the separate collective bargaining agreements relating to different jobs can operate as a ground of justification to an equal pay claim if the reason for the pay differential is the separate collective bargaining and not the difference of sex. It further held that the pay differences resulting from separate collective bargaining may be unfair but may not be due to pay discrimination based on sex and a pay differential which is due to separate collective bargaining in these circumstances can be a complete defence to an equal pay claim provided that it is not sex tainted. The equal pay claimants claimed that they received unequal pay to that of their chosen comparators in the form of bonus payments which were enjoyed by their comparators but not by them. The employer (Middlesbrough) argued that the difference in pay relating to the bonus payments was not due to any discrimination based on sex but was due to separate collective bargaining which was undertaken by different collective bargaining bodies and which resulted in separate collective agreements. The Employment Tribunal rejected the defence of separate collective bargaining in order to explain the pay differential as it found that the separate collective bargaining was sex tainted. A further appeal to the Employment Appeal Tribunal was unsuccessful as it found that the Employment Tribunal was correct in finding that the employer was not able to explain the pay differential by non-discriminatory collective bargaining. The Court of Appeal noted that it was common cause

---

[460] At paras 63, 69, 75, 80. McCollum J dissenting from the majority judgment found the following at para 44: “In 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.”

[461] The rest of the parties are: *Surtees & Others v Middlesbrough Borough Council*; *Redcar & Cleveland Borough Council v Bainbridge & Others* (No.2) [2008] IRLR 776 (CA).

that in appropriate circumstances separate collective bargaining agreements could amount to a complete defence to an equal pay claim to explain the pay differential provided that the agreements were not sex tainted. It stated that where the claimants group and the comparators group consist of similar proportions of male and female employees and one group (comparators group) earns more than the other (claimants group) then the separate collective bargaining agreements could be a complete defence to an equal pay claim by the claimant group. It further stated that where on the other hand there is a significant difference in the proportion of male and female employees between the claimant group and that of the comparator group as was the case in *Enderby* then that difference in gender proportion is evidence which the Employment Tribunal can use to draw an inference that the separate collective bargaining agreements were sex tainted unless the employer can put forth a different explanation. The Court of Appeal then stated that separate collective bargaining agreements cannot in and of itself disprove unfair pay discrimination based on sex.[462]

The Court of Appeal noted that the Employment Appeal Tribunal found that the employer had in the present case not been able to prove that the pay (bonus) differential was not due to sex discrimination but was due to separate collective bargaining agreements in circumstances where the comparator group who received the bonuses was made up of predominantly male employees. The Court of Appeal held that the Employment Tribunal was entitled in law to make the finding based on the evidence before it that the pay differential was not due to the separate collective bargaining processes but was rather due to the difference of sex. It consequently dismissed the employer's appeal relating to the separate collective bargaining agreements operating as a genuine material factor defence to the equal pay claims.[463]

It should be noted for purposes of South African law reform that the mere existence of different pay structures as well as different negotiating machinery are not in and of itself

[462] At paras 181, 186, 188, 191, 193, 197-198.
[463] At paras 203, 210-212.

capable of constituting a material factor defence for the pay differential.[464] Also, the existence of two separate collective agreements which are on their own not discriminatory will not on its own prevent a finding of *prima facie* pay discrimination and this finding is important in order to prevent employers from circumventing the principle of equal pay.[465]

The nub of these principles is that an employer is not allowed to rely on separate collective bargaining processes as a ground of justification to unequal pay. The international labour law regarding the issue of separate collective bargaining agreements as a ground of justification to unequal pay as discussed in paragraphs 6.7 and 9.6 of Chapter 3 of this thesis is essentially the same as the position in the United Kingdom equal pay law on this score. This being the case the research question posed in (d) under paragraph 6 above can now be squarely answered here. It is submitted that the non-listing of separate collective bargaining agreements in regulation 7 of the Employment Equity Regulations is strengthened by its rejection as a ground of justification to pay discrimination in both international labour law and the United Kingdom equal pay law.

6.1.8 Grading Scheme/Job Evaluation Scheme

In *National Vulcan Engineering Insurance Group Ltd v Wade*[466] the respondent employee

---

[464] See *British Coal Corporation v Smith & Others* [1996] IRLR 404 (HL) discussed above. Ebrahim S "Can the outcome of collective bargaining (collective agreements) justify an equal pay claim in terms of the EEA?" *THRHR* 2020(83) 514 states the following at 526: "An employer will not succeed in relying on collective agreements in and of itself as a ground of justification where it contains unfair discrimination. This applies to both direct and indirect unfair discrimination. The courts will set aside the infringing provision/s."

[465] See *British Road Services Ltd v Loughran & Others* [1997] IRLR 92 (NICA) and *Redcar & Cleveland Borough Council v Bainbridge & Others* (No.2) [2008] IRLR 776 (CA) discussed above. Ebrahim S "Can the outcome of collective bargaining (collective agreements) justify an equal pay claim in terms of the EEA?" *THRHR* 2020(83) 514 states the following at 526-527: "While it is generally accepted that the courts will not easily intervene in collective agreements as they are the fruits of collective bargaining which is the prime method to resolve labour disputes, the courts will not hesitate to intervene where the collective agreements contain provisions which amount to unfair discrimination … Employers (including trade unions) will thus not be able to hide and veil unfair discrimination relating to pay in a collective agreement (whether directly or indirectly) hoping that the fact that it is contained in a collective agreement will be sufficient justification to an equal pay claim as the courts will not hesitate to pierce the proverbial "collective agreement veil".

[466] [1978] ICR 800 (CA).

was employed by the appellant employer as a clerk and she launched an equal pay claim before the Industrial Tribunal claiming equal pay with other male clerks who all performed the same work but who were graded higher than her in terms of a job grading scheme and consequently received higher pay. The Industrial Tribunal found in her favour and an appeal to the Employment Appeal Tribunal by the employer against this decision was dismissed. The appellant then appealed the matter to the Court of Appeal.[467] In the Court of Appeal all three Lords agreed that the appeal should succeed but they also made certain remarks which are instructive to a situation where an employer relies on a grading scheme as a material factor defence in order to prove that the pay differential is not based on sex. Only the remarks of Lord Denning with which both Lords Ormrod and Geoffrey agreed will be discussed. Lord Denning held the following. He stated that it was clear from the evidence that the appellant had in place a job grading scheme which it operated in a fair manner relevant to the employees experience and skills and not according to the sex of the employees. He further stated that a grading scheme which operates according to the experience, skill and ability of employees forms an essential part of good business management provided that it is applied in a manner that is fair and genuine regardless of an employee's sex and there is nothing wrong with operating such scheme. His Lordship also stated that such schemes should not be susceptible to a successful challenge under the Equal Pay Act. He held that the burden of proof on an employer under section 1(3) of the Equal Pay Act was not such a heavy burden but required the employer to discharge the burden on a balance of probabilities and it was clear, *in casu*, that the appellant had successfully discharged its burden as it successfully showed that the pay differential between the respondent employee and the male comparator was not due to sex but rather due to skill and capacity. His Lordship remarked that any contrary decision to the one reached would have a serious impact on any business as the consequence of such decision would be that where all the employees were performing the same work then any lower paid female employee would be able to successfully claim equal pay with the highest paid male and *vice versa* with the result that all employees would have to be paid at the rate of the highest paid employee. He further stated that the consequence might also negatively affect this group of employees eventually as they all might be remunerated

[467] At 801B-D.

at the lowest rate so as to prevent anyone from claiming higher pay enjoyed by the other.[468]

The following guidance can be extracted from the above case relating to the grounds of justification. *National Vulcan Engineering Insurance Group Ltd* is an important case because it sets out how a grading scheme (job evaluation scheme) should be approached where it is raised as a defence to an equal pay claim. It makes it clear that a grading scheme (job evaluation scheme) which operates according to the experience, skill and ability of employees forms an essential part of good business management provided that it is applied in a manner that is fair and genuine regardless of an employee's sex and such scheme should not be susceptible to a successful challenge under the Equal Pay Act. The case also cautions that to allow a successful challenge to a genuine and fair grading scheme (job evaluation scheme) which is free from unfair discrimination will have serious deleterious consequences for the employer because any lower paid female employee engaged in the same work would be able to successfully claim equal pay with the highest paid male employee and *vice versa* with the result that all employees would have to be paid at the rate of the highest paid employee.

Regulation 7(1)-(2) of the Employment Equity Regulations does not list a job evaluation scheme as a ground of justification to an equal pay claim. It is submitted that this is a serious omission in regulation 7 for the following reasons: (i) It has been argued under paragraphs 12 read with 13.11 of Chapter 2 of this thesis that an objective job evaluation system as mentioned in the Integration of Employment Equity Code and which is free from unfair discrimination in section 6(4) of the EEA and disproportionate income differentials will assist in complying with the aims of section 27 of the EEA and constitutes a measure which can be taken to progressively reduce unfair pay discrimination and disproportionate income differentials and should specifically be listed as such under section 27(3) of the EEA; (ii) To allow an employee to successfully challenge an objective job evaluation which is free from unfair discrimination in effect removes the status of such job evaluation as being a proactive measure to achieving equal pay and renders the

[468] At 805H-806A, 808A-E.

causes of action in section 6(4) of the EEA and the taking of proactive measures as required by section 27(3) of the EEA internally incoherent which leads to legal uncertainty; and (iii) To allow this will result in employers not wanting to embark on job evaluation schemes which are objective if they are not allowed to rely on it to resist an equal pay claim which has the opposite effect of achieving equal pay by implementing proactive measures. Based on this, it is submitted that an objective job evaluation scheme which is free from unfair discrimination should specifically be listed under regulation 7 of the Employment Equity Regulations as a ground of justification to an equal pay claim and the guidance extracted from *National Vulcan Engineering Insurance Group Ltd* as set out in the immediately preceding paragraph should be stated in regulation 7 in relation to an objective job evaluation scheme.

6.1.9 Higher Spinal Point

In *Secretary of State for Justice v Bowling*[469] the Employment Appeal Tribunal heard an appeal against the Employment Tribunal's decision which upheld the respondent claimant's equal pay claim in part. The respondent claimant commenced employment on 18 August 2008 with the Prison Service in Newport in a Shared Service Centre as a service desk user support team customer service adviser. As is commonplace in the public sector, the terms and conditions of employment applicable to the respondent claimant was determined by a pay scale which contained seven spinal points in terms of which an employee may progress yearly depending on their performance. A new employee was to commence employment on spinal point 1 unless there were special circumstances which justified a departure therefrom. The respondent claimant thus commenced employment on spinal point 1 which attracted a salary of £14,762 per annum. A month after the respondent claimant commenced employment, Mr Paul Thomas (comparator) was employed in the same post as the respondent claimant but he commenced employment on spinal point 3 which attracted a salary of £15,567 per annum. The appellant Secretary of State argued that the reason for placing the comparator on

[469] [2012] IRLR 382 (EAT).

spinal point 3 instead of spinal point 1 was due to his background and experience relating to ten years' experience in IT testing, analysis and support as well as implementing change in a customer service environment and this argument was accepted by the Employment Tribunal. Pay progression was reviewed annually in the Prison Service and both the respondent claimant and the comparator had satisfactory assessments and thus progressed one point up the pay scale.[470]

The respondent claimed that she was doing like work to that of the comparator but she was paid less than him. The appellant Secretary of State conceded that the respondent claimant and the comparator were performing like work but it relied on the genuine material factor defence under section 1(3) of the Equal Pay Act. The appellant Secretary of State stated that the reason for the pay differential was the greater IT skills and experience of the comparator. The Employment Tribunal held in favour of the appellant Secretary of State up to the period of April 2009 before the claimant and the comparator progressed one point up the pay scale and accepted the genuine material factor defence. The Employment Tribunal, however, rejected the appellant Secretary of State's explanation for the pay differential for the period after April 2009 going forward as it found that after April 2009 the claimant was on the same level as the comparator by reason of her training and the fact that they had both achieved the same assessment ratings. It held that after April 2009, the appellant Secretary of State's original reasons for the pay differential ceased to be a genuine material factor. As a result, the Employment Tribunal held that the respondent claimant's equal pay claim for the period after April 2009 succeeded. The appellant Secretary of State argued before the Employment Appeal Tribunal that the Employment Tribunal's reasoning was incorrect because it found that the reason for the comparator commencing employment on spinal point 3 was not sex tainted but this was only applicable to the first year of employment. The appellant Secretary of State argued that this was incorrect because the nature of an incremental pay scale is that if an employee commences employment on a higher spinal point as opposed to his colleagues then his pay will be higher in each year as opposed to his

[470] At paras 1-2.

colleagues until they reach the top of the spinal point. The appellant Secretary of State argued that as the comparator was appointed on spinal point 3 which was two points higher than the respondent claimant then a pay differential was built in and as the original reason for the pay differential was not sex tainted then it follows that the pay differential in later years will also not be sex tainted. The appellant Secretary of State further argued that even if the respondent claimant had in the first year achieved the same level as the comparator with the result that his background and experience disappeared wholly the original reasons for placing him on spinal point 3 still fully explained why he was placed on the spinal point and why he continued to remain ahead of the respondent claimant on the pay scale.[471]

The Employment Appeal Tribunal held that the appellant Secretary of State's arguments were correct. It held that the original reasons for the pay differential during the first year continued to apply in subsequent years and to label the original reasons as historical was misplaced. It stated that all explanations relating to pay differentials are historic in the sense that they occurred in the past. The Employment Appeal Tribunal held that the proper issue to determine is whether the original reasons for the pay differential stopped being a reason to explain the differential thereafter. It remarked, that the Employment Tribunal's finding that the respondent claimant caught up with the comparator, may possibly have undermined the original reasons for the pay differential but it could not undermine the causative effect of the original reasons (the incremental pay scale perpetuated the pay differential). The Employment Appeal Tribunal held that the pay differential between the respondent claimant and the comparator had nothing to do with their sex. It further held that the original reasons for placing the comparator on a higher spinal point thus resulting in a pay differential between him and the respondent claimant was not limited in time because the original reasons resulting in the pay differential continued to exist in the later years. It held that the important question in these type of cases it to ascertain what the reason/s for the continuation of the pay differential was and if such reason/s had nothing to do with sex then that is the end of the matter and there is

[471] At paras 3, 5-6.

nothing further to consider. The Employment Appeal Tribunal finally dismissed the appeal.[472]

Bowling is an important case because it sets out how the reliance on the comparator being placed on a higher spinal point in terms of an incremental pay scale should be approached where it is raised as a defence to an equal pay claim. It makes it clear that the nature of an incremental pay scale is that if an employee commences employment on a higher spinal point as opposed to his colleagues then his pay will be higher in each year as opposed to his colleagues until they reach the top of the spinal point. A pay differential will thus be built in and if the original reason for the pay differential was not sex tainted then it follows that the pay differential in later years will also not be sex tainted.

Regulation 7(1)-(2) of the Employment Equity Regulations does not list the reliance on the comparator being placed on a higher spinal point in terms of an incremental pay scale as a ground of justification to an equal pay claim. It is submitted that this is an omission because the use of an incremental pay scale in order to determine employees' pay is common in the workplace and it not being mentioned presents legal incoherence between its common usage in the workplace and its non-mentioning under regulation 7 of the Employment Equity Regulations. Based on this, it is submitted that the reliance on the comparator being placed on a higher spinal point in terms of an incremental pay scale should specifically be listed under regulation 7 of the Employment Equity Regulations as a ground of justification to an equal pay claim and the guidance extracted from *Bowling* as set in the immediately preceding paragraph should be stated in regulation 7 in relation thereto.

6.1.10 Payment prescribed by law

In *R v Secretary of State for Social Services and Others Ex Parte Clarke and Others*[473] the equal pay claimants launched equal pay proceedings before the Industrial Tribunal

[472] At paras 7-8, 10-11.
[473] [1988] IRLR 22 (HC).

claiming equal pay for work of equal value with that of pharmacists and clinical psychologists as they received less pay than them. The Industrial Tribunal dismissed the equal pay claims on the preliminary point that the Health Authorities who employed the claimants and the comparators were required by law (1974 Regulations and the approval letter written by the Secretary of State) to pay the claimants and the comparators the different wages. The proceedings before the High Court sought to challenge the statutory authority behind the determination of the wages. Regulation 3 of the 1974 Regulations provided that where the Secretary of State has approved wages which have been agreed to by the relevant negotiating body then the authorities (including the Health Authorities) must not pay more or less wages than the wages approved but must pay the exact amount. The Health Authorities stated that the fact that they are obliged by law to pay the employees according to what is prescribed is a material factor. The claimants argued that the mere fact that the salary was imposed by law did not signal the end of the matter as it infringed the equal pay principle. The Industrial Tribunal accepted the argument that the Health Authorities duty to comply with regulation 3 of the 1974 Regulations was on its own without more a material factor which was not related to sex. The Industrial Tribunal further held that if the pay negotiations which were approved by the Secretary of State infringed the equal pay principle then the proper remedy is for the claimants to judicially review the approval and this gave rise to the proceedings before the High Court.[474]

The High Court held that the claimants had succeeded on the ground that section 1(3) of the Equal Pay Act requires the employer to show before the Industrial Tribunal that the pay differential is due to a material factor which is unrelated to sex and this as a general rule requires evidence save in exceptional circumstances. It held further that such evidence was not produced in the case *in casu* and it was not an exceptional case where no evidence was required and was not susceptible of being decided as a preliminary point. The High Court further held that the fact on its own that the Health Authorities are obliged by law to pay the prescribed wage was not enough to constitute a material factor defence unrelated to sex as a finding as to whether or not it could constitute a valid defence could only be decided after a factual enquiry into same. It further held that as the

[474] At paras 2, 10-14.

Industrial Tribunal had not followed the correct procedure, their decision was quashed and the matter was remitted to the Industrial Tribunal to continue the equal pay hearing. The High Court remarked that while section 1(3) of the Equal Pay Act was not happily worded to cater for a scenario where the wage-fixer is not the employer this does not relieve the employer from proving the material factor defence under section 1(3) as in the usual case where the wages are fixed by the employer. It further remarked that in such case the employer should obtain evidence from the wage-fixer regarding the basis on which the wages were fixed.[475]

It is submitted that the non-listing of payments prescribed by law which gives rise to different pay for the claimants and comparators for the same work, substantially the same work or work of equal value in regulation 7 of the Employment Equity Regulations and its absence in South African case law is strengthened by this case which states that the obligation by law to pay the prescribed wage is not enough on its own to constitute a material factor defence unrelated to sex as a finding as to whether or not it can constitute a valid defence can only be decided after a factual enquiry into same.

6.1.11 Genuine Mistake

In *Tyldesley v TML Plastics Ltd*[476] the Employment Appeal Tribunal stated that the legal position relating to the genuine material factor defence was as follows. The purpose of the Equal Pay Act was to eliminate pay discrimination based on sex and not the achievement of fair wages. A factor which is unrelated to sex and which explains the pay differential meets the requirement of a valid defence. The requirement to prove that the pay differential is objectively justified is only required in the case of indirect pay discrimination and there was no suggestion of indirect pay discrimination in the present case. The Employment Appeal Tribunal held that this all means that even where the employer's explanation of the pay differential amounts to a careless mistake which was not capable of being objectively justified, then absent evidence of indirect discrimination,

[475] At paras 28-29, 34, 39.
[476] [1996] IRLR 395 (EAT).

the mistake would amount to a material factor defence which is unrelated to sex under section 1(3) of the Equal Pay Act provided that the Industrial Tribunal is satisfied that the mistake was the cause of the pay differential by either being the sole reason therefore or by significantly influencing it. It further held that if a genuine mistake was capable of constituting a genuine material factor defence then so should a genuine perception relating to the need to hire an individual with certain experience and skills at a higher rate of pay (which seemed to be the case *in casu*). The Employment Appeal Tribunal thus held that the Industrial Tribunal had committed an error of law by finding that the respondent had to objectively justify the pay differential absent evidence of indirect pay discrimination. The cross-appeal succeeded and the matter was remitted to the Industrial Tribunal to hear the matter in line with the correct approach to section 1(3) of the Equal Pay Act.[477]

Tyldesley makes it clear that where an employer's explanation for the pay differential amounts to a careless mistake then he does not have to objectively justify such mistake in the absence of the claimant proving indirect discrimination and the mistake will constitute a material factor defence. Based on this, it submitted that whilst a genuine mistake is not listed under regulation 7 of the Employment Equity Regulations as a ground of justification it should not be listed under regulation 7 but it should rather have the potential to constitute such ground of justification by falling under regulation 7(1)(g) of the Employment Equity Regulations which relates to any other relevant factor that is not unfairly discriminatory in terms of section 6(1) of the EEA. It is further submitted that the reliance on a genuine mistake as a ground of justification under regulation 7(1)(g) of the Employment Equity Regulations will be subject to regulation 7(2) which is in accordance with *Tyldesley* and which will not require further justification where it is relied on provided that it does not give rise to indirect unfair pay discrimination as set out in regulation 7(2) of the Employment Equity Regulations. It is further submitted that the suggestion that a genuine mistake should not specifically be listed under regulation 7(1) as a ground of justification to an equal pay claim is because this does not seem to be a common ground

[477] At paras 18-23, 26.

of justification and an employer faced with an equal pay claim will not see this ground of justification being foreshadowed in regulation 7 which may lend credence to the genuineness of the raising of such ground of justification.

6.1.12 Factors for assessing the value of the work

In *McGregor & Others v General Municipal Boilermakers & Allied Trades Union*[478] the majority of the Employment Appeal Tribunal held the following. It stated that an employer is able to rely on a genuine material factor defence either at the stage when the Industrial Tribunal is determining whether or not it should request an independent expert's report or at the stage when the expert's report and/or his *viva voce* evidence is placed before the Industrial Tribunal. The Employment Appeal Tribunal stated that it would be exceptional for the factors which are used to determine the value of the work to each be given an equal weight in relation to the work of the equal pay claimant and the comparator. The Employment Appeal Tribunal further stated that it must follow that an employer may place greater emphasis on one factor as opposed to other factors and then remunerate a comparator with the greater factor more than the equal pay claimant. It held that as it was conceded that there was evidence which allowed the Industrial Tribunal to make the findings that it did there was no room to argue that the Industrial Tribunal committed an error of law. It further held that it was clear that the Industrial Tribunal was of the view that the whole pay differential was caused by the material factors assessing the equal value of the respective work and, in the absence of an error of law, the appeal was dismissed.[479]

In *Davies v McCartneys*[480] the Employment Appeal Tribunal held that the appellant claimant conceded that some of the demand factors for assessing equal value could be used as a genuine material factor defence under section 1(3) of the Equal Pay Act provided that there was something extra. It further held that there was no limitation to the factors which the employer could raise as a genuine material factor defence and there

---

478 [1987] ICR 505 (EAT).
479 At 512G, 513G-H, 514G, 515A, 515F.
480 [1989] IRLR 439 (EAT).

was no need to limit such factors. It held that the essential enquiry should revolve around the genuineness of the material factor and whether the pay difference is due to such material factor which is not related to sex. It, however, stated that an employer should never be permitted to merely say that it values one demand factor so highly that it pays more because of it unless the real reason for paying more is one which the Industrial Tribunal finds to be genuine and reasonable and which is not related to sex. It finally dismissed the appeal.[481]

The following guidance can be extracted relating to the grounds of justification:

(a) The factors for assessing work can be used as a genuine material factor defence provided that it is genuine and the pay difference is due to such material factor which is not related to unfair discrimination;[482] and

(b) An employer is not allowed to simply say that it values one demand factor so highly that it pays more because of it as it has to, in addition, show that it is genuine and the pay difference is due to such material factor which is not related to unfair discrimination.[483]

Regulation 7(1)-(2) of the Employment Equity Regulations does not list the factors for assessing whether work is the same/substantially the same or of equal value as a ground of justification to an equal pay claim. It is submitted that this is an omission in regulation 7 because it will be legally incoherent if an employer is not allowed to rely on the fact that the claimant employee's work has been given a lesser value in terms of one or more factors for assessing her work and that is the reason why she is paid less than her comparator, in circumstances where regulation 6 of the Employment Equity Regulations specifically states that an assessment of the relevant factors for assessing whether work is the same/substantially the same or of equal value should be made. It is further submitted that the factors for assessing whether work is the same/substantially the same

481 At paras 12, 14-16, 18-19.
482 See *Davies v McCartneys* [1989] IRLR 439 (EAT) discussed above.
483 See *Davies v McCartneys* [1989] IRLR 439 (EAT) discussed above.

or of equal value as set out in regulation 6 of the Employment Equity Regulation should specifically be listed as a ground of justification under regulation 7 of the Employment Equity Regulations. It is submitted that the principles extracted from the above case law in the immediate preceding paragraphs above should be mentioned under this ground of justification in regulation 7 of the Employment Equity Regulations.

An employer may place greater emphasis on one factor for assessing the value of the work in question as opposed to other factors and then remunerate a comparator with the greater factor more than the equal pay claimant and this will amount to a material factor defence. It is submitted this this one factor can for example be responsibility as it is a common factor used to assess the value of work. Based on this, it is submitted that the factor of responsibility falls under regulation 7(1)(g) of the Employment Equity Regulations as any other relevant factor that is not unfairly discriminatory in terms of section 6(1) of the EEA and it should specifically be listed as a ground of justification under regulation 7 because it is specifically listed as a factor for assessing work in regulation 6(1)(a) of the Employment Equity Regulations.

6.1.13 Financial Constraints

In *Benveniste v University of Southampton*[484] the Court of Appeal dealt with an appeal against an order of the Employment Appeal Tribunal which dismissed the equal pay claim of the appellant, Dr Regina Benveniste. The appellant was employed by the respondent University as a lecturer in Mathematics and at the time of her appointment the respondent was faced with severe financial constraints. It was common cause that the salary offered to the appellant in the sum of £8,515 per annum constituted the maximum salary that could be paid to her as a result of the financial constraints facing the respondent. It was also common cause that the salary offered to the appellant was well below the salary which would have been offered to her if financial constraints were absent. The appellant employee was aware of this.[485]

[484] [1989] IRLR 122 (CA).
[485] At paras 2-5.

Before the Court of Appeal, the appellant argued that while the factor of financial constraints could constitute a genuine material factor defence in favour of the respondent for the period in which it existed, it stopped being a genuine material factor defence at the end of 1981 when the financial constraints ceased. The appellant further argued that the respondent has been in breach of the Equal Pay Act since October 1982 and the respondent could thus not rely on the genuine material factor defence under section 1(3) of the Equal Pay Act. The respondent argued that the pay differential was due to a genuine material factor defence which was not sex tainted in that the appellant was appointed at a time when the respondent was faced with financial constraints and even if the financial constraints did not apply after 1981, the material difference between the appellant and her chosen comparators still persisted. The Court of Appeal held that once it is accepted that the financial constraints ceased to apply, then the material factor which justified the low salary paid to the appellant evaporated. The Court of Appeal further held that it was improper for the appellant to continue being paid the lower salary in circumstances where the reason for the lower payment (financial constraints) had evaporated. It, however, remarked that there may be cases where the evidence will show that notwithstanding that the financial situation of an employer has improved there still remains a degree of financial constraints which makes it imperative to keep the relevant salaries at a lower level. It held that in the case before it there was no evidence by the respondent relating to continuing financial constraints. It further held that the material difference in the form of the factor of financial constraints to explain the pay differential between the appellant and her chosen comparators evaporated at the moment at which the financial constraints ceased. The Court of Appeal subsequently allowed the appeal and remitted the matter to the Industrial Tribunal to deal with the issue of an appropriate remedy.[486]

---

[486] At paras 22, 27, 30-34. In *Redcar & Cleveland Borough Council v Bainbridge & Others*; *Surtees & Others v Middlesbrough Borough Council*; *Redcar & Cleveland Borough Council v Bainbridge & Others* [2008] IRLR 776 (CA) the Court of Appeal made the following remarks in passing in relation to financial constraints: … "We accept that a large public employer might be able to demonstrate that the constraints on its finances were so pressing that it could not do other than it did and that it was justified in putting the need to cushion the men's pay reduction ahead of the need to bring the women up to parity with the men. But we do not accept that that result should be a foregone conclusion. The employer must be put to proof that what he had done was objectively justified in the individual case."

Benveniste makes it clear that an employer is allowed to rely on financial constraints as a material factor defence to an equal pay claim by an employee in circumstances where the maximum salary that it can pay the employee is below the salary that would have been offered to her if the financial constraints were absent and where the employee is aware of this. It also makes it clear that where the financial constraints ceases to exist then it no longer amounts to a ground of justification to an equal pay claim which is able to justify the lower salary paid to the claimant employee. Based on this, it submitted that whilst financial constraints is not listed under regulation 7 of the Employment Equity Regulations as a ground of justification it should not be listed under regulation 7 but it should rather have the potential to constitute a ground of justification by falling under regulation 7(1)(g) of the Employment Equity Regulations which relates to any other relevant factor that is not unfairly discriminatory in terms of section 6(1) of the EEA. It is further submitted that the reliance on financial constraints will only constitute a ground of justification to an equal pay claim for the period in which the financial constraints persist and ceases operating as such once the financial constraints comes to an end. It is further submitted that the suggestion that financial constraints should not specifically be listed under regulation 7(1) as a ground of justification to an equal pay claim is because an employer faced with an equal pay claim will not see this ground of justification being foreshadowed in regulation 7 which may lend credence to the genuineness of the raising of such ground of justification.

6.1.14 High Cost

In *Redcar & Cleveland Borough Council v Bainbridge & Others*[487] the Employment Appeal Tribunal held that *Cross v British Airways plc*[488] suggests that an employer cannot succeed with a genuine material factor defence by solely relying on a financial burden but it can argue the issue of the financial burden together with other factors in order to successfully prove the genuine material factor defence.[489] In *Pulham & Others v London*

[487] [2007] IRLR 91 (EAT).
[488] [2005] IRLR 423 (EAT).
[489] At para 92.

Borough of Barking & Dagenham[490] the Employment Appeal Tribunal held that an employer is not allowed to automatically justify his failure to fully address pay discrimination by setting aside a certain amount of money to address it and then stating that the money is depleted. It remarked that the size of the budget is the employer's choice and it cannot be allowed to limit its own pay discrimination liability by its own choices. The Employment Appeal Tribunal however stated that if the Employment Tribunal intended that the exhaustion of the £5.5m reserve fund was a relevant factor to be taken into account in assessing the employer's defence then this is allowed. It further stated that the size of the reserve fund constitutes a useful benchmark but cannot be determinative.[491]

In *Bury Metropolitan Borough Council v Hamilton & Others*[492] the Employment Appeal Tribunal held that if an employer seeks to rely on unaffordability as a ground of justification then it has to adduce evidence explaining the costs involved as well as the financial context in order to place the Employment Tribunal in a position where it can make an informed decision. It further held that as it stated in *Pulham*,[493] this evidence must be sufficient to place the Employment Tribunal in a proper position to assess the broader issue of unaffordability.[494]

Before dealing with the guidance that can be extracted from the above case law it is prudent to state here that the discussion regarding increased costs to correct unfair pay discrimination should not be conflated with the discussion in paragraph 6.1.13 above relating to financial constraints because that discussion is limited to the situation where an employer provides an employee with a maximum salary which is less than the salary that she would be offered had the employer not been under financial constraints and this is common cause between the parties.

---

490 [2010] IRLR 184 (EAT).
491 At paras 42-43.
492 [2011] IRLR 358 (EAT).
493 *Pulham & Others v London Borough of Barking & Dagenham* [2010] IRLR 184 (EAT).
494 At para 78. See also *Glasgow City Council v Unison Claimants & Others* [2017] IRLR 739 (CS).

The following guidance can be extracted from the above case law with regards to the grounds of justification:

(a) An employer cannot succeed in a genuine material factor defence by solely relying on a financial burden but it can argue the issue of financial burden together with other factors in order to successfully prove the genuine material factor defence;[495]

(b) An employer is not allowed to automatically justify his failure to fully address pay discrimination by setting aside a certain amount of money to address it and then stating that the money is depleted;[496] and

(c) If an employer seeks to rely on unaffordability as a ground of justification then it has to adduce evidence explaining the costs involved as well as the financial context in order to place the Employment Tribunal in a position where it can make an informed decision.[497]

Having submitted in paragraph 6.4 of Chapter 3 of this thesis that the non-listing of budgetary considerations, increased costs and the curtailing of public expenditure in regulation 7 of the Employment Equity Regulations and its absence in South African case law is strengthened by its rejection as a ground of justification to equal pay claims in international labour law coupled with the fact that increased costs to correct unfair pay discrimination is not clearly regarded as a ground of justification according to the principles set out in (a)-(b) in the immediately preceding paragraph, it has to be submitted here as well that it should not be listed as a ground of justification under regulation 7 of the Employment Equity Regulations. It is further submitted that the principle set out in (c) in the immediately preceding paragraph does not have benefit for the research question relating to the grounds of justification as stated in (e) under paragraph 6 above due to the submissions made here that increased costs does not constitute a ground of justification

495 See *Redcar & Cleveland Borough Council v Bainbridge & Others* [2007] IRLR 91 (EAT) discussed above.

496 See *Pulham & Others v London Borough of Barking & Dagenham* [2010] IRLR 184 (EAT) discussed above.

497 See *Bury Metropolitan Borough Council v Hamilton & Others* [2011] IRLR 358 (EAT) discussed above.

but it is submitted that the principle does have benefit for the submission made in paragraphs 12 and 13.11 of Chapter 2 of this thesis to the effect that the progressive realisation of the right to equal pay is capable of featuring in a court order and will accordingly be dealt with under paragraph 8.2 below. The purpose of mentioning it here is to foreshadow its relevance.

6.1.15 Progressive realisation of the right to equal pay

Section 69(3) of the Equality Act provides that where there is a long-term objective to reduce pay inequality between males and females then this should always be regarded as a legitimate aim. This means that where the reliance on a material factor is concerned with the long-term objective of reducing pay inequality between males and females then this should always be regarded as a legitimate aim. The Equal Pay Statutory Code of Practice states that there is no list of what could fall within the ambit of a long-term objective to reduce pay inequality and as a consequence thereof this will depend on the facts of each case. It, however, states that the employer must be able to prove that the measure relied on was adopted in order to reduce pay inequality and that such measure is proportionate in the circumstances.[498]

It is submitted that the argument made based on South African law to the effect that it will be difficult to refuse to recognise the progressive realisation of the right to equal pay as a ground of justification, falling under regulation 7(1)(g) of the Employment Equity Regulations, where it is genuine and in circumstances where it gives effect to section 27(2) of the EEA is strengthened by the United Kingdom equal pay law which recognises the principle of the progressive realisation of the right to equal pay by stating that the long-term objective of reducing pay inequality should always be regarded as a legitimate aim.

[498] The Equal Pay Statutory Code of Practice at paras 88-89.

7. EQUAL PAY RELATING TO NON-STANDARD (ATYPICAL) EMPLOYEES

Agency (temporary service) employees, fixed-term contract employees and part-time employees in the United Kingdom are given equal pay protection, *inter alia*, in terms of the following statutory instruments: (a) the Agency Workers Regulations Statutory Instrument No 93 of 2010; (b) the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations Statutory Instrument No 2034 of 2002; and (c) the Part-time Workers (Prevention of Less Favourable Treatment) Regulations Statutory Instrument No 1551 of 2000. These statutory instruments together with the relevant case law and attendant materials will be discussed hereunder.

The United Kingdom equal pay law relating to agency (temporary service) employees, fixed-term contract employees and part-time employees will be analysed under separate headings below. The guidance sought from the United Kingdom equal pay law for the research questions relating to these three categories of non-standard employees will be stated under the separate headings below with submissions relating to any guidance that can be extracted, as sought for, being made during or at the end of the discussion of each heading as deemed appropriate.

7.1 Agency (Temporary Service) Employees

The guidance sought from the United Kingdom equal pay law for the research questions relating to temporary service employees as called for in paragraph 13.10.1 of Chapter 2 of this thesis is as follows: (a) Whether the United Kingdom equal pay law can provide guidance to the two arguments made relating to the interpretation to be accorded to the phrase "must be treated on the whole not less favourably" in section 198A(5) of the LRA which entails on the one hand, that the phrase can be interpreted to mean the *same terms and conditions of employment* and, on the other hand, that the phrase can be interpreted to mean that an employer is allowed to provide the deemed employee with a package on condition that it does not result in treatment that is on the whole not less favourable; (b) Whether guidance can be gained regarding how they approach the same work or similar

work (substantially the same work); and (c) Any further lessons that can be learnt from the United Kingdom equal pay law for the South African equal pay law relating to temporary service employees under section 198A of the LRA.

The Agency Workers Regulations, 2010[499] ("Agency Workers Regulations") gives effect to the European Union Temporary Agency Directive 2008/104/EC which is discussed in Chapter 3 of this thesis.[500] It is important to note that the Agency Workers Regulations does not change the agency workers status from that of being an agency worker and neither does it provide the agency worker with more general employment rights beyond those mentioned in the Regulations. The Agency Workers Regulations furthermore does not apply to the supply of candidates for permanent employment as it only applies to the supply of temporary workers.[501] Regulation 3(1)(a)-(b) of the Agency Workers Regulations states that an agency worker is a person who is provided to a hirer[502] (client)

[499] The Agency Workers Regulations Statutory Instrument No 93 of 2010 ("Agency Workers Regulations") discussed under para 7.1 in Chapter 3 of this thesis.

[500] Directive 2008/104/EC of the European Parliament and of the Council of 19 November 2008 on Temporary Agency Work. Leach D "Temporary Workers" in *Tolley's Employment Law Service* (loose-leaf) states the following at T2028: "The Agency Workers Regulations 2010 (SI 2010/93) ('the Regulations') implement the Temporary Agency Workers Directive 2008/104/EC and these Regulations came into force on 1 October 2011." Smith I "Division AI – Agency Workers" in Smith I (gen editor) *Harvey on Industrial Relations and Employment Law* (loose-leaf) states the following at para 182: "The [European Union Temporary Agency Directive 2008/104/EC] Directive is transposed into domestic law in the Agency Workers Regulations 2010 SI 2010/93 …" The BIS Guidance on the Agency Workers Regulations 2011 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/32121/11-949-agency-workers-regulations-guidance.pdf (last accessed on 4/11/2022) (the Agency Workers Guide) states the following at 5: "The Agency Workers Regulations apply to: • individuals who work as temporary agency workers; • individuals or companies (private, public and third sector eg charities, social enterprises) involved in the supply of temporary agency workers, either directly or indirectly, to work temporarily for and under the direction and supervision of a hirer; • and hirers (private, public and third sector)…". The Agency Workers Guide further states at 3 that the aim of this guide is to assist hirers of agency workers as well as the recruitment sector to understand the Agency Workers Regulations. In Kocur & Another v Angard Staffing Solutions Ltd & Another [2021] IRLR 212 (EAT) the Employment Appeal Tribunal states the following at 10 relating to the relationship between the Agency Workers Regulations and the European Union Temporary Agency Directive 2008/104/EC: "The AWR were made in order to implement into domestic law the Temporary Agency Workers' Directive, Directive 2008/104/EC of 19 November 2008 ('the Directive'). In accordance with normal principles of construction of domestic legislation which implements an EU Directive, the provisions of the AWR must, so far as is possible, be read in a way which gives effect to the meaning and purpose of the provisions of the Directive that they were designed to implement."

[501] Leach D "Temporary Workers" in *Tolley's Employment Law Service* (loose-leaf) at T2028-T2029.

[502] The Agency Workers Guide states the following relating to a hirer (client): "The hirer (end-user) is a "person" – eg company, partnership, sole trader, public body - which is engaged in economic activity (whether or not for profit) and which books agency workers via a TWA. The hirer is responsible for

by a temporary work agency[503] *to temporarily perform work*[504] for the client and who has

supervising and directing the agency worker while they undertake the assignment. A hirer will have its own legal identity – so a division within a company will not be a separate hirer if it does not have its own legal identity."

503 Regulation 4(1)-(2) of the Agency Workers Regulations defines a temporary work agency as follows: "(1) In these Regulations "temporary work agency" means a person engaged in the economic activity, public or private, whether or not operating for profit, and whether or not carrying on such activity in conjunction with others, of - (a) supplying individuals to work temporarily for and under the supervision and direction of hirers; or (b) paying for, or receiving or forwarding payment for, the services of individuals who are supplied to work temporarily for and under the supervision and direction of hirers. (2) Notwithstanding paragraph (1)(b) a person is not a temporary work agency if the person is engaged in the economic activity of paying for, or receiving or forwarding payments for, the services of individuals regardless of whether the individuals are supplied to work for hirers." The Agency Workers Guide states the following relating to a temporary work agency: "A temporary work agency (TWA) supplies agency workers to work temporarily for a third party (the hirer). The agency worker works temporarily under the supervision and direction of the hirer but only has a contract (an employment contract or a contract to perform work or services personally) with the TWA. Under the Regulations a TWA is a person (individual or company) in business, whether operating for profit or not and including both public and private sector bodies, involved in the supply of temporary agency workers. This could be a "high street" agency, but also an intermediary such as an umbrella company or a master or neutral vendor if they are involved in the supply of the agency worker. An individual is not prevented from being an agency worker under the Regulations simply because they work through an intermediary body. For example, an individual working through an umbrella company, who finds work via a TWA, is covered by the Regulations. The individual will usually have an overarching employment contract with the umbrella company with full employment rights and the employee's income generally being treated as employment income. However, that will not prevent the individual from benefitting from these Regulations. … Sometimes the supply of agency workers is managed on behalf of a hirer by a master vendor or neutral vendor that may or may not engage and supply workers directly or indirectly. These arrangements exist where a hirer appoints one agency (the master vendor) to manage its recruitment process, using other recruitment agencies as necessary ("second tier" suppliers) or appoints a management company (neutral vendor) which normally does not supply any workers directly but manages the overall recruitment process and supplies temporary agency workers through others. Master or neutral vendors fall within the legal definition of TWA in view of their involvement in the supply of individuals and/or their role in forwarding payments to such individuals."

504 In *Moran & Others v Ideal Cleaning Services Ltd & Another* [2014] IRLR 172 (EAT) the EAT stated the following at para 41 regarding temporary work: "The word 'temporary' can mean something that is not permanent or it can mean something that is short term, fleeting etc. The two are not necessarily the same: for example a contract of employment may be of a fixed duration of many months or perhaps even years. It can properly be regarded as temporary because it is not permanent but it would not ordinarily be regarded as short term. I should add that by permanent I do not mean a contract that lasts forever, since every contract of employment is terminable upon proper notice being given. What is meant is that it is indefinite, in other words open-ended in duration, whereas a temporary contract will be terminable upon some other condition being satisfied, for example the expiry of a fixed period or the completion of a specific project. Leach D "Temporary Workers" in *Tolley's Employment Law Service* (loose-leaf) makes the following comments regarding *Moran & Others v Ideal Cleaning Services Ltd & Another* [2014] IRLR 172 (EAT) at T2029: "What is really needed, however, is for the issue to be revisited at appellate level or even via legislative amendment, and for the meaning of 'temporary' to be reconsidered. Arguably, the EAT's approach in *Moran* has simply replaced difficulty in defining 'temporary' with difficulty in defining 'not permanent'. There ought to be room for some assignments to be regarded as 'temporary' even if there is no formal end date given, by reference to the surrounding circumstances."

a contract with the temporary work agency.[505] Regulation 5(1)(a) of the Agency Workers Regulations states that an agency worker is entitled to *the same basic working and employment conditions* that he/she would have been entitled to for doing the same work had he/she been recruited by the client without the use of a temporary work agency.[506] Regulation 5(2)(a)-(b) of the Agency Workers Regulations defines the basic working and employment conditions mentioned in regulation 5(1)(a) as those terms and conditions that are usually included in the employment/worker contracts of the client. The Agency Workers Guide states that equal treatment is not required in respect of all the employment

---

[505] The Agency Workers Guide states the following regarding an agency worker: "An agency worker (often referred to as a 'temp') is someone who has a contract with the TWA (an employment contract or a contract to perform work personally) but works temporarily for and under the direction and supervision of a hirer. The unique tripartite relationship between agency worker, agency and hirer is a key feature of these Regulations and who is covered by them. The key elements required for someone to be an agency worker are: • there is a contract (an employment contract or a contract to perform work personally) between the worker and a TWA; • that worker is temporarily supplied to a hirer by the TWA; and • when working on assignment the worker is subject to the supervision and direction of that hirer AND • the individual in question is not in a business on their own account (where they have a business to business relationship with the hirer who is a client or customer)". In *Brooknight Guarding Limited v Matei* UKEAT/0309/17/LA the Employment Appeal Tribunal held that following at para 25: "On the whole, I agree with the Respondent that the terms of the contract will not necessarily be determinative of agency worker status. The focus under Regulation 3(1)(a) is on the purpose and nature of the work for which the work is supplied: is it temporary or permanent? The underlying contract - as will necessarily have been found to exist for the purposes of Regulation 3(1)(b) - may state that there is no obligation to provide or undertake work, and may allow that the worker can be moved from site to site but if, in fact, that individual is supplied to carry out work on an indefinite basis (the continuing cleaning jobs in issue in Moran, for example), it would not be temporary in nature. … That said, the terms of the contract may not be irrelevant: the contract provides evidence as to what the parties understood and intended in terms of the work that the worker might carry out, and the ET is entitled to test the evidence given as to what occurred in practice against the relevant documentary evidence, which would include the contract." *Kocur & Others v Angard Staffing Solutions Ltd & Another* [2020] IRLR 732 (EAT) states the following at paras 43 and 59: "For an individual to be an agency worker for the purposes of the 2010 Regulations there are (subject as provided in the remainder of reg 3) two conditions, one set out in reg 3(1)(a) and the other in reg 3(1)(b). Regulation 3(1)(b) requires there to be a contract between the worker and the temporary work agency, of a certain kind. … Parliament has decided that workers should have the protection of the 2010 Regulations only if, and for so long as, they are supplied to work temporarily (and subject to the qualifying period and other conditions), but not if or when they are not so supplied. If there is, at some point in an ongoing relationship, a change in that respect, then the worker may either gain, or lose, protection, accordingly, as the case may be."

[506] In *London Underground Ltd v Amissah & Others* [2019] IRLR 545 (CA) the Court of Appeal stated the following at para 23 in relation to regulation 5 of the Agency Workers Regulations: "The right is to 'be entitled to' the same terms and conditions as permanent workers." The Court of Appeal in the same case held the following at para 25: "I regard it as clear that the language of reg 5(1) has the effect of creating a substantive right to the equalised benefits. To say that a worker is 'entitled to' the same terms and conditions as the comparator enjoys under his or her contract naturally connotes a right actually to receive the benefits in question. Thus, in the case of pay, which is what we are concerned with here, an agency worker is given the right to be paid, on each pay-day, what the comparator would be paid. That right is enforceable under the provisions as to remedy in the Regulations themselves."

terms and conditions as it only applies to the basic employment conditions. It further states that basic conditions of employment are those conditions that are usually found in relevant contracts or associated documents which include: a pay scale/structure; a collective agreement; and a company handbook.[507] Leach states that basic conditions of employment can also be found in custom and practice.[508] Regulation 6(1) of the Agency Workers Regulations provides the following list of terms and conditions that fall within the ambit of *relevant terms and conditions*: (a) pay; (b) duration of working time;[509] (c) night work; (d) rest periods; (e) rest breaks;[510] and (f) annual leave.[511] Regulation 6(2) of the Agency Workers Regulations defines pay as any sum payable to a worker of the client which is linked to the worker's employment and this includes any fee, holiday pay,

---

[507] The Agency Workers Guide 25.

[508] Leach D "Temporary Workers" in *Tolley's Employment Law Service* (loose-leaf) at T2033.

[509] In *Kocur v Angard Staffing Solutions Ltd & Another* [2019] IRLR 933 (CA) the Court Appeal held the following at paras 32-33, 35: "… reg 6(1)(b) is intended to refer to terms which set a maximum length for any such period … That is how both the ET and the EAT read it: see para 49 of the ET's Reasons and para 44(a) and (b) of the EAT's judgment. I believe that they were right; and on that basis the Regulations do not entitle agency workers to work the same number of contractual hours as a comparator. … The purpose of the Directive [EU Agency Workers Directive 2008/104/EC] is plainly to ensure the equal treatment of agency workers and permanent employees while at work, and in respect of rights arising from their work; but there is nothing in either the preamble or its actual provisions to suggest that it is intended to regulate the amount of work which agency workers are entitled to be given." In *Kocur & Another v Angard Staffing Solutions Ltd & Another* [2021] IRLR 212 (EAT) the Employment Appeal Tribunal held the following at para 80: "There is no requirement in the AWR that shift lengths must be the same for agency workers as for comparable employees, but if the hirer has set a maximum shift length for comparable employees, that maximum must apply to agency workers also."

[510] In *Kocur & Another v Angard Staffing Solutions Ltd & Another* [2021] IRLR 212 (EAT) the Employment Appeal Tribunal held the following at para 157: "In any event, we do not think that the timing of breaks comes within the subject-matter of 'working and employment conditions'. It is not part of the 'duration of working time'. Even if that phrase were given a wide meaning – and the Court of Appeal judgment in *Kocur 1* makes clear that it should not be given a wide meaning – it would not extend to the scheduling of breaks within a shift."

[511] Regulation 6(1)(a)-(f) of the Agency Workers Regulations. The Agency Workers Guide states the following at 18: "After an agency worker completes a 12 week qualifying period with the same hirer, in the same role, they will be entitled to have the same basic terms and conditions of employment as if they had been employed directly by the hirer. They are; • key elements of pay • duration of working time e.g. if working is limited to a maximum of 48 hours a week • night work • rest periods • rest breaks • annual leave … In addition, pregnant agency workers who have completed the 12 week qualifying period, will be entitled to paid time off for ante natal appointments … For any entitlement requiring a period of service – eg enhanced entitlement to annual leave after 12 months – the period starts at the time the qualifying period commenced (not 12 months and 12 weeks but 12 months)." In *Kocur v Angard Staffing Solutions Ltd & Another* [2018] IRLR 388 (EAT) the Employment Appeal Tribunal held the following: "Terms and conditions relating to annual leave would include terms both as to the amount of leave and the remuneration for it. Both terms would have to be at least those he would have had had he been directly recruited by the second respondent in order to avoid a breach of reg 5."

commission, bonus,[512] or other emolument connected to the employment, whether payable in terms of the contract or otherwise.[513] Regulation 6(4)(a)-(b) of the Agency Workers Regulations states that any monetary value attached to a voucher/stamp which is of fixed value expressed in monetary terms and which is capable of being exchanged for money, goods or services shall be treated as pay of the worker. This will then also fall within the ambit of pay. The Agency Workers Guide adds the following list of items that will fall under the ambit of pay as defined in regulation 6(2) of the Agency Workers Regulations: (a) basic pay; (b) overtime payments; (c) shift allowance; (d) unsocial hours allowance; and (e) risk payment for hazardous work.[514]

Regulation 5(4) of the Agency Workers Regulations further states that an employee is a comparable employee to an agency worker provided that at the time of the alleged breach both the employee and agency worker must work for and under the supervision and direction of the client and both the employee and the agency worker must be engaged in the *same or broadly similar work* having regard to, if relevant, whether the employee and agency worker have a similar level of qualification and skills.[515] The further requirement for the comparable employee is that he/she must be based at the same establishment as

---

512 The Agency Workers Guide states the following at 29: "bonus or commission payments directly attributable to the amount or quality of the work done by the individual. This can include commission linked to sales or production targets and payments related to quality of personal performance (see sections below on bonuses linked to personal performance and performance appraisal systems). This might also include non-contractual payments which have been paid with such regularity that they are a matter of custom and practice." The Agency Workers Guide further states the following at 31-32: "It may however be considered inappropriate to fully integrate the agency worker into the hirer's appraisal system. Where an agency worker qualifies for equal treatment in respect of a bonus that would normally be calculated on the basis of a performance appraisal system, alternative approaches could include: • creating a simpler system to appraise agency workers - agency workers will normally have clear objectives to help them undertake the assignment which could form the basis of their appraisal and this could be aligned to that used by the hirer • utilising an agency's existing appraisal/feedback system to keep track of their performance through regular discussion between the hirer and agency – this could be utilised to decide if an agency worker should get a "standard" bonus or one linked to high achievement".

513 Regulation 6(2) of the Agency Workers Regulations.

514 The Agency Workers Guide 29.

515 Regulation 5(4)(a)(i)-(ii) of the Agency Workers Regulations. Leach D "Temporary Workers" in *Tolley's Employment Law Service* (loose-leaf) states the following at T2033." … the test for who will qualify as a 'comparable worker' (whose terms those of the agency worker should in broad terms match), is whether the claimant and the comparator are engaged on 'the same or broadly similar work' (regs 5(4), 12(4), 13(4)). It is not whether they have 'the same or broadly similar skills' … the level of qualification and skill of each of the claimant and the comparator is only relevant to the extent that it bears on the nature of the work actually being performed."

the agency worker and if there is no such comparable employee at the same establishment as the agency worker then a comparable employee who is based at a different establishment provided that such comparable employee satisfies the requirements set out in regulation 5(4). It is important to note that a predecessor employee is not a comparable employee.[516] Smith, however, states that there is no need for an agency worker to compare himself/herself with a comparator because the comparison to be made is with himself/herself had he/she been directly employed by the client and this differs from the situation under the Regulations relating to fixed-term and part time work.[517]

Regulation 12 of the Agency Workers Regulations states that an agency worker has the right, during an assignment, to be treated no less favourably than a comparable employee in relation to collective facilities and amenities[518] provided by the client unless the less favourable treatment is justified on objective grounds.[519] Regulation 12(3)(a)-(c) of the Agency Workers Regulations states that the collective facilities and amenities include canteen facilities, childcare facilities and transport services. This does not present a closed list of collective facilities and amenities upon a reading of the section and because the Agency Workers Guide lists the following collective amenities and facilities which can fall under regulation 12(3)(a)-(c) of the Agency Workers Regulations: (a) toilet and/or show facilities; (b) staff room; (c) waiting room; (d) baby and mother room; (e) prayer room; (f) food and drink machines; and (g) car parking facilities. The Agency Workers

---

516 Regulation 5(4)(b), 5(5) of the Agency Workers Regulations.

517 Smith I "Division AI – Agency Workers" in Smith I (gen editor) *Harvey on Industrial Relations and Employment Law* (loose-leaf) at para 206.

518 The Agency Workers Guide states at 15-16 that collective facilities and amenities may include the following: • "a canteen or other similar facilities • a workplace crèche • transport services (e.g. in this context, local pick up and drop offs, transport between sites – but not company car allowances or season ticket loans) • toilets/shower facilities • staff common room • waiting room • mother and baby room • prayer room • food and drinks machines • car parking". The Agency Workers Guide states the following at 16 regarding this list: "This is a non-exhaustive list and acts as an indication of which kind of facilities should be included. It applies to facilities provided by the hirer and therefore these facilities will usually be on-site. However, for example, if a canteen is used on another site – or shared with another company – then this should also be available to agency workers." Leach D "Temporary Workers" in *Tolley's Employment Law Service* (loose-leaf) states the following at T2028: "… There is also the right to no less favourable treatment with regard to access to collective facilities and amenities and information on internal vacancies from day one."

519 Regulation 12(1)-(2) of the Agency Workers Regulations.

Guide then goes on to state that this list is not a *numerus clausus* but provides an indication of which type of facilities should be included under regulation 12(3)(a)-(c) of the Agency Workers Regulations.[520]

The Agency Workers Regulations requires a term by term approach and not a package-based approach but the mechanism by which equality is to be achieved does not have to be the same in respect of directly recruited employees and agency workers, for instance, there will be no breach of the Agency Workers Regulations where an agency worker is paid for his holiday entitlement by way of a lump sum payment given at the end of his/her assignment or is paid a higher hourly rate which includes an amount for the holiday pay and these methods of paying holiday entitlement pay differs from the mechanism used to pay holiday entitlement pay to employees of the client. All that is required is that the agency worker is paid the holiday entitlement pay that is paid to an employee for the same holiday entitlement.[521]

The Agency Workers Regulations does not allow a temporary work agency or a client to offset a failure to provide a specific term and condition of employment to an agency worker with a higher rate of pay, in other words, payment *in lieu* of the specific term and condition of employment, unless such payment *in lieu* can be made to employees. This is so because it would undermine the entitlement to a specific term and condition of employment if a temporary work agency or a client were allowed to make such payment *in lieu* in circumstances where such payment cannot be made to employees.[522]

It is submitted that it is clear from the above discussion, that the Agency Workers Regulations does not change the agency workers status from being that of an agency worker to a permanent employee as is the case under section 198A(3)(b) of the LRA

---

520 The Agency Workers Guide 15-16.

521 *Kocur & Another v Angard Staffing Solutions & Another* [2021] IRLR 212 (EAT) at para 19 read with *Kocur v Angard Staffing Solutions Ltd & Another* [2018] IRLR 388 (EAT) at paras 27-28.

522 *Kocur v Angard Staffing Solutions Ltd & Another* [2018] IRLR 388 (EAT) at paras 23-24. The EAT in the same case states the following at para 24: “Payment in lieu for holidays can of course legitimately be made in respect of unused holiday entitlement upon the termination of the assignment or where payment in lieu may ordinarily be made to employees in accordance with their contracts.”

where an agency worker is deemed to be employed on an indefinite basis.[523] Notwithstanding this, the following guidance can be extracted in order to assist with the research question relating to temporary service employees as called for in paragraph 13.10.1 of Chapter 2 of this thesis as stated in (a) under this paragraph 7.1 above. The principle that the Agency Workers Regulations requires a term by term approach and not a package-based approach even though it applies to an agency worker who works temporarily as opposed to section 198A of the LRA which applies to an agency employee who is deemed to be employed on indefinite employment can still provide the following guidance. It supports the argument put forth that the phrase "must be treated on the whole not less favourably" in section 198A(5) of the LRA can be interpreted to mean the *same terms and conditions of employment* and supports a rejection of the other argument made that the phrase "must be treated on the whole not less favourably" in section 198A(5) of the LRA can be interpreted to mean that an employer is allowed to provide the deemed employee with a package on condition that it does not result in treatment that is on the whole not less favourable.

The following guidance can be extracted in order to assist with the research question relating to temporary service employees as called for in paragraph 13.10.1 of Chapter 2 of this thesis as stated in (b) under this paragraph 7.1 above. Whilst the Agency Workers Regulations is restricted to the same work or broadly similar work as is evident from regulation 5(4)(a)(i)-(ii) of the Agency Workers Regulations and this is the same position under section 198A(5) of the LRA, it is submitted that the guidance regarding how the same work or similar work issue should be approached under section 198A(5) of the LRA can be found in paragraphs 5.4-5.5 in Chapter 2 of this thesis as read with paragraph 4.4.1 above. No guidance can be extracted for the research question relating to temporary service employees as called for in paragraph 13.10.1 of Chapter 2 of this thesis as stated in (c) under this paragraph 7.1 above.

---

[523] See para 11.1 of Chapter 2 of this thesis.

7.2 Fixed-term Contract Employees

The guidance sought from the United Kingdom equal pay law for the research questions relating to fixed-term contract employees as called for in paragraph 13.10.2 of Chapter 2 of this thesis is as follows: (a) Whether the United Kingdom equal pay law can provide guidance to the uncertainty regarding whether the phrase "must not be treated less favourably" in section 198B(8)(a) of the LRA must be interpreted to mean treatment that is the same or treatment that is on the whole not less favourably; and whether a fixed-term employee whose contract is deemed to be of an indefinite duration as contemplated in section 198B(5) of the LRA and a fixed-term employee whose contract is for a fixed-term which complies with section 198B must be provided with the same treatment as compared to a comparable permanent employee as contemplated in section 198B(8)(a) of the LRA; (b) Whether guidance can be gained regarding how they approach the same work or similar work (substantially the same work) issue; and (c) Any further lessons that can be learnt from the United Kingdom equal pay law for the South African equal pay law relating to fixed-term contract employees under section 198B(8)(a) of the LRA.

The Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002 ("Fixed-term Employees Regulations") gives effect to the European Union Council Directive 1999/70/EC Concerning the Framework Agreement on Fixed-term Work which is discussed in paragraph 7.2 of Chapter 3 of this thesis.[524] The crux of the Fixed-term

[524] European Union Council Directive Concerning the Framework Agreement on Fixed-term Work Council Directive 1999/70/EC; *Department for Work and Pensions v Webley* [2005] IRLR 288 at para 13; *Allen v National Australia Group Europe Ltd* [2004] IRLR 847 at para 7. Leach D "Temporary Workers" in *Tolley's Employment Law Service* (loose-leaf) states the following at T2041: "The Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002, SI 2002/2034, ('the FTER') came into force in October 2002 in order to implement the Fixed-term Work Directive (Directive 99/70/EC)." Smith I "Division AI – Fixed-term Employees" in Smith I (gen editor) *Harvey on Industrial Relations and Employment Law* (loose-leaf) states the following at para 156: "The UK legislation owes its origin to the Fixed-Term Work Directive 99/70/EC and is contained in the Fixed-Term Employees (Prevention of Less Favourable Treatment) Regulations 2002 (the 'FTE Regs SI 2002/2034') …" Smith I "Division AI – Fixed-term Employees" in Smith I (gen editor) *Harvey on Industrial Relations and Employment Law* (loose-leaf) states the following at para 156.01: "It may be that the existence of these Regulations affects the economic case for using fixed-termers, but on the other hand the judgment of Lady Hale in *Duncombe v Secretary of State for Children, Schools and Families [2011] UKSC 14, [2011] IRLR 840* begins by reminding us that the purpose of the Directive on which the Regulations are based is to counter discrimination against fixed-termers and to prevent abuse of successive fixed-term contracts, not to attack such contracts as such." Taylor S & Emir A *Employment Law: An Introduction*

Employees Regulations is the affording to fixed-term employees the right not to be treated less favourably than comparable permanent employees employed by the same employer and engaged in the same or similar work.[525] A *fixed-term employee* is defined as an employee who is employed in terms of a fixed-term contract.[526] Lockton states that the

---

3ed (Oxford University Press 2012) state the following at 370: "The Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002 incorporate the 1999 EU Directive on fixed-term work, and provide a right for fixed-term employees to be treated no less favourably than comparable permanent employees, unless the difference in treatment can be objectively justified." Taylor S & Emir A *Employment Law: An Introduction* 3ed (Oxford University Press 2012) further state the following at 370: "This [Fixed-term Employees Regulations] has been criticised by a number of commentators, not only because it gives no protection to 'workers', but also because it is argued that it does not fully transpose the provisions of the Directive which applies to 'fixed-term workers' as well as 'employees'." Smith I & Baker A *Smith & Wood's Employment Law* 10ed (Oxford University Press 2010) state the following at 64: "The Fixed-term Worker Directive has two principal objectives: to establish a regime of non-discrimination and to require member states to have laws to prevent the perceived abuse of keeping individuals on successive fixed-term contracts for unreasonable periods. … Both of these objectives are transposed into domestic law in the Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations 2002."

[525] Explanatory Note to the Fixed-term Employees Regulations. Leach D "Temporary Workers" in *Tolley's Employment Law Service* (loose-leaf) states the following at T2041: "The FTER provide that employees working on fixed-term contracts should not be treated less favourably than comparable permanent employees in respect of their terms and conditions of employment unless there is an objective reason justifying this treatment." Smith I "Division AI – Fixed-term Employees" in Smith I (gen editor) *Harvey on Industrial Relations and Employment Law* (loose-leaf) states the following at para 166: "According to Slade J in *Manchester College v Cocliff UKEAT/0035/10, [2010] All ER (D) 92 (Sep)* the correct sequence in which to apply these rules is: (1) were the claimant and comparator engaged on the same or broadly similar work? (2) was the less favourable treatment on the ground that the claimant was a fixed-term employee? (3) if the answer to (2) is 'yes', was the treatment justified on objective grounds?" Smith IT and Baker A *Smith and Wood's Employment Law* (Oxford University Press 2010) state the following at 67: "The [Fixed-term Employees] Regulations do *not* ban the use of fixed-term contracts, and bona fide use may continue; this point was affirmed by the Court of Appeal in *Webley v Department of Work and Pensions* …"

[526] Section 1 of the Fixed-term Employees Regulations. Section 1 of the Fixed-term Employees Regulations defines a fixed-term contract as follows: " "fixed-term contract" means a contract of employment that, under its provisions determining how it will terminate in the normal course, will terminate-(a) on the expiry of a specific term, (b) on the completion of a particular task, or (c) on the occurrence or non-occurrence of any other specific event other than the attainment by the employee of any normal and bona fide retiring age in the establishment for an employee holding the position held by him, and any reference to "fixed-term" shall be construed accordingly …" The Fixed-term work – Guidance https://webarchive.nationalarchives.gov.uk/ukgwa/20070603203105/http://www.dti.gov.uk/employment/employment-legislation/employment-guidance/page18475.html (last accessed on 4/11/2022) provides the following examples of fixed-term employees: "Employees doing so-called 'seasonal' or 'casual' work who have contracts for a short period or task that end when the period expires or the task is completed. (Examples include: employees at children's summer camps; agricultural workers; and shop assistants working specifically for Christmas or another busy period.) Employees on fixed-term contracts concluded specifically to cover for maternity, parental or paternity leave or sick leave Employees hired to cover for peaks in demand and whose contracts expire when demand returns to normal levels. Employees whose contracts will expire when a specific task is complete (i.e. setting up a new data base, painting a house or running a training course.)" Smith I "Division AI – Fixed-term Employees" in Smith I (gen editor) *Harvey on Industrial Relations and Employment Law* (loose-leaf)

Fixed-term Employees Regulations only applies to employees employed under a fixed-term contract.[527] Regulation 3 affords a fixed-term employee the right not to be treated less favourably than a comparable permanent employee with regard to: (a) the terms of his/her contract (it is axiomatic that this will include pay);[528] (b) being subject to any other detriment; (c) any period of service in order to qualify for a specific condition of service;[529] (d) the opportunity to receive training; and (e) the opportunity to secure permanent employment.[530] It is thus far clear that the Fixed-term Employees Regulations only deals with the treatment to be accorded to fixed-term employees who are employed for a fixed-term and does not deal with a fixed-term employee who is deemed to be employed on an indefinite basis. This being the case, the discussion under this heading will not be able to provide a direct answer to the part of the research questions as stated in (a) under this paragraph 7.2 above dealing with the treatment to be accorded to a fixed-term employee

---

states the following at para 157 regarding who has the right in terms of the Fixed-term Employees Regulations: "An employee who is or was employed under a fixed-term contract."

527 Lockton DJ *Employment Law* 9ed (Palgrave Macmillan 2014) 162. Taylor S & Emir A *Employment Law: An Introduction* 3ed (Oxford University Press 2012) state the following at 370: "Significantly, unlike the Part-time Workers Regulations, these [Fixed-term Employees Regulations] apply only to employees."

528 Ebrahim S "A Critical Analysis of the New Equal Pay Provisions Relating to Atypical Employees in Sections 198A-198D of the LRA: Important Lessons from the United Kingdom" *PER* 2017(20) 1 commenting on regulation 3 of the Fixed-term Employees Regulations states the following at 14: "It is axiomatic that pay will readily fall within the terms of a contract of employment as it is the most important term thereof." Smith I "Division AI – Fixed-term Employees" in Smith I (gen editor) *Harvey on Industrial Relations and Employment Law* (loose-leaf) states the following at para 167: "The FTE Regs SI 2002/2034 apply to all contractual terms and so, for example, would cover: (i) remuneration under the contract; (ii) membership or rights under an occupational pension scheme; (iii) contractual bonuses; (iv) holiday and holiday pay; (v) medical insurance; (vi) career breaks; (vii) parental leave; (viii) contractual redundancy payments; (ix) maternity leave and maternity pay; (x) gym membership."

529 Smith IT and Baker A *Smith and Wood's Employment Law* (Oxford University Press 2010) state the following at 65: "Employees on short-term contracts may lawfully be excluded from particular benefits by attaching qualifying periods to those benefits, *provided* that the period in question does not discriminate between fixed-term and permanent employees." The Fixed-term work – Guidance https://webarchive.nationalarchives.gov.uk/ukgwa/20070603203105/http://www.dti.gov.uk/employment/employment-legislation/employment-guidance/page18475.html provides the following example: " … If permanent employees get an extra five days' paid holiday after one year's service, fixed-term employees should also get the same increase in holiday after this period, unless there are objective reasons for them to serve a longer qualifying period. (Note: if this qualifying period applies and a fixed-term employee has been employed for less than one year and the permanent comparator for longer than one year, the fact that the fixed-term employee has less paid leave does not mean he or she is being treated less favourably, provided they will qualify for more leave at the same point.)"

530 Regulations 3(1)(a)-(b); 3(2)(a)-(c) of the Fixed-term Employees Regulations. Smith I "Division AI – Fixed-term Employees" in Smith I (gen editor) *Harvey on Industrial Relations and Employment Law* (loose-leaf) states the following at para 177: "Fixed-term employees are entitled to be treated in the same way as permanent employees when it comes to the opportunity to receive training and to secure any permanent position in the establishment …"

whose contract is deemed to be of an indefinite duration as contemplated in section 198B(5) of the LRA read with section 198B(8)(a) of the LRA. This question thus remains.

Regulation 2 provides that a comparable permanent employee is a comparator of a fixed-term employee provided that the following is met: (a) both the fixed-term employee and the comparable permanent employee are employed by the same employer; and (b) they are both engaged in the *same/similar work* and, if relevant, having regard to whether they have a similar level of skills and qualifications; and (c) the comparable permanent employee works at the same establishment as the fixed-term employee and where there is no such comparable permanent employee then a comparable permanent employee who works at a different establishment.[531] Leach states that, in determining whether the work is the same or similar, the focus should be on the work that the fixed-term employee and the comparable permanent employee are engaged in instead of focusing on their skills and qualifications unless this is relevant to the actual work performed.[532] It is clear that the Fixed-term Employees Regulations is restricted to work that is the same or similar. Whilst the Fixed-term Employees Regulations is restricted to the same/similar work and this is the same position under section 198B(8)(a) of the LRA, it is submitted that the guidance regarding how the same work or similar work issue should be approached under section 198B(8)(a) of the LRA, as called for in (b) under this paragraph 7.2 above, can be found in paragraphs 5.4-5.5 in Chapter 2 of this thesis as read with

---

531 Regulation 2(1)(a)-(b) of the Fixed-term Employees Regulations. The Fixed-term work – Guidance https://webarchive.nationalarchives.gov.uk/ukgwa/20070603203105/http://www.dti.gov.uk/employment/employment-legislation/employment-guidance/page18475.html states the following: “A fixed-term employee cannot compare conditions with someone at an associated employer’s establishment.” Smith I “Division AI – Fixed-term Employees” in Smith I (gen editor) *Harvey on Industrial Relations and Employment Law* (loose-leaf) states the following at para 168: “The concept of 'associated employers' is not adopted by the FTE Regs SI 2002/2034.” Lockton DJ *Employment Law* 9ed (Palgrave Macmillan 2014) states the following at 161 regarding the Fixed-term Employees Regulations: “The comparator is the same as under the Part-time Worker Regulations, that is a permanent employee employed by the same employer, at the same establishment or a different establishment operated by the employer, and employed on the same or broadly similar work …”

532 Leach D “Temporary Workers” in *Tolley’s Employment Law Service* (loose-leaf) at T2042. Leach D “Temporary Workers” in *Tolley’s Employment Law Service* (loose-leaf) states the following at T2042: “ … The same approach to the test of 'the same or broadly similar work' will apply, as that which is applied under the Part-time Workers Regulations 2000 and the Agency Workers Regulations 2010, following *Matthews v Kent & Medway Fire Authority [2006] IRLR 367 (HL)* and *Coles v Ministry of Defence [2015] IRLR 872 (EAT)* respectively: the focus should be on the work that the worker and the comparator are engaged to do, rather than a comparison of their respective qualifications and skills which will only be relevant to the extent that they impinge on the work that is actually done.”

paragraph 4.4.1 above. It should be noted that the guidance provided by Leach in this paragraph to the effect that the focus should be on the work that the fixed-term employee and the comparable permanent employee are engaged in instead of focusing on their skills and qualifications unless this is relevant to the actual work performed in determining whether the work is the same or similar has been dealt with in paragraph 4.4.1 above and submissions based on the benefit of this statement by Leach thus does not have to be made here as it is not necessary.

Smith states that there is no minimum qualification period of continuous employment required in order for the fixed-term employee to obtain protection.[533] Notwithstanding this, an employer may lawfully exclude fixed-term employees on short-term contracts from certain benefits by setting a qualifying period for those benefits on condition that the qualifying period does not discriminate between fixed-term employees and permanent employees.[534] Regulation 3(2)(a) of the Fixed-term Employees Regulations allows the employer to do so.[535] It is submitted that the discussion in this paragraph serves to place the Framework Agreement relating to fixed-term employees in context with no guidance being sought to be extracted for the research questions as stated in (a)-(c) above under this paragraph 7.2 for the following reasons. Section 198B of the LRA does not contain a provision similar to regulation 3(2)(a) of the Fixed-term Employees Regulations which allows an employer to exclude a fixed-term employee on short-terms contracts from certain benefits by setting a qualification period for those benefits and no guidance can be extracted therefrom.

The Fixed-term Work Guidance Note[536] ("Fixed-term Guide") sets out the following instances of when less favourable treatment can occur: (a) when a fixed-term employee

---

[533] Smith I "Division AI – Fixed-term Employees" in Smith I (gen editor) *Harvey on Industrial Relations and Employment Law* (loose-leaf) at paras 160-165.

[534] Smith I & Baker A *Smith & Wood's Employment Law* 10ed (Oxford University Press 2010) 65.

[535] Regulation 3(2)(a) of the Fixed-term Employees Regulations provides the following: " … (2) Subject to paragraphs (3) and (4), the right conferred by paragraph (1) includes in particular the right of the fixed-term employee in question not to be treated less favourably than the employer treats a comparable permanent employee in relation to-(a) any period of service qualification relating to any particular condition of service …"

[536] This guidance note sets out the requirements of the Fixed-term Regulations and its purpose is to explain the requirements of the Regulations to employers, union representatives and employees. National

is not provided with a benefit be it contractual or non-contractual that a comparable permanent employee receives; (b) the fixed-term employee is offered a benefit on less favourable terms; (c) if the employer fails to do something for a fixed-term employee that is done for a permanent employee; (d) where the fixed-term employee is given less paid holidays than a comparable permanent employee; (e) where the contracts of the fixed-term employee and the comparable permanent employee are the same but the permanent employee is provided with extra benefits which are not provided to the fixed-term employee (for eg a non-contractual bonus); and (f) where training is accessible to permanent employees but not to fixed-term employees.[537] Based on this, the following guidance can be extracted for the research question stated in (c) above under this paragraph 7.2 dealing with any further lessons that can be learnt from the United Kingdom equal pay law for the South African equal pay law relating to fixed-term contract employees under section 198B(8)(a) of the LRA. There is no mention made in the South African equal pay law relating to fixed-term contract employees under section 198B(8)(a) of the LRA as to what constitutes less favourable treatment of a fixed-term employee and to this end it is submitted that the instances of when less favourable treatment can occur as set out in the Fixed-term Guide in this paragraph provides invaluable guidance on this score for section 198B(8)(a) of the LRA and should be mentioned and explained in the Equal Pay Code with reference to the Code in this regard being specifically made under section 198B of the LRA.

Regulation 3(5) of the Fixed-term Employees Regulations states that in order to determine whether a fixed-term employee has been treated *less favourably* as compared to a comparable permanent employee, the *pro rata* principle should be applied unless it is inappropriate. The Fixed-term Employees Regulations does not state when the application of the *pro rata* principle will be inappropriate, but it is submitted that the inappropriateness of the application of the *pro rata temporis* principle as explained under

Archives 2007 http://webarchive.nationalarchives.gov.uk/20070603164510/http://www.dti.gov.uk/employment/employment-legislation/employment-guidance/page18475.html

537 The Fixed-term work – Guidance https://webarchive.nationalarchives.gov.uk/ukgwa/20070603203105/http://www.dti.gov.uk/employment/employment-legislation/employment-guidance/page18475.html.

paragraph 7.2 of Chapter 3 of this thesis in relation to fixed-term contract employees under international labour law applies *mutatis mutandis* here to the application of the *pro rata* principle. Based on this it submitted that the *pro rata* principle under the Fixed-term Employees Regulations only applies to divisible benefits and not to indivisible benefits. The *pro rata* principle, which is quintessentially a principle of proportionality, requires that where a comparable permanent employee is afforded pay including any other benefit then a fixed-term employee should receive a reasonable proportion of that pay and/or benefit having regard to the length of his/her employment contract as well as the terms on which the pay and/or benefit is afforded.[538] It is clear from this that the *pro rata* principle operates on a term by term approach in that it looks at a term/s of the comparable permanent employee and determines what proportion of that term/s should be afforded to the fixed-term employee. The Fixed-term Guide states that the term by term approach requires that every individual term of a fixed-term employee's employment package must be precisely the same, including the same on a *pro rata* basis, as compared to that of the comparable permanent employee unless a difference in the term is objectively justified. For example, if a permanent employee is paid £350 per week and has 25 days' annual leave per year,

---

[538] Regulation 1 of the Fixed-term Employees Regulations. Regulation 1 of the Fixed-term Employees Regulations defines the *pro rata* principle as follows: ""pro rata principle" means that where a comparable permanent employee receives or is entitled to pay or any other benefit, a fixed-term employee is to receive or be entitled to such proportion of that pay or other benefit as is reasonable in the circumstances having regard to the length of his contract of employment and to the terms on which the pay or other benefit is offered …". The Fixed-term work – Guidance https://webarchive.nationalarchives.gov.uk/ukgwa/20070603203105/http://www.dti.gov.uk/employment/employment-legislation/employment-guidance/page18475.html states the following: "There are some benefits which may be offered on an annual basis or over a specified period of time, such as season tickets, season ticket loans, health insurance or staff discount cards. Where a fixed-term employee is not expected to work for the entire period for which a benefit is offered, it may be appropriate to offer it in proportion to the duration of the contract. If the contract is for six months, the employee should receive half of an annual benefit; if the contract is for four months, they should receive one third. There may be circumstances where it is not possible to offer the benefit in proportion in this way, in which case employers may be able to objectively justify not giving it to fixed-term employees if the cost of doing so would be disproportionate to the benefit the employee received. Employers need to consider whether less favourable treatment is objectively justified on a case-by-case basis." Smith I "Division AI – Fixed-term Employees" in Smith I (gen editor) *Harvey on Industrial Relations and Employment Law* (loose-leaf) states the following at para 168: "The pro rata principle (reg 1(2)) is applied by reg 3(5) to ensure that the fixed-term employee's pay and benefits are the same as the comparable permanent employee or are pro-rated according to the circumstances, taking into account factors such as length of service and the basis upon which the pay and benefits are provided." Pitt G *Employment Law* 6ed (Sweet & Maxwell Limited 2007) states the following at 90: "Following the model of the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 … the pro rata principle applies."

then the fixed-term employee is entitled to the same conditions (including the same conditions on a *pro rata* basis) unless objectively justified.[539]

It is submitted that it is clear from the above discussion that the use of the *pro rata* principle which is essentially the *pro rata temporis* principle, where its application is appropriate, results in the fixed-term employee not receiving less treatment as compared to a comparable permanent employee. Based on this as well as the discussion in the immediately preceding paragraph, the following guidance can be extracted for the part of the research question stated in (a) above under this paragraph 7.2 dealing with whether the United Kingdom equal pay law can provide guidance to the uncertainty regarding whether the phrase "must not be treated less favourably" in section 198B(8)(a) of the LRA must be interpreted to mean treatment that is the same or treatment that is on the whole not less favourably insofar as fixed-term employees who are employed for a fixed-term are concerned. It is submitted that the phrase "must not be treated less favourably" in section 198B(8)(a) of the LRA should be interpreted to refer to treatment that is the same and treatment that is the same subject to the *pro rata temporis* principle. It is further submitted that treatment that is the same will apply in the case of indivisible benefits as it cannot be granted *pro rata temporis* whereas treatment that is the same subject to the *pro rata temporis* principle will apply to divisible benefits which can be granted *pro rata temporis*. This, should, however, be mentioned and explained in the Equal Pay Code with reference to the Code in this regard being specifically made under section 198B of the LRA.

Regulation 3(3)(b) of the Fixed-term Employees Regulations which provides that the right of fixed-term employees to no less favourable treatment only applies if the less favourable treatment cannot be justified on objective grounds is subject to regulation 4 which deals with objective justification in relation to less favourable treatment.[540] Regulation 4(1) of the Fixed-term Employees Regulations states that where an employee is treated less

---

[539] The Fixed-term work – Guidance https://webarchive.nationalarchives.gov.uk/ukgwa/20070603203105/http://www.dti.gov.uk/employment/employment-legislation/employment-guidance/page18475.html.

[540] Regulation 3(4) of the Fixed-term Employees Regulations.

favourably than a comparable permanent employee by his employer in relation to any term/s of his her employment contract, then the less favourable treatment relating to the term/s will be justified on objective grounds if the term/s of the fixed-term employee's contract taken as a whole is/are at least as favourable as the terms of the comparable permanent employee's contract.[541] It is clear from this that the employer may justify the less favourable treatment of the fixed-term employee regarding a term/s by showing that the package given to the fixed-term employee is on the whole at least as favourable as the terms enjoyed by the comparable permanent employee. Smith and Baker state that regulation 4(1) of the Fixed-term Employees Regulations which provides for the fixed-term employee's contract to be taken as a whole in relation to the terms of the comparable permanent employee permits the employer to rely on a package approach instead of a term by term approach and this allowance is suitable in cases where the employer pays the fixed-term employee more, for instance a higher hourly rate, in order to reflect the fact that the fixed-term employee does not qualify for longer term benefits. They, however, remark that the package approach is not usual in the sense that it is not allowed in general equal pay law, in terms of which the claimant can demand equality on a term by term

[541] Leach D "Temporary Workers" in *Tolley's Employment Law Service* (loose-leaf) states the following at T2044: "An employer can justify some terms that are worse than those of a permanent employee if, overall, the fixed-term employee's package is not less favourable than that of the comparator." Smith I "Division AI – Fixed-term Employees" in Smith I (gen editor) *Harvey on Industrial Relations and Employment Law* (loose-leaf) states the following at para 169: " … where the 'term-by-term' comparison throws up provisions which are less favourable in the case of the fixed term employee as compared with a permanent employee, an employer can treat the differences as justified on objective grounds if the terms of the fixed term employee's contract of employment, taken as a whole, are at least as favourable as the terms of the comparable permanent employee's contract of employment (reg 4)." Taylor S & Emir A *Employment Law: An Introduction* 3ed (Oxford University Press 2012) state the following at 372: "The other point to note is that less favourable treatment of a fixed-term employee will be justified on objective grounds if the terms of his or her contract, taken as a whole, are at least as favourable as the terms of the comparable permanent employee's contract of employment. This means, therefore, that if one of the terms of a fixed-term employee's contract is less favourable than the equivalent term in the comparator's contract, it can be offset by the provision of another benefit or more advantageous term in the fixed-term employee's contract, so long as the overall package of benefits is no less favourable than that of the permanent comparator." Pitt G *Employment Law* 6ed (Sweet & Maxwell Limited 2007) states the following at 90 relating to the Fixed-term Employees Regulations: "Unlike the Equal Pay Act, it is possible for an employer to argue justification on the basis that the job package for the fixed-term employee is as favourable as that of the permanent employee, taken as a whole, rather than on a term-by-term basis."

basis, and the package approach is further not permitted in the *Part-time Workers Regulations*.[542]

The Fixed-term Guide states that the package approach allows an employer to balance a less favourable term against a more favourable one on condition that it ensures that the fixed-term employee's overall employment package is not less favourable as compared to that of the comparable permanent employee. It further states that the package approach means that the employer is not prohibited from paying higher up-front rewards to the fixed-term employee in return for reduced benefits elsewhere provided that the fixed-term employee's overall package is not less favourable. The value of the benefits should be assessed having regard to their objective monetary value and not to the value which the employer or employee perceives them to have.[543] The Fixed-term Guide provides the following example relating to the application of the package approach:

> Example of using the package approach: A fixed-term employee is paid £20,800 per year (£400 per week) which is the same as a comparable permanent employee but gets three days' fewer paid holiday per year than comparable permanent employees. To ensure that the fixed-term employee's overall employment package is not less favourable, their annual salary is increased to £20,970. (£170 is added on, since this is the value of three days' holiday pay. A day's holiday pay is worked out as annual salary divided by 365.)[544]

It is clear from the above discussion that treatment of a fixed-term employee that is on the whole at least as favourable (on the whole not less favourable) as the terms of the comparable permanent employee is regarded as less favourable treatment and its operation is thus confined to it operating as an objective ground to justify the less favourable treatment. This strengthens the argument made above under this paragraph 7.2 to the effect that the phrase "must not be treated less favourably" in section 198B(8)(a)

---

542 Smith IT and Baker A *Smith and Wood's Employment Law* (Oxford University Press 2010) 65 read with fn 110.

543 National Archives 2007 http://webarchive.nationalarchives.gov.uk/20070603164510/http://www.dti.gov.uk/employment/employment-legislation/employment-guidance/page18475.html. The Fixed-term Guide states the following: "If a package approach is used, it will be objectively justified for a fixed-term employee to have a less favourable overall package than a comparable permanent employee, if the difference consists in one or more terms that it is objectively justified not to give the fixed-term employee."

544 National Archives 2007 http://webarchive.nationalarchives.gov.uk/20070603164510/http://www.dti.gov.uk/employment/employment-legislation/employment-guidance/page18475.html.

of the LRA should be interpreted to refer to treatment that is the same and treatment that is the same subject to the *pro rata temporis* principle which excludes an interpretation that the phrase can be interpreted to mean treatment that is on the whole not less favourably.

Based on the above discussion, the following lessons can be learnt from the United Kingdom equal pay law for the South African equal pay law relating to fixed-term contract employees especially insofar as treatment that is on the whole not less favourable is concerned:

(a) An employer may justify the less favourable treatment of the fixed-term employee regarding a term/s by showing that the package given to the fixed-term employee is on the whole at least as favourable as the terms enjoyed by the comparable permanent employee;

(b) The package approach allows an employer to balance a less favourable term against a more favourable one on condition that it ensures that the fixed-term employee's overall employment package is not less favourable as compared to that of the comparable permanent employee; and

(c) The allowance of an employer to rely on a package approach instead of a term by term approach is suitable in cases where the employer pays the fixed-term employee more, for instance a higher hourly rate, in order to reflect the fact that the fixed-term employee does not qualify for longer term benefits. The package approach means that the employer is not prohibited from paying higher up-front rewards to the fixed-term employee in return for reduced benefits elsewhere provided that the fixed-term employee's overall package is not less favourable. The value of the benefits should be assessed having regard to their objective monetary value and not to the value which the employer or employee perceives them to have.

It is submitted that the allowance of an employer to justify the less favourable treatment of the fixed-term employee regarding a term/s by relying on treatment that is on the whole not less favourable (the package approach) as compared to the terms enjoyed by the comparable permanent employee in the United Kingdom equal pay law should be used as a ground of justification to differential treatment of a fixed-term employee under section 198D of the LRA. It is submitted that the appropriateness of using this ground of justification is set out in the principles listed in (a)-(c) above. It is further submitted that the principles listed in (a)-(c) above should be mentioned in the Equal Pay Code with reference thereto being made in section 198D of the LRA which deals with justifiable reasons (grounds of justification) that can be relied on for differential treatment.[545]

Regulation 4(2) of the Fixed-term Employees Regulations provides that regulation 4(1) does not prejudice the generality of the objective justification referred to in regulation 3(3)(b) of the Fixed-term Employees Regulations. Regulation 3(3)(b) allows an employer to use a straightforward objective justification for the less favourable treatment.[546] This means that an employer may rely on treatment that is on the whole not less favourable as a ground of justification to different treatment as contemplated in regulation 4(1) of the Fixed-term Employees Regulations and/or it may rely on the general ground of justification to different treatment as contemplated in regulation 3(3)(b) of the Fixed-term Employees Regulations. The Fixed-term Guide states that less favourable treatment will be objectively justified provided that the following is shown by the employer: (a) it is to achieve a legitimate objective; (b) it is necessary to achieve that objective; and (c) it is an appropriate means to achieve that objective.[547] The Fixed-term Guide further states that

[545] See para 11.4 of Chapter 2 of this thesis for a discussion of section 198D of the LRA.
[546] Smith I & Baker A *Smith & Wood's Employment Law* 10ed (Oxford University Press 2010) 65.
[547] The Fixed-term work – Guidance https://webarchive.nationalarchives.gov.uk/ukgwa/20070603203105/http://www.dti.gov.uk/employment/employment-legislation/employment-guidance/page18475.html. Smith I "Division AI – Fixed-term Employees" in Smith I (gen editor) *Harvey on Industrial Relations and Employment Law* (loose-leaf) states the following at para 170: "With regard to justification generally, the guidance by BIS (previously the DTI and BERR and now BEIS) suggests adoption of the EC law test that the employer must show that the less favourable treatment: (1) is to achieve a legitimate objective, for example a genuine business objective; (2) is necessary to adhere [achieve] that objective; and (3) is an appropriate way to achieve that objective. That test has been expanded on by the ECJ to hold that it requires unequal treatment to be justified by the existence of 'precise and concrete factors, characterising the employment conditions to which it relates, in the specific context in which it occurs and on the basis of

objective justification can be a matter of degree and to this end it states the following. If the cost to an employer of affording a benefit to a fixed-term employee is disproportionate to the benefit that the fixed-term employee would receive then different treatment may be objectively justified.[548] The Fixed-term Guide then importantly states that an employer has to, on a case-by-case basis, consider whether the less favourable treatment in question is objectively justified.[549] It is important to note that an employer is allowed to try and objectively justify the less favourable treatment by relying on the differences between the job roles of the fixed-term employee and the comparable permanent employee even where an Employment Tribunal has found that their work is broadly similar.[550] Smith states that if it is found that the respective work performed is broadly similar then there may still be differences within the "broadly similar" that might be able to objectively justify the less favourable treatment.[551]

objective and transparent criteria in order to ensure that that unequal treatment in fact responds to a genuine need, is appropriate for achieving the objective pursued and is necessary for that purpose' …"

548 The Fixed-term work – Guidance https://webarchive.nationalarchives.gov.uk/ukgwa/20070603203105/http://www.dti.gov.uk/employment/employment-legislation/employment-guidance/page18475.html states the following: "Sometimes, the cost to the employer of offering a particular benefit to an employee may be disproportionate when compared to the benefit the employee would receive, and this may objectively justify different treatment. An example of this may be where a fixed-term employee is on a contract of three months and a comparator has a company car. The employer may decide not to offer the car if the cost of doing so is high and the need of the business for the employee to travel can be met in some other way."

549 The Fixed-term work – Guidance https://webarchive.nationalarchives.gov.uk/ukgwa/20070603203105/http://www.dti.gov.uk/employment/employment-legislation/employment-guidance/page18475.html. Taylor S & Emir A *Employment Law: An Introduction* 3ed (Oxford University Press 2012) state the following at 372: "The employer can also generally justify his treatment of the fixed-term employee, so long as this is done on objective grounds. This means that the employer must show that he has considered and balanced the rights of the employee against business objectives. As long as he can show it is a genuine objective and that the treatment was necessary and appropriate to achieve that objective, then the treatment will be justified."

550 *Manchester College v Cocliff* UKEAT/0035/10 at para 29.

551 Smith I "Division AI – Fixed-term Employees" in Smith I (gen editor) *Harvey on Industrial Relations and Employment Law* (loose-leaf) at para 170.02. Smith I "Division AI – Fixed-term Employees" in Smith I (gen editor) *Harvey on Industrial Relations and Employment Law* (loose-leaf) states the following at para 170.02: "One particular point to note in relation to the application of the Regulations as a whole is that the fact that a tribunal has found that the claimant and comparator were engaged on similar work does not mean that the employer cannot raise the justification defence based on differences between their job roles; in other words, once the comparison has been established, there can still be differences (within that similarity) that could legally merit the difference in treatment: *Manchester College v Cocliff UKEAT/0035/10*, *[2010] All ER (D) 92 (Sep)*."

The following further lessons can be learnt from the United Kingdom equal pay law for the South African equal pay law relating to fixed-term contract employees under section 198B(8)(a) of the LRA:

(a) Less favourable treatment will be objectively justified provided that the following is shown by the employer: (i) it is to achieve a legitimate objective; (ii) it is necessary to achieve that objective; and (iii) it is an appropriate means to achieve that objective;

(b) An employer has to, on a case-by-case basis, consider whether the less favourable treatment in question is objectively justified;

(c) If the cost to an employer of affording a benefit to a fixed-term employee is disproportionate to the benefit that the fixed-term employee would receive then different treatment may be objectively justified; and

(d) An employer is allowed to try and objectively justify the less favourable treatment by relying on the differences between the job roles of the fixed-term employee and the comparable permanent employee even where the work performed is broadly similar and such differences may be able to justify the less favourable treatment.

It is submitted that the principles listed in (a)-(b) in the immediately preceding paragraph provides general guidance for section 198D of the LRA. It is further submitted that the principles listed in (c)-(d) in the immediately preceding paragraph provides specific guidance for section 198D of the LRA which should be mentioned in the Equal Pay Code with reference thereto being made in section 198D of the LRA.

In *Manchester College v Cocliff*[552] the Employment Appeal Tribunal held that the Fixed-term Employees Regulations requires a stepped approach to determine whether a fixed-term employee has been less favourably treated as compared to his/her comparable permanent employee (comparator). The Employment Appeal Tribunal further held that

552 UKEAT/0035/10.

the stepped approach consists of the following steps: (a) the first step looks at whether the fixed-term employee and the comparable permanent employee are engaged in the same or broadly similar work; (b) the second step looks at whether the less favourable treatment is on the ground that the fixed-term employee claimant is a fixed-term employee; and (c) the third step looks at whether the less favourable treatment can be justified on objective grounds. The Employment Appeal Tribunal importantly held that progression can only be made to the next step if the prior step has been met.[553] The following guidance (principles) can be extracted for the research question stated in (c) above under this paragraph 7.2 dealing with any further lessons that can be learnt from the United Kingdom equal pay law for the South African equal pay law relating to fixed-term contract employees under section 198B(8)(a) of the LRA. Whilst the three-step approach seems obvious it is submitted that the three-step approach set out above together with the guidance that progression from one step to the next step can only be made if the prior step has been met provides valuable guidance which should be mentioned in relation to section 198B read with section 198D of the LRA. It is submitted that this should be mentioned in the Equal Pay Code with reference thereto being made in section 198B of the LRA.

7.3 Part-time Employees

The guidance sought from the United Kingdom equal pay law for the research questions relating to part-time employees as called for in paragraph 13.10.3 of Chapter 2 of this thesis is as follows: (a) Whether the United Kingdom equal pay law can provide guidance relating to what is meant by the phrase "must treat a part-time employee on the whole not less favourably" in section 198C(3)(a) of the LRA, and related to this is, whether international labour law can provide guidance relating to how the working hours of the part-time employee should be taken into account when providing her with treatment that is on the whole not less favourable; (b) Whether guidance can be gained regarding how they approach the same work or similar work (substantially the same work) issue; and (c)

[553] At para 20.

Any further lessons that can be learnt from the United Kingdom equal pay law for the South African equal pay law relating to part-time employees under section 198C(3)(a) of the LRA.

The Part-time Workers (Prevention of Less Favourable Treatment) Regulations, 2000[554] ("Part-time Workers Regulations") gives effect to the European Council Directive 97/81/EC Concerning the Framework Agreement on Part-time Work which is discussed in paragraph 7.3.2 of Chapter 3 of this thesis.[555] A part-time worker is defined as a worker

---

[554] Part-time Workers (Prevention of Less Favourable Treatment) Regulations Statutory Instrument No 1551 of 2000 ("Part-time Workers Regulations"). Duggan M *Equal Pay – Law and Practice* (Jordan Publishing Limited 2009) states at 242 that the Part-time Workers Regulations are not gender based and as such provides and easier route for the part-time worker than claims in equal pay where the principles are complex. Smith I "Division AI – Part-time Workers" in Smith I (gen editor) *Harvey on Industrial Relations and Employment Law* (loose-leaf) states the following at para 133.01: "The aim of the Directive and, therefore, of the Part-Time Regulations is to end less favourable treatment to Part-Time Workers and support the development of a flexible labour market by encouraging the greater availability of part-time work and increasing the quality and range of such work."

[555] European Council Directive Concerning the Framework Agreement on Part-time Work Council Directive 97/81/EC. The Explanatory Note to the Part-time Workers Regulations states the following: "These Regulations come into force on 1st July 2000 and implement Directive 97/81/EC (normally referred to as the Part-time Work Directive) …" Benson E "Part-time Employment" in *Tolley's Employment Law Service* (loose-leaf) states the following at P1001-P1002: "The rights of part-time workers to equal treatment with full-time workers was given a significant boost by the Part-time Workers Directive, which was implemented in the UK with effect from 1 July 2000 by the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000." Smith I "Division AI – Part-time Workers" in Smith I (gen editor) *Harvey on Industrial Relations and Employment Law* (loose-leaf) states the following at para 133: "A part-time worker is entitled to be treated no less favourably than a comparable full-time worker. The principal source for the UK legislation to secure this objective is the Part-Time Workers Directive 97/81/EC which was extended to the UK by Directive 98/23/EC. The Directive was implemented by the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000 SI 2000/1551 …." Lockton DJ *Employment Law* 9ed (Palgrave Macmillan 2014) states the following at 158: " … the government implemented the Part-time Work Directive (97/81/EC) by the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 …" Taylor S & Emir A *Employment Law: An Introduction* 3ed (Oxford University Press 2012) states the following at 366: " In 1997, the European Union passed a directive specifically to protect part-time workers from discrimination, the Part-time Workers Directive 1997. This was incorporated into British law as the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000, and came into force in July of that year. It was hoped that this would protect part-time workers and create a better working environment." Smith I & Baker A *Smith & Wood's Employment Law* 10ed (Oxford University Press 2010) states the following at 61: "The Part-time Workers Directive is transposed into domestic law in the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 in relation to its primary requirement of a regime of non-discrimination." Duggan M *Equal Pay – Law and Practice* (Jordan Publishing Limited 2009) states the following at 241: "In the UK the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000, SI 2000/1551 (PTW Regs 2000) have sought to implement Community law." Duggan M *Equal Pay – Law and Practice* (Jordan Publishing Limited 2009) states the following at 246: "The [Part-time Workers] Regulations were enacted as a result of the Part-time Worker Directive (97/81/EC)." Hardy S *Labour Law and Industrial Relations in Great Britain* 3rd revised edition (Kluwer Law International 2007) states the following at 100: "The Part-time Work directive has been implemented in

who is paid wholly or partly by reference to the time that he/she works and having regard to the custom and practice of the employer as it relates to workers employed under the same type of contract. The Part-time Workers Regulations goes on to state that a part-time worker is a worker who is not identifiable as a full-time worker.[556]

---

the UK by the Part-time Work (Prevention of Less Favourable Treatment) Regulations 2000." Pitt G *Employment Law* 6ed (Sweet & Maxwell Limited 2007) states the following at 88: "The Part-time Work Directive sought to encourage enhanced opportunities for part-time work, but this is not expressed as a binding obligation and it is not addressed in the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000."

[556] Regulation 2(2) of the Part-time Workers Regulations provides the following: "A worker is a part-time worker for the purpose of these Regulations if he is paid wholly or in part by reference to the time he works and, having regard to the custom and practice of the employer in relation to workers employed by the worker's employer under the same type of contract, is not identifiable as a full-time worker." Regulation 1 defines a worker as follows: ""worker" means an individual who has entered into or works under or (except where a provision of these Regulations otherwise requires) where the employment has ceased, worked under-(a) a contract of employment; or (b) any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual." . Benson E "Part-time Employment" in *Tolley's Employment Law Service* (loose-leaf) states the following regarding the definitions of a part-time worker and full-time worker in the Part-time Workers Regulations at P1010: "… Despite the vagueness of these definitions, there are remarkably few cases in which there has been any argument over whether a worker is full- or part-time." Lockton DJ *Employment Law* 9ed (Palgrave Macmillan 2014) states the following at 158: "… the [Part-time Workers] Regulations apply to workers and not just employees, and therefore apply to anyone who has agreed to perform any work or services personally." Taylor S & Emir A *Employment Law: An Introduction* 3ed (Oxford University Press 2012) states the following at 366: "The role of the part-time worker has traditionally been taken by women, as a means of earning money while still being able to care for children. As more and more women took on a role in the workforce, there were more and more part-time workers. In addition, as the economy expanded, and services started to be provided on a twenty-four hours, seven days a week basis, the traditional working hours had to be stretched to accommodate this and so the availability and number of part-time jobs increased." Taylor S & Emir A *Employment Law: An Introduction* 3ed (Oxford University Press 2012) further state the following at 368: "A part-time worker is someone who works fewer hours a week than recognised full-timers do in the organisation in question. The Regulations do not set out a full definition of what a part-time worker is, effectively saying that a part-time worker is someone who is not a full-time worker, depending on the employer's business. In other words, there is no specific formula, and each case depends on its own facts. Thus, in some companies, workers who work thirty hours and above might be customarily regarded as full-time, whereas in another company it might be only workers who work more than, say, forty-five hours a week." Smith I & Baker A *Smith & Wood's Employment Law* 10ed (Oxford University Press 2010) state the following at 62 regarding a part-time worker under the Part-time Workers Regulations: "A part-timer is defined quite simply as any worker who 'having regard to the custom and practice of his employer in relation to workers employed by the worker's employer under the same type of contract is not identifiable as a full-time worker. This covers anyone working fewer hours than full time and so is not confined to those working, for example, half time." Duggan M *Equal Pay – Law and Practice* (Jordan Publishing Limited 2009) states the following at 241: "It is a fact that the majority of part-time workers in the UK are women. … The use of part-time workers may satisfy the requirements of employers who want a flexible work force and also enable one partner in a family to work part-time whilst catering for domestic needs or even for both partners to work part-time so that they can spend time with the family."

Regulation 2(4) of the Part-time Workers Regulations provides that a comparable full-time worker[557] is a comparator of a part-time worker provided that the following is met: (a) both the part-time worker and the comparable full-time worker are employed by the same employer under the same type of contract; and (b) they are both engaged in the same/similar work[558] and, if relevant, having regard to whether they have a similar level of qualification, skills and experience; and (c) the comparable full-time worker works at the same establishment as the part-time worker and where there is no such comparable full-time worker then a comparable full-time worker who works at a different

[557] Regulation 2(1) of the Part-time Workers Regulations provides the following: "A worker is a full-time worker for the purpose of these Regulations if he is paid wholly or in part by reference to the time he works and, having regard to the custom and practice of the employer in relation to workers employed by the worker's employer under the same type of contract, is identifiable as a full-time worker."

[558] Benson E "Part-time Employment" in *Tolley's Employment Law Service* (loose-leaf) states the following at P1011: "The meaning of 'the same or broadly similar work' was explored in *Matthews v Kent and Medway Fire Authority [2006] IRLR 367*. The tribunal, EAT and the Court of Appeal concluded that retained or part-time fire fighters and full-time fire fighters were employed on the same type of contract but that the two groups of employees were not employed to do the same or broadly similar work. In addition to fighting fires and responding to emergencies, there were 'measurable additional functions' carried out by the full-time fire fighters such as educational, preventative and administrative tasks that were not carried out by the part-timers. The House of Lords overturned the decision and held that the tribunal had focused too much on the differences between the two jobs rather than on the core similarities. The tribunal should have focused on whether the differences were important enough to prevent the work being regarded as the same or broadly similar overall. The case was remitted to a tribunal for re-hearing. The tribunal subsequently upheld the claims of the retained fire-fighters on the basis that they carried out the same or broadly similar work as the full-time fire-fighters, but they were treated less favourably in relation to pension and sick pay provision and the differences were not justified." In *Matthews v Kent & Medway Towns Fire Authority* [2006] IRLR 367 (HL) Lady Hale stated the following at para 44: "… The fact that the full-timers do some extra tasks would not prevent their work being the same or broadly similar. In other words, in answering that question particular weight should be given to the extent to which their work is in fact the same and to the importance of that work to the enterprise as a whole. Otherwise one runs the risk of giving too much weight to differences which are the almost inevitable result of one worker working full-time and another working less than full-time." Smith I "Division AI – Part-time Workers" in Smith I (gen editor) *Harvey on Industrial Relations and Employment Law* (loose-leaf) states the following at para 143.01: "This emphasis on similarities will in general legitimise a relatively broad and pro-claimant approach to comparability, especially in a case where the clear majority of functions are in common, but a shot across that particular bow was fired subsequently in *Moultrie v Ministry of Justice [2015] IRLR 264, EAT* which shows that it may be necessary to look at qualitative differences, not just quantitative similarities. … This decision, essentially looking at qualitative differences, not just quantitative ones, was not surprisingly appealed but, in spite of detailed arguments that the tribunal had not applied the Matthews test properly and had reached the wrong conclusion, the EAT held that this was a decision that the tribunal had been entitled to come to. The tribunal had indeed started with the 85% similarity and only then gone on to assess the importance of the 15% differences. Of course, ultimately these are largely matters of fact, but in an area of little case law so far a decision such of [as] this is of interest in showing the way the wind is blowing. It is also of interest legally in its approval of the possible use of qualitative factors, even where quantitatively two jobs look very similar."

establishment.[559] Pitt states that where the contract of either the claimant part-time worker or the comparable full-time worker is for a fixed-term then this will not prevent a comparison between them.[560] Duggan states that a cross-establishment comparison is possible where there is no comparable full-time worker in the same establishment as the claimant part-time worker but both establishments must be operated by the same employer. He further states that the requirement that both establishments must be operated by the same employer is due to the Part-time Workers Regulations not having adopted the concept of associated employers.[561] Lockton states that the Part-time Workers Regulations does not require the comparator to be of the opposite sex because the basis of the less favourable treatment is the worker's part-time status and not his/her sex.[562] The Part-time Workers Regulations does not provide protection to a part-time worker against less favourable treatment as compared to another part-time worker who does not work full-time time but who works longer than the claimant part-time worker. A part-time worker can thus not choose another part-time worker as his/her comparator for the purpose of the Part-time Workers Regulations.[563] Benson states that a part-time worker must choose an actual comparable full-time worker (comparator) and cannot use a hypothetical comparator[564] by for example arguing that a full-time worker would have

---

[559] Regulation 2(4)(a)-(b) of the Part-time Workers Regulations. Taylor S & Emir A *Employment Law: An Introduction* 3ed (Oxford University Press 2012) state the following at 369: "In order for a claim to be made, part-timers will need to identify a comparable full-timer who is receiving more favourable treatment."

[560] Pitt G *Employment Law* 6ed (Sweet & Maxwell Limited 2007) 87.

[561] Duggan M *Equal Pay – Law and Practice* (Jordan Publishing Limited 2009) 248.

[562] Lockton DJ *Employment Law* 9ed (Palgrave Macmillan 2014) 158.

[563] *Advocate General For Scotland v Barton* [2016] IRLR 210 (CS) at para 32.

[564] Smith I "Division AI – Part-time Workers" in Smith I (gen editor) *Harvey on Industrial Relations and Employment Law* (loose-leaf) states the following at para 140: "Part-time workers are, however, only allowed to compare their jobs with a full-time worker doing the same job for the same employer and there is no provision for a hypothetical comparator …" In *Advocate General For Scotland v Barton* [2016] IRLR 210 (CS) the Court of Session stated the following at para 8 with regard to the comparator required by the Part-time Workers Regulations: "… unlike the position in relation to other forms of discrimination, a claimant requires [is required] to show that his treatment was less favourable than that afforded to an actual comparator. Comparison with a hypothetical comparator will not do." In *Carl v University of Sheffield* [2009] IRLR 616 (EAT) the Employment Appeal Tribunal held the following at para 23: "… can Mrs Carl rely on a hypothetical comparator in her PTWR claim? For the reasons we have endeavoured to give we are quite satisfied that she cannot. She must rely on an actual comparator." Lockton DJ *Employment Law* 9ed (Palgrave Macmillan 2014) states the following at 158: "However, unlike other anti-discriminatory legislation, the comparator must be an actual full-time worker and not a hypothetical one …" Connolly M *Discrimination Law* 2ed (Sweet & Maxwell 2011) states the following at 294 regarding the Part-time Workers Regulations: "The regulations demand a real comparator, so claimants cannot use these regulations to bypass the requirement for a real comparator

been treated more favourably than the part-time worker in circumstances where no such comparable full-time worker exists. Benson further states that unlike an equal pay claim under the Equality Act, the Part-time Workers Regulations does not allow a part-time worker to choose a comparator employed at an associated employer or a predecessor comparator.[565] Smith, however, states there is one exception where no actual comparator is required and this is where the worker becomes a part-time worker after having worked full-time in the job then she can compare her part-time employment conditions with her previous full-time contract.[566] Whilst the Part-time Workers Regulations is restricted to the

…" Pitt G *Employment Law* 6ed (Sweet & Maxwell Limited 2007) states the following at 87: "The crucial issue determining the effectiveness of the [Part-time Workers] Regulations relates to the condition that less favourable treatment can only be established by comparison with an actual full-time comparator … This means that a part-timer will have no claim under the [Part-time Workers] Regulations unless there is a "comparable full-time worker" … "

[565] Benson E "Part-time Employment" in *Tolley's Employment Law Service* (loose-leaf) P1011, P1018. Benson E "Part-time Employment" in *Tolley's Employment Law Service* (loose-leaf) states the following at P1018: "Conversely, there are some claims by part-timers which can only be brought under the Part-time Workers Regulations-for example in sectors where there is no clear majority of men or women amongst part-time workers." Smith I "Division AI – Part-time Workers" in Smith I (gen editor) *Harvey on Industrial Relations and Employment Law* (loose-leaf) states the following at para 140 regarding the Part-time Workers Regulations: "… the concept of 'associated employers' … is not adopted by these Regulations." In *Advocate General For Scotland v Barton* [2016] IRLR 210 (CS) the Court of Session stated the following at para 35 regarding the prohibition of using a predecessor comparator for the purpose of the Part-time Workers Regulations: "… on a proper interpretation of regs. 1(2) and 2(4) of the PTWR, Mr Howey would have ceased to be a relevant comparator on retiral; comparability clearly depends on relevant contemporaneous employment."

[566] Smith I "Division AI – Part-time Workers" in Smith I (gen editor) *Harvey on Industrial Relations and Employment Law* (loose-leaf) at para 144. In *Carl v University of Sheffield* [2009] IRLR 616 (EAT) the Employment Appeal Tribunal stated at para 16 that regulation 3(2) of the Part-time Workers Regulations allows for a hypothetical comparator. Regulation 3(2) of the Part-time Workers Regulations provides the following: "Notwithstanding regulation 2(4), regulation 5 shall apply to a worker to whom this regulation applies as if he were a part-time worker and as if there were a comparable full-time worker employed under the terms that applied to him immediately before the variation or termination." Lockton DJ *Employment Law* 9ed (Palgrave Macmillan 2014) states the following at 159: "If a full-time worker becomes part-time or returns to work part-time after an absence of less than 12 months, the worker can choose her former full-time post as comparator …" Taylor S & Emir A *Employment Law: An Introduction* 3ed (Oxford University Press 2012) states the following at 369: " … the part-time worker can also be compared to himself when he worked full-time, if that is relevant." Smith I & Baker A *Smith & Wood's Employment Law* 10ed (Oxford University Press 2010) state the following at 62 regarding the choosing of a comparator under the Part-time Workers Regulations: "There must normally be a comparison with a comparable full-time worker, except where a worker changes from full time to part time or has a period of absence for full-time work and returns part time, in which case the comparison may be with their own previous full-time terms." Duggan M *Equal Pay – Law and Practice* (Jordan Publishing Limited 2009) states the following at 249: "Under reg 3(1) and (2), notwithstanding reg 2(4), reg 5 shall apply as if there were a part-time worker, and as if there were a comparable full-time worker employed under the terms that applied immediately before a variation or termination, where the worker: '(a) was identifiable as a full-time worker in accordance with regulation 2(1); and (b) following a termination or variation of his contract, continues to work under a new or varied contract, whether of the same type or not, that requires him to work for a number of weekly hours that is lower than the

same or similar work and this is the same position under section 198C(3)(a) of the LRA, it is submitted that the guidance regarding how the same work or similar work issue should be approached under section 198C(3)(a) of the LRA as called for in (b) above under paragraph 7.3 can be found in paragraphs 5.4-5.5 in Chapter 2 of this thesis as read with paragraph 4.4.1 above.

Regulation 5(1)(a) states that a part-time worker has the right not to be treated less favourably than a comparable full-time worker regarding the terms of his/her contract.[567] The Part-time Workers Regulations does not set out examples of such contractual terms. The Part-time Workers, the Law and Best Practice – A Detailed Guide for Employers and Part-timers[568] ("Part-time Work Best Practice Guide") is a document which provides

---

number he was required to work immediately before the termination or variation.' The regulation thus makes a comparison between the worker's part-time employment and full-time employment. However, by reg 3(3) any rights by virtue of reg 2(4) are not affected." Pitt G *Employment Law* 6ed (Sweet & Maxwell Limited 2007) states the following at 87: "Workers who were full-time and then change to part-time work, whether or not after a period of absence such as maternity leave, have a right not to be treated less favourably than they were before going part-time."

[567] Part-time Workers Regulations. Benson E "Part-time Employment" in *Tolley's Employment Law Service* (loose-leaf) states the following regarding the Part-time Workers Regulations at P1009: "They give a part-time worker the right not to be unjustifiably subjected to less favourable treatment on the grounds of his or her part-time status than a 'comparable' full-time worker in relation to: (a) terms and conditions of employment; or (b) subjection to any detriment (including dismissal)." Smith I "Division AI – Part-time Workers" in Smith I (gen editor) *Harvey on Industrial Relations and Employment Law* (loose-leaf) states the following at para 138: "A part-time worker has the right not to be treated by his employer less favourably than the employer treats a comparable full-time worker as regards terms of his contract or by being subjected to any other detriment by any act or deliberate omission on the part of his employer …" Smith I "Division AI – Part-time Workers" in Smith I (gen editor) *Harvey on Industrial Relations and Employment Law* (loose-leaf) states the following at para 145: "Normally this factor will be a relatively simple question of fact, as is shown by two case examples … This basic anti-discrimination rule is, however, subject to a defence of objective justification in reg 5(2)(b)." Smith I "Division AI – Part-time Workers" in Smith I (gen editor) *Harvey on Industrial Relations and Employment Law* (loose-leaf) states the following at para 147.01: "… reg 5 gives no equal and opposite legal right to full-timers not to be treated less favourably." Lockton DJ *Employment Law* 9ed (Palgrave Macmillan 2014) states the following at 158: "These [Part-time Workers] Regulations give part-time workers the right not to be treated less favourably, as to the terms and conditions of their employment, than a full-time comparator, unless the employer can justify the less favourable treatment on objective grounds." Duggan M *Equal Pay – Law and Practice* (Jordan Publishing Limited 2009) states the following at 249: "The central provision of the PTW Regs 2000 is contained in reg 5 which enacts the principle of non-discrimination required by clause 4 of the framework agreement in Directive 97/81/EC." Connolly M *Discrimination Law* 1ed (Sweet & Maxwell Ltd 2006) states the following at 250: "The Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 provide that less favourable treatment, including pay, of a part-time worker is unlawful unless "objectively justified.""

[568] The Part-time Work Best Practice Guide https://webarchive.nationalarchives.gov.uk/ukgwa/+/berr.gov.uk/whatwedo/employment/employment-legislation/employment-guidance/page19479.html (last accessed on 4/11/2022).

guidance on how to comply with the Part-time Workers Regulations and offers suggestions for best practice in this area but is not intended to be an authoritative statement of law as this is the role of the tribunals and the courts.[569] The Part-time Work Best Practice Guide unlike the Part-time Workers Regulations sets out the following examples of terms which can fall within regulation 5(1)(a) of the Part-time Workers Regulations: (a) basic rate of pay;[570] (b) bonus pay;[571] (c) shift allowances;[572] (d) unsocial hours payments;[573] (e) weekend payments; (f) participation in a profit sharing and share

---

569 The Part-time Work Best Practice Guide https://webarchive.nationalarchives.gov.uk/ukgwa/+/berr.gov.uk/whatwedo/employment/employment-legislation/employment-guidance/page19479.html. Smith I & Baker A *Smith & Wood's Employment Law* 10ed (Oxford University Press 2010) state the following at 63 regarding the Part-time Work Best Practice Guide: " Of course, the lawyer might be tempted to dismiss this all as non-legalistic wishful thinking, but it is possible that in the future employment lawyers will have to take this form of 'soft law' more seriously, especially as it comes from a directive. It is true that the guidance has no direct form of enforcement, but increasingly in areas such as this employment lawyers are having to think laterally and try to envisage how soft law might be *used* in other contexts. … the guidance might be relevant as evidence of reasonable or unreasonable employer action in a case where the refusal was made in such circumstances as to result in the employee leaving and claiming constructive dismissal. Thus, to write the guidance off as 'only' soft law might be a very short-sighted view."

570 The Part-time Work Best Practice Guide https://webarchive.nationalarchives.gov.uk/ukgwa/+/berr.gov.uk/whatwedo/employment/employment-legislation/employment-guidance/page19479.html states the following: "As a result of the regulations, part-time workers must receive the same basic rate of pay as comparable full-time workers. They must not be given a lower hourly rate, unless justified by objective grounds. One example where a different hourly rate might be objectively justified would be a performance related pay scheme. If workers are shown to have a different level of performance measured by a fair and consistent appraisal system this could justifiably result in different rates of pay." Duggan M *Equal Pay – Law and Practice* (Jordan Publishing Limited 2009) states the following at 252: "Part-timers should not receive a lower basic hourly rate than full-time workers …"

571 The Part-time Work Best Practice Guide https://webarchive.nationalarchives.gov.uk/ukgwa/+/berr.gov.uk/whatwedo/employment/employment-legislation/employment-guidance/page19479.html provides the following example relating to complying with the Part-time Workers Regulations relating to bonus pay: "Bonus pay: A firm awards its workers a Christmas bonus. Its part-time workers receive a pro rata amount, depending on the number of hours they work." Duggan M *Equal Pay – Law and Practice* (Jordan Publishing Limited 2009) states the following at 251: "Part-time workers are entitled to a pro rata bonus."

572 The Part-time Work Best Practice Guide https://webarchive.nationalarchives.gov.uk/ukgwa/+/berr.gov.uk/whatwedo/employment/employment-legislation/employment-guidance/page19479.html provides the following example relating to complying with the Part-time Workers Regulations relating to shift allowances: "Shift allowances: A store has both full-time and part-time workers, working early, day and late shifts. The early and late shifts attract time-and-a-half pay for both full-time workers and comparable part-time workers."

573 The Part-time Work Best Practice Guide https://webarchive.nationalarchives.gov.uk/ukgwa/+/berr.gov.uk/whatwedo/employment/employment-legislation/employment-guidance/page19479.html provides the following example relating to complying with the Part-time Workers Regulations relating to unsocial hours payments: "Unsocial hours: A part-time care assistant receives the same unsocial hours payment for working between midnight and 6 am as his comparable full-time colleague."

option scheme;[574] (g) contractual sick and maternity pay;[575] (h) access to occupational pensions;[576] (i) access to training;[577] (j) health insurance, subsidised mortgages, staff

[574] The Part-time Work Best Practice Guide https://webarchive.nationalarchives.gov.uk/ukgwa/+/berr.gov.uk/whatwedo/employment/employment-legislation/employment-guidance/page19479.html states the following regarding profit sharing and share option schemes: "Participation in profit sharing and share option schemes has sometimes been limited, and those who work part-time excluded. This can undermine one of the key aims of these benefits - to motivate staff, and make sure they have a stake in their company's future success. The Regulations will make most exclusions of part-time staff from profit sharing or share option schemes unlawful. …"

[575] The Part-time Work Best Practice Guide https://webarchive.nationalarchives.gov.uk/ukgwa/+/berr.gov.uk/whatwedo/employment/employment-legislation/employment-guidance/page19479.html states the following regarding contractual sick and maternity pay: "The Regulations apply directly to contractual sick and maternity pay. This means that there is an obligation on employers not to treat a part-time worker less favourably than a comparable full-time worker. The benefits that a full-time worker receives must also apply to part-time workers pro rata. The only exception will be if the different treatment is justified on objective grounds. …" Duggan M *Equal Pay – Law and Practice* (Jordan Publishing Limited 2009) states the following at 252: "The PTW Regs 2000 [Part-time Workers Regulations] apply to contractual sickness and maternity pay so that the part-time worker should receive pro rata benefits …"

[576] The Part-time Work Best Practice Guide https://webarchive.nationalarchives.gov.uk/ukgwa/+/berr.gov.uk/whatwedo/employment/employment-legislation/employment-guidance/page19479.html states the following regarding access to occupational pensions: "Most part-time workers have had access to their employer's occupational pension scheme since 1995 as a result of the principle of 'equal pay for equal work'. Under this principle, employers must provide equality of access, contributions and benefits to men and women, unless the differences are attributable to a material difference other than sex. As most part-time workers are women, the majority of part-time staff already had access to pension schemes because excluding part-time workers might have represented unlawful sex discrimination against women. However, coverage was not universal. Employers could deny access to part-time workers if the exclusion could be objectively justified on ground[s] unrelated to sex and there was no disparate impact on women. Under the new Regulations, employers cannot deny access to both male and female part-time workers, unless different treatment is justified on objective grounds. Scheme rules may need to be revised, to ensure that they comply with the new legislation. …" Smith I "Division AI – Part-time Workers" in Smith I (gen editor) *Harvey on Industrial Relations and Employment Law* (loose-leaf) states the following at para 154: "As there is no requirement under the Part-Time Regulations for a complainant to show that their exclusion from membership of the pension scheme resulted from indirect discrimination against one sex, it may be easier to make a complaint under the Part-Time Regulations than under the Equality Act 2010."

[577] The Part-time Work Best Practice Guide https://webarchive.nationalarchives.gov.uk/ukgwa/+/berr.gov.uk/whatwedo/employment/employment-legislation/employment-guidance/page19479.html states the following regarding access to training: "Access to training is essential if part-time workers are to work effectively, and employers are to make the most of their staff. There is a strong business case for making sure that staff are equipped to do their job well, and their skills are up-to-date. Investing in training, when well-targeted, is investing in the future of the enterprise. It also shows a commitment to workers which will pay dividends in increasing the level of staff morale and commitment to the organisation. Part-time workers often encounter difficulty in obtaining access to training - especially career-orientated development or vocational training. Either they are excluded entirely, or, though they are in theory entitled to attend, their other responsibilities prevent them from participating because of the inconvenient hours. Denying part-time workers access to training will obviously be less favourable treatment. …"

discounts, company cars;[578] (k) annual leave, maternity leave, parental leave;[579] and (l) public holidays.[580] Smith states that there is no minimum period of continuous employment which is required in order for a part-time worker to receive protection.[581] It is submitted that the discussion in this paragraph serves to place the Part-time Workers

---

[578] The Part-time Work Best Practice Guide https://webarchive.nationalarchives.gov.uk/ukgwa/+/berr.gov.uk/whatwedo/employment/employment-legislation/employment-guidance/page19479.html states the following regarding health insurance, subsidised mortgages, staff discounts and company cars: "Where possible, these and similar benefits should be provided pro rata. In some cases, this may prove difficult. In the case of a benefit such as health insurance or company cars, that cannot easily be divided, employers will have to decide whether to withhold it from part-time workers. Employers may decide that the cost of extending such a benefit to part-time workers would be prohibitive. However, it will not be enough for employers to show that a benefit could not be applied pro rata. They must also show that the decision is justified on objective grounds. Employers providing company cars or car allowance might, by way of best practice, calculate the financial value of the benefit to a full-timer and apply that value pro rata to a part-timer. Alternatively, if the benefit or allowance was given to a full-timer, for example every year, then a part-timer working half the full-time hours might be given the benefit or allowance every two years. Other benefits such as clothing allowance, travel allowance or staff discounts might also be extended to part-timers in line with the principles set out here. …"

[579] The Part-time Work Best Practice Guide https://webarchive.nationalarchives.gov.uk/ukgwa/+/berr.gov.uk/whatwedo/employment/employment-legislation/employment-guidance/page19479.html states the following regarding annual leave, maternity leave and parental leave: "Part-time workers, like their full-time colleagues, are entitled to a minimum of statutory annual leave, maternity leave, and parental leave. Many of these entitlements are extended or enhanced by contractual conditions. Part-time workers should have the same leave entitlements pro rata as their full-time colleagues. …" Duggan M *Equal Pay – Law and Practice* (Jordan Publishing Limited 2009) states the following at 252: "Part-time workers are entitled to pro rata …. parental and maternity leave, subject to the issue of objective justification."

[580] The Part-time Work Best Practice Guide https://webarchive.nationalarchives.gov.uk/ukgwa/+/berr.gov.uk/whatwedo/employment/employment-legislation/employment-guidance/page19479.html states the following regarding public holidays: "The rights of part-timers in relation to public holidays and bank holidays may not always be clear. Under the regulations, part-timers should not be treated less favourably than comparable full-timers in their entitlement to public/bank holidays. Allowing full-timers the day off, but not part-timers, is clearly less favourable treatment and unlawful under the regulations unless there is objective justification. To comply with the law, an employer must treat part-time workers as favourably as they treat full time workers. In some circumstances it may be enough simply to give workers a paid day off if their day of work happens to coincide with the public holiday, without giving time off in lieu to those who would not ordinarily work on that day. This may produce a fair result, for example where a shift system means that full-time and part-time workers are equally likely to be scheduled to work on a public holiday. However, where workers work fixed days each week, such a practice could put part-timers at a disadvantage. For example, because most bank and public holidays fall on a Monday, those who do not work Mondays will be entitled to proportionately fewer days off. …" Benson E "Part-time Employment" in *Tolley's Employment Law Service* (loose-leaf) states the following at P1012.1: "… In general, best practice and the least risky way of dealing with this issue is to give all part-time workers a pro-rated entitlement to all public holidays regardless of which days they normally work. This is what is recommended in the BIS guidance." Duggan M *Equal Pay – Law and Practice* (Jordan Publishing Limited 2009) states the following at 252: "Part-time workers are entitled to pro rata contractual holiday entitlement … subject to the issue of objective justification."

[581] Smith I "Division AI – Part-time Workers" in Smith I (gen editor) *Harvey on Industrial Relations and Employment Law* (loose-leaf) at para 137.

Regulations relating to part-time workers in context with no guidance being sought to be extracted for the research questions as stated in (a)-(c) above under this paragraph 7.3.

Regulation 5(3) of the Part-time Workers Regulations states that in deciding whether a part-time worker has been treated less favourably as compared to a comparable full-time worker the *pro rata* principle must be applied unless it is inappropriate. The *pro rata* principle provides the following:

> … where a comparable full-time worker receives or is entitled to receive pay or any other benefit, a part-time worker is to receive or be entitled to receive not less than the proportion of that pay or other benefit that the number of his weekly hours bears to the number of weekly hours of the comparable full-time worker.[582]

It is important to note that the *pro rata* principle as set out in regulation 5(3) of the Part-time Workers Regulations is only relevant to the question regarding whether or not a part-time worker has received less favourable treatment as compared to that of a comparable full-time worker. The *pro rata* principle is not an independent right and does not apply at the stage of determining whether or not the less favourable treatment is on the ground that the employee is a part-time worker.[583] Smith states that a difficulty which may arise

---

582 Regulation 1(2) of the Part-time Workers Regulations. Ebrahim S "A Critical Analysis of the New Equal Pay Provisions Relating to Atypical Employees in Sections 198A-198D of the LRA: Important Lessons from the United Kingdom" *PER* 2017(20) 1 states the following at 19 relating to the *pro rata* principle as contained in the Part-time Workers Regulations: "This test is specifically designed to achieve equal pay for part-time workers and it [is] thus different from the *pro rata* test used in the case of fixed-term contract employees." Duggan M *Equal Pay – Law and Practice* (Jordan Publishing Limited 2009) states the following at 247: "The 'pro rata principle' is a central concept to the PTW Regs 2000 …" Pitt G *Employment Law* 6ed (Sweet & Maxwell Limited 2007) states the following at 87: "In judging whether or not there is less favourable treatment the pro rata principle is to be used, meaning that the part-timer's treatment should be proportionately the same as the full-timer's unless there are objectively justified grounds for any difference." Connolly M *Discrimination Law* 1ed (Sweet & Maxwell Ltd 2006) states the following at 250: "Regulation 1(2) [of the Part-time Workers Regulations] provides that comparisons can be made on a pro rata basis, so that the level of pay for part-time worker['s] is proportionally the same as the full-time worker's."

583 *McMenemy v Capita Business Services Ltd* [2007] IRLR 400 (CS) at para 10. Benson E "Part-time Employment" in *Tolley's Employment Law Service* (loose-leaf) states the following at P1012:" Therefore, benefits such as contractual sick pay or paid holiday entitlement should be based on the ratio of a part-timer's hours per week to those of a comparable full-timer. It is the number of weekly hours that matters-not the number of weeks in the year. So a part-time teacher who worked the same number of hours per week as full-time teachers but who worked fewer weeks in the year was entitled to the same rate of holiday pay as those who worked all weeks (*Brazel v The Harpur Trust UKEAT/0102/17*, 6 March 2018). Where the terms and conditions express benefits such as holiday entitlement in numbers of days, the effect of the pro rata principle is that the part-time worker should be given pro rata entitlement, eg where full-time employees working a five-day week are entitled to 25

is where the particular benefit is not amenable to the *pro rata* principle, for example, a company car or certain holiday entitlements. He further states that if an acceptable agreement cannot be reached in these circumstances then the employer may have an obligation to afford the part-time worker more than a purely *pro rata* entitlement.[584] The Part-time Workers Regulations does not state when the application of the *pro rata* principle will be inappropriate, but it is submitted that the inappropriateness of the application of the *pro rata temporis* principle as explained under paragraphs 7.3.1-7.3.2 in Chapter 3 of this thesis in relation to part-time employees under international labour law applies *mutatis mutandis* here to the application of the *pro rata* principle. Based on this, it submitted that the *pro rata* principle under the Part-time Workers Regulations only applies to divisible benefits and not to indivisible benefits. It is further submitted that where the benefit is indivisible then the part-time worker should be given access to such benefit.

Based on the above paragraphs dealing with the *pro rata* principle, the following guidance can be extracted for the research question stated in (a) above under this paragraph 7.3. A part-time worker is entitled to all forms of payment and benefits that a comparable permanent employee is entitled to but the payment should be granted to the part-time employee in accordance with the *pro rata* principle which is essentially the *pro rata temporis* principle and which requires the calculation of benefits proportionate to working time. It is submitted that the phrase "must treat a part-time employee on the whole not less favourably" in section 198C(3)(a) of the LRA read with the requirement under section 198C(3)(a) of the LRA to take the working hours of the part-time employee into account when providing her with such treatment should be interpreted to mean that a part-time employee is entitled to all forms of payment *pro rata temporis* to which a comparable permanent full-time employee is entitled to. It is further submitted that section 198C(3)(a)

---

days' paid holiday per annum, an employee who works three days per week will be entitled to 15 days' paid annual leave. … Regulation 5(3) recognises that the pro rata principle is not always appropriate in deciding whether there has been less favourable treatment. A simple example would be the selection of part-timers for redundancy ahead of full-timers …"

[584] Smith I "Division AI – Part-time Workers" in Smith I (gen editor) *Harvey on Industrial Relations and Employment Law* (loose-leaf) at para 145. Smith I "Division AI – Part-time Workers" in Smith I (gen editor) *Harvey on Industrial Relations and Employment Law* (loose-leaf) at para 139: "Part-timers must also not be treated less favourably in connection with the service required to qualify for any benefits or the extent of any entitlement and should not be excluded from training simply because they work part-time."

of the LRA should be amended to reflect this clearly and an explanation should be provided in the Equal Pay Code.

The guidance that can be extracted for the research question stated in (c) above under this paragraph 7.3 relating to any further lessons that can be learnt from the United Kingdom equal pay law for the South African equal pay law relating to part-time employees under section 198C(3)(a) of the LRA is as follows. The paragraphs above dealing with the *pro rata* principle entitles a part-time employee to be provided with the same terms and conditions of employment *in proportion* to their working hours, where this is applicable, and to this extent the reference to treatment that is on the whole not less favourable in section 198C(3)(a) does not reflect the purpose of the section which is to provide a part-time employee with the same terms and conditions of employment as a comparable permanent employee taking the part-time workers hours of work into account (*pro rata temporis*) where this is applicable. It is submitted that section 198C(3)(a) of the LRA should be amended to reflect this and reference to treatment that is on the whole not less favourable should accordingly be removed from the section.

Regulation 5(4) of the Part-time Workers Regulations states that a part-time worker who is paid at a lower rate for overtime worked as opposed to what would be paid to a comparable full-time worker for overtime worked in the same period shall not for that reason be regarded as being treated less favourably than the comparable full-time worker if the total number of hours worked by the part-time worker including the overtime, does not exceed the number of hours that the comparable full-time worker is required to work in the period.[585] The Guidance Notes to the Part-time Workers Regulations states that a

[585] Lockton DJ *Employment Law* 9ed (Palgrave Macmillan 2014) states the following at 159-160 regarding regulation 5(4) of the Part-time Workers Regulations: "… This merely adopts the ECJ decision in *Stadt Lengerich v Helmig* [1995] IRLR 216, and was applied in *Jones v Great Northern Railways* (2005) IDS 780." Taylor S & Emir A *Employment Law: An Introduction* 3ed (Oxford University Press 2012) state the following at 369: "The only area in which discrimination against part-timers generally remains lawful is in respect of overtime payments. Part-timers only have the right to enhanced hourly rates when they work more hours than is usual for full-timers in the organisation concerned. It is important to note, however, that this exception only applies to overtime payments and not to other forms of payment such as overtime allowances." Connolly M *Discrimination Law* 1ed (Sweet & Maxwell Ltd 2006) states the following at 251: "Part-time workers cannot compare their overtime pay to that of full-time workers, until the part-time overtime hours reaches a set threshold, say 38 hours per week. So, whilst a full-time

part-time worker is not automatically entitled to overtime pay once he/she works beyond their normal part-time hours but is only entitled to the same hourly rate of overtime pay once they have worked more than the full-time hours of a comparable full-time worker.[586] Benson states that a rule which states that part-time workers are only eligible for overtime rates once they exceed the normal weekly hours of full-time workers is not prohibited.[587] Smith states that regulation 5(4) of the Part-time Workers Regulations does not affect the right of a part-time worker to receive other forms of payment such as, enhanced pay, weekend payments and unsocial hours payments as compared to that of a comparable full-time worker.[588] It is submitted that the discussion in this paragraph serves to place the Part-time Workers Regulations relating to part-time workers in context with no guidance being sought to be extracted for the research questions as stated in (a)-(c) above under this paragraph 7.3 for the following reasons. Section 198C of the LRA does not contain a provision similar to regulation 5(4) of the Part-time Workers Regulations which allows an employer to exclude a part-time employee from overtime pay unless he/she works more than the full-time hours of a comparable full-time worker and no guidance can be extracted therefrom. It is further submitted that this is not known in South African labour law.

The right in regulation 5(1) of the Part-time Workers Regulations only applies if the less favourable treatment is based on the ground that the worker is a part-time worker and the treatment is not justified on objective grounds.[589] The right in regulation 5(1) of the Part-

worker may be paid at double rates for hours worked in excess of 38 per week, a part-time worker may [be] paid at her standard rate for her extra hours up to 38 per week. However, where the full-timers are paid a bonus for some of their contractually obliged hours, then a comparison can be made."

[586] The Guidance Notes to the Part-time Workers Regulations https://www.legislation.gov.uk/uksi/2000/1551/note/made (last accessed on 4/11/2022) states the following: "As case-law currently stands, part-timers do not have an automatic right to overtime payments once they work beyond their normal hours. However, once part-timers have worked up to the full-time hours of comparable full-timers they do have a legal right to overtime payments where these apply. To comply with the law: Part-timers should receive the same hourly rate of overtime pay as comparable full-timers, at least once they have worked more than the normal full-time hours."

[587] Benson E "Part-time Employment" in *Tolley's Employment Law Service* (loose-leaf) P1006.

[588] Smith I "Division AI – Part-time Workers" in Smith I (gen editor) *Harvey on Industrial Relations and Employment Law* (loose-leaf) at para 147.

[589] Regulation 5(2)(a)-(b) of the Part-time Workers Regulations. Smith I "Division AI – Part-time Workers" in Smith I (gen editor) *Harvey on Industrial Relations and Employment Law* (loose-leaf) states the following at para 138 regarding regulation 5(2)(a)-(b) of the Part-time Workers Regulations: "This right applies if, but only if, (a) the less favourable treatment in question was on the ground that the worker is

time Workers Regulations only applies if the condition in regulation 5(2)(a) of the Part-time Workers Regulations is met which relates to showing that the less favourable treatment is on the ground that the worker is a part-time worker. The purpose of the Part-time Workers Regulations is to only redress less favourable treatment of part-time workers if the less favourable treatment is on account of them being part-time workers and not to redress all injustices that may exist.[590] Benson states that it is not required that the part-time status of the worker must be the sole reason for the less favourable treatment and an equal treatment claim (in regulation 5(1)) can succeed provided that the claimant's part-time status is one of the reasons and this is in accordance with other areas of discrimination law.[591] There is no requirement that the part-time work must be the only cause for the less favourable treatment as all that is required is that it must be the predominant and effective cause of such treatment.[592] Based on this discussion, the following guidance can be extracted for the research question stated in (c) above under this paragraph 7.3 relating to any further lessons that can be learnt from the United Kingdom equal pay law for the South African equal pay law relating to part-time employees under section 198C(3)(a) of the LRA. The guidance under the United Kingdom equal pay law relating to a part-time worker not being required to prove that her part-time status is the sole reason for the less favourable treatment and only being required to show that her part-time status is one of the reasons for the less favourable treatment in the sense that it is the predominant and effective cause of such treatment is a principle that is not unknown in South African discrimination law but should be stated in the Equal Pay

---

a part-timer and (b) the treatment is not justified on objective grounds (reg 5(2)). The first of these is simply a causation requirement but the second is potentially more open to debate …"

590 *Engels v Ministry of Justice* [2017] ICR (EAT) at paras 17-18.

591 Benson E "Part-time Employment" in *Tolley's Employment Law Service* (loose-leaf) P1009. In *Carl v University of Sheffield* [2009] IRLR 616 (EAT) the Employment Appeal Tribunal held the following at para 28 relating to the Part-time Workers Regulations: "Thus, applying the approach in *O'Neill*, it is enough if her part-time worker status is an effective cause, albeit not the sole cause, of the less favourable treatment of which complaint is made."

592 *Carl v University of Sheffield* [2009] IRLR 616 (EAT) at para 42. In *Carl v University of Sheffield* [2009] IRLR 616 (EAT) the Employment Appeal Tribunal held the following at para 43: "It follows that in our opinion, in order to succeed in the present claim, the claimant must show that she has been less favourably treated than an actual full-time comparator on the ground that (but not solely because) she is a part-time worker before the respondent is required to show that the treatment is objectively justified (reg. 5(2)(b))."

Code with reference thereto being made in section 198C of the LRA for the sake of completeness.

Regulation 5(2)(b) read with regulation 5(1) of the Part-time Workers Regulations provides that a part-time worker has the right not to be treated by her employer less favourably than the employer treats a comparable full-time worker as regards the terms of her contract unless the treatment can be justified on objective grounds. The Guidance Notes to the Part-time Workers Regulations states that less favourable treatment is capable of being justified on objective grounds if the following can be shown: (a) the less favourable treatment seeks to achieve a legitimate objective such as a genuine business objective; (b) the less favourable treatment is necessary in order to achieve that objective; and (c) the less favourable treatment is an appropriate manner in order to achieve the objective.[593] Smith states that another difficulty is that the Part-time Workers Regulations does not allow, in relation to non-pay benefits, for a package approach to terms and conditions as is allowed in regulation 4 of the Fixed-term Employees Regulations and the part-time worker is entitled to insist on a term by term comparison.[594] Benson states that less favourable treatment of a part-time worker is not necessarily prohibited as it is only prohibited if the employer cannot justify it on objective grounds.[595] An employer will not be allowed to justify less favourable treatment on the sole basis that the elimination thereof will involve increased costs as the saving or avoidance of costs, on its own without more, will not amount to the achieving of a legitimate aim.[596]

---

[593] Guidance Notes to the Part-time Workers Regulations https://www.legislation.gov.uk/uksi/2000/1551/note/made. Smith I "Division AI – Part-time Workers" in Smith I (gen editor) *Harvey on Industrial Relations and Employment Law* (loose-leaf) states the following at para 148: "The defence of objective justification in SI 2000/1551 reg 5(2)(b) is specifically permitted by the Directive. Perhaps because of this the guidance by BIS (now BEIS) adopts an EC law approach to its possible interpretation stating that less favourable treatment will only be justified on objective grounds if it can be shown that it: (a) it[is] to achieve a legitimate objective, for example a genuine business objective; (b) is necessary to achieve that objective; and (c) is an appropriate way to achieve that objective."

[594] Smith I "Division AI – Part-time Workers" in Smith I (gen editor) *Harvey on Industrial Relations and Employment Law* (loose-leaf) at para 148.

[595] Benson E "Part-time Employment" in *Tolley's Employment Law Service* (loose-leaf) P1013.

[596] *Woodcock v Cumbria Primary Care Trust* [2012] IRLR 491 (CA) at para 66. In *Woodcock v Cumbria Primary Care Trust* [2012] IRLR 491 (CA) the Court of Appeal stated the following at para 66: " … the guidance of the Court of Justice is that an employer cannot justify discriminatory treatment 'solely' because the elimination of such treatment would involve increased costs, that guidance cannot mean more than that the saving or avoidance of costs will not, without more, amount to the achieving of a

The following guidance can be extracted for the research question stated in (c) above under this paragraph 7.3 relating to any further lessons that can be learnt from the United Kingdom equal pay law for the South African equal pay law relating to part-time employees under section 198C(3)(a) of the LRA:

(a) Less favourable treatment is capable of being justified on objective grounds if the following can be shown: (a) the less favourable treatment seeks to achieve a legitimate objective such as a genuine business objective; (b) the less favourable treatment is necessary in order to achieve that objective; and (c) the less favourable treatment is an appropriate manner in order to achieve the objective;

(b) An employer will not be allowed to justify less favourable treatment on the sole basis that the elimination thereof will involve increased costs as the saving or avoidance of costs, on its own without more, will not amount to the achieving of a legitimate aim; and

(c) The Part-time Workers Regulations does not allow, in relation to non-pay benefits, for a package approach to terms and conditions as is allowed in regulation 4 of the Fixed-term Employees Regulations and the part-time worker is entitled to insist on a term by term comparison.

It is submitted that the principle listed in (a) in the paragraph above provides general guidance for section 198D of the LRA. It is further submitted that the principle listed in (b) in the paragraph above provides specific guidance for section 198D of the LRA which should be mentioned in the Equal Pay Code with reference thereto being made in section 198D of the LRA.

It is submitted that the principle listed in (c) relating to an employer not being able to rely on a package approach to justify less favourable treatment of a part-time worker under

---

'legitimate aim'. That is entirely unsurprising. To adopt a simple example given by Mr Short, it is hardly open to an employer to claim to be entitled to justify the discriminatory payment to A of less than B simply because it would cost more to pay A the same as B. Such treatment of A could not, without more, be a 'legitimate aim'."

the Part-time Workers Regulations should not be incorporated into section 198D of the LRA for the following reasons. There might be instances where an employer may be justified in using the package approach with regard to the less favourable treatment of a part-time employee such as its use in relation to fixed-term workers as discussed under paragraph 7.2 above where for example an employer pays a fixed-term employee a higher hourly rate, in order to reflect the fact that the fixed-term employee does not qualify for longer term benefits. The inclusion of the package approach (together with its rules) as a ground of justification in relation to less favourable treatment of fixed-term employees under section 198D of the LRA has been argued for under paragraph 7.2 above and there is no reason why it should not be used in relation to part-time employees. Based on this, it is submitted that the allowance of an employer to justify the less favourable treatment of a fixed-term employee regarding a term/s by relying on treatment that is on the whole not less favourable (the package approach) as compared to the terms enjoyed by the comparable permanent employee in the United Kingdom equal pay law, should be used as a ground of justification for differential treatment of a part-time employee under section 198D of the LRA. It is further submitted that the appropriateness of using this ground of justification as set out in the principles listed in (a)-(c) under paragraph 7.2 above applies *mutatis mutandis* in relation to part-time employees under section 198D of the LRA.

In *McMenemy v Capita Business Services Ltd*[597] the appellant, a part-time worker who worked on Wednesdays, Thursdays and Fridays alleged that he was being treated less favourably as compared to comparable full-time workers because he did not receive the benefit of public holidays which fell on Mondays. The Employment Tribunal held that there was no breach of the Part-time Workers Regulations because there was no distinction between full-time workers and part-time workers but rather between those workers who worked on Mondays and those who did not regardless of whether they were full-time or part-time.[598] The Employment Appeal Tribunal agreed with the decision of the Employment Tribunal and held that the *pro rata* principle contained in regulation 5(3) of the Part-time Workers Regulations does not constitute an independent right and does not

---

[597] *McMenemy v Capita Business Services Ltd* [2007] IRLR 400.
[598] *McMenemy v Capita Business Services Ltd* [2007] IRLR 400 at paras 9, 13.

apply at the point of determining whether or not the less favourable treatment was on the ground that the employee was a part-time worker.[599] The Court of Session on appeal to it from the Employment Appeal Tribunal held that the intention of the employer must be examined when dealing with whether the less favourable treatment was solely because the appellant was a part-time worker. It held that the reason for the appellant part-time worker receiving less favourable treatment as compared to a comparable full-time worker was as a result of an agreement with the employer that he would not work on Mondays and Tuesdays. The Court of Session further held that it thus becomes legitimate to consider hypothetical scenarios with the aim of testing the true intention of the employer. It held that in terms of the employer's policy relating to public holidays, if a full-time worker in the part-time worker's team worked a fixed shift from Tuesday to Saturday then that full-time worker would not receive the benefit of statutory holidays which fell on Mondays and if a part-time worker in the appellant part-time worker's team worked on Mondays then that part-time worker would be entitled to receive the benefit of the statutory Monday holidays in the same manner as a full-time employee would. The Court of Session consequently dismissed the appeal.[600]

The following further lessons can be learnt from the United Kingdom equal pay law for the South African equal pay law relating to part-time employees. The intention of the employer must be examined in determining whether the less favourable treatment of the part-time employee is solely because the appellant is a part-time worker. In examining the intention of the employer, it is legitimate to consider hypothetical scenarios with the aim of testing the true intention of the employer. It is submitted that this provides valuable guidance for the Labour Court (including the CCMA) when they deal with this issue under section 198D of the LRA and this guidance should be mentioned in the Equal Pay Code with reference thereto being made under section 198D of the LRA.

599 *McMenemy v Capita Business Services Ltd* [2007] IRLR 400 at para 10.
600 *McMenemy v Capita Business Services Ltd* [2007] IRLR 400 at paras 14, 16.

In *Sharma v Manchester City Council*[601] the Employment Appeal Tribunal held that the scheme of the Part-time Workers Regulations is for the claimant part-time worker to choose a comparable full-time worker, show less favourable treatment and satisfy the Tribunal that the less favourable treatment is on the ground that the claimant is a part-time worker. Once this is shown, the onus shifts to the employer to show that there is an objectively justifiable reason for the less favourable treatment. It further held that once it is established that a part-time worker is treated less favourably as compared to a comparable full-time worker and the worker's part-time status is one of the reasons, then this will be sufficient to trigger the Part-time Workers Regulations.[602] Lockton states that the Part-time Workers Regulations provides a quick and speedy remedy available to part-time workers who suffer less favourable treatment.[603] The following guidance can be extracted from this case for the research question stated in (c) above under this paragraph 7.3 relating to any further lessons that can be learnt from the United Kingdom equal pay law for the South African equal pay law relating to part-time employees under section 198C(3)(a) of the LRA. Whilst the approach relating to what a part-time employee needs to show and what an employer needs to show under the Part-time Workers Regulations seems obvious, it is submitted that the approach provides valuable guidance which should be mentioned in relation to section 198C read with section 198D of the LRA. It is submitted that this should be mentioned in the Equal Pay Code with reference thereto being made in section 198C of the LRA. The statement by Lockton relating to the Part-time Workers Regulations providing a quick and speedy remedy available to part-time

---

601 *Sharma v Manchester City Council* [2008] IRLR 336 (EAT).

602 At paras 24, 51. Duggan M *Equal Pay – Law and Practice* (Jordan Publishing Limited 2009) states the following at 250: "In *Pipe v Hendrickson Europe Ltd* (15 April 2003, EAT, HHJ Prophet) … The EAT stated that there were four stages to be considered: (i) What was the treatment complained of? (ii) Was that treatment less favourable than that of a comparable full-time worker? (iii) Was the less favourable treatment on the ground that the worker was a part-time worker? (iv) If so, was it justified?"

603 Lockton DJ *Employment Law* 9ed (Palgrave Macmillan 2014) 160. Lockton DJ *Employment Law* 9ed (Palgrave Macmillan 2014) states the following at 160: "While in the vast majority of situations part-time workers who are women would already have protection under the Equality Act 2010, the Regulations provide a quick and speedy remedy for all part-time workers, including men, suffering less favourable treatment which cannot be objectively justified. In some cases, however, the worker may wish to use the Equality Act 2010 rather than the Regulations as it is likely that any financial compensation awarded under that legislation will be higher." Duggan M *Equal Pay – Law and Practice* (Jordan Publishing Limited 2009) states the following at 247: "It was originally intended to apply the PTW Regs 2000 only to employees." Hardy S *Labour Law and Industrial Relations in Great Britain* 3rd revised edition (Kluwer Law International 2007) states the following at 100: "The [Part-time Workers] Regulations create the right for a part-time worker to be no less favourably treated than a full-time worker."

workers who suffer less favourable treatment, whilst at first blush seeming obvious for equal pay relating to certain part-time employees under section 198C of the LRA, provides guidance thereto and should accordingly be mentioned in the Equal Pay Code with reference thereto being made in section 198C of the LRA.

8. PROACTIVE MEASURES RELATING TO EQUAL PAY

The United Kingdom equal pay regime contains the following proactive measures: (a) the Equal Pay Statutory Code of Practice which provides non-binding guidance to employers on how to go about eliminating gender pay inequalities (including pay inequalities on other grounds) by conducting equal pay audits; (b) the Equality Act 2010 (Equal Pay Audits) Regulations 2014 which gives the Employment Tribunal the power, where it finds that an equal pay breach has been committed, to order an employer to carry out an equal pay audit; and (c) the Equality Act 2010 (Gender Pay Gap Information) Regulations 2017 which places an obligation on an employer with 250 or more employees to publish annual information relating to pay.

These measures will be discussed in more detail hereunder with guidance being sought for the following research questions relating to proactive measures as called for in paragraph 13.11 of Chapter 2 of this thesis: (a) Which proactive measures relating to equal pay are mentioned under the United Kingdom equal pay law in order to strengthen the proactive measures listed in section 27(3) of the EEA; (b) What guidance is provided to employers under the United Kingdom equal pay law regarding the taking and implementing of proactive measures to equal pay in order to learn lessons for section 27(3) of the EEA; (c) Whether an employer is allowed under the United Kingdom equal pay law to address pay differentials by reducing the pay of employees (downward equalisation); and (d) Whether the progressive realisation of the right to equal pay is capable of featuring in a court order.

It is submitted that there is another proactive measure which the employer can take in the form of a job evaluation study/scheme because this is a voluntary exercise which can be

undertaken by an employer. A job evaluation study features under the second equal pay cause of action which is equal pay for work rated as equivalent and where it can be relied on as a material factor defence to an equal pay claim under section 69 of the Equality Act. A job evaluation study/scheme has been discussed above under paragraph 4.4.2 "Work rated as equivalent" and paragraph 6.1.8 "Grading Scheme/Job Evaluation Scheme" and it is thus not necessary to repeat these discussions here regarding a job evaluation study/scheme save to make the submission that a job evaluation study is a proactive measure with regard to equal pay which can be taken by an employer.

8.1 Equal Pay Statutory Code of Practice - Equal Pay Audit

The Equal Pay Statutory Code of Practice states that even though an equal pay audit is not mandatory it provides the most effective manner of ascertaining whether an employer's pay structures do in fact provide equal pay. It further states that an equal pay audit is appropriate to identify and remove gender pay discrimination and is the most effective manner to ensure that a pay system does not suffer from unlawful bias. The benefits of carrying out an equal pay audit include the following: (a) to identify and eliminate pay inequalities which are not justifiable; (b) to have fair, rational and transparent pay arrangements; (c) to show to employees a commitment to equality; and (d) to show the employer's values to those that it has business dealings with.

An equal pay audit must include the following in order to constitute an equal pay audit: (a) a comparison of the pay of males and females doing the same/similar work, work rated as equivalent and work of equal value; (b) identify and explain any differences in pay; and (c) the elimination of pay inequalities that are not free from (unfair) discrimination. The crux of an equal pay audit is to address pay inequalities which are unjustified and it is not simply a data collection exercise. The validity and success of any action taken in terms of an equal pay audit will be enhanced if the pay system is accepted and understood by those who are in charge of the system as well as employees and their trade unions. Employers should thus involve their employees and their trade unions in the equal pay

audit process.[604]

The Equality and Human Rights Commission of the United Kingdom recommends that employers embark on regular equal pay audits and to this end it mentions a five-step equal pay audit model. The following comprises the five-step equal pay audit model: (a) make a decision as to the scope of the equal pay audit and identify the required information; (b) determine where males and females are doing the same/similar work, work rated as equivalent and work of equal value; (c) collect pay data and use it to identify significant pay inequality between work of equal value; (d) identify the cause/s of significant pay inequalities (if any) and determine the reasons therefore; and (e) develop an equal pay action plan with the aim of remedying pay discrimination whether direct or indirect.[605] These five steps are elaborated on below.

Step 1: Scope of the equal pay audit and identify the required information

The Equal Pay Statutory Code of Practice states that this step of the equal pay audit is important, more so, if it is the employer's first equal pay audit. In determining the scope of the audit the employer needs to decide the following: (a) which of its employees are to be included in the equal pay audit. It is prudent to include all those employees who are in the same employment. Where a comprehensive audit is not possible or not necessary then the employer may audit a sample of roles and it must ensure that the basis for selecting the roles are clear; and (b) what information is needed for the equal pay audit and what tools are available to the employer. An employer should collect and compare information about its employees relating to the jobs that they perform, the amount that they are paid (this includes all the elements of pay) and the sex of the employees including their job grade or pay band. If there is gender pay inequality then the employer should collect information relating to the qualifications related to the job, the hours of work, the length of service and performance ratings.[606]

---

[604] The Equal Pay Statutory Code of Practice at paras 163, 166-170.
[605] The Equal Pay Statutory Code of Practice at paras 163, 171.
[606] The Equal Pay Statutory Code of Practice at para 172.

The employer should consider what resources are needed and to this end the following should be considered: (a) which persons should be involved in the carrying out of the equal pay audit. An equal pay audit needs the involvement/input of persons with different viewpoints, particularly those persons with knowledge and understanding of the employer's pay and grading arrangements, the job evaluation system being used, payroll systems, occupational segregation and the tendency to undervalue work performed by females; (b) an employer should also consider the point at which to involve the employees/trade unions; and (c) an employer may also want to consider involving an outside expert in the process.[607]

Step 2: Determine where males and females are doing the same/similar work, work rated as equivalent and work of equal value

Under this step, an employer needs to ascertain whether females and males are engaged in the same/similar work, work rated as equivalent and work of equal value. This is the foundation of an equal pay audit. An employer who does not make use of an analytical job evaluation scheme which is designed with equal pay in mind will have to look at other ways of assessing whether its male and female employees are engaged in the same/similar work, work rated as equivalent and work of equal value. An employer who does make use of an analytical job evaluation scheme will need to ascertain whether the job evaluation scheme was designed and implemented in such a manner that it is free from discrimination.[608]

Step 3: Collect pay data and use it to identify significant pay inequality between work of equal value

When an employer has determined which of its male and female employees are engaged in the same/similar work, work rated as equivalent and work of equal value, then it has to collate and compare their pay information in order to ascertain whether there is a

[607] The Equal Pay Statutory Code of Practice at para 175.
[608] The Equal Pay Statutory Code of Practice at para 176.

significant pay inequality by calculating the males and females average basic pay and total earnings and compare access to and amounts received in respect of each element of the pay package. In order to ensure that pay comparisons are consistent an employer should calculate the average basic pay and average total earnings on an hourly basis or on a full-time equivalent wage basis. The employer then has to review the pay comparisons in order to identify whether there is any gender pay inequality and, if there is, whether the inequality is significant enough to warrant further investigation. It is recommended that all the pay inequalities be recorded.[609]

Step 4: Identify the cause/s of significant pay inequalities (if any) and determine the reasons therefore

Under this step, an employer needs to ascertain if there is a material reason for the pay difference which is not connected to the sex of the employees. An employer must examine its pay systems in order to ascertain which of its pay practices/policies may have caused or contributed to any gender pay inequality. Pay systems may vary and as a result thereof an employer must check all the aspects of its pay system from the design to the implementation thereof as well as any differential impact on males and females.[610] The Equal Pay Statutory Code of Practice states that the following common pay practices pose a risk of potential non-compliance with an employer's equal pay obligations: (a) a lack of transparency and secrecy over job grading and pay which is not necessary; (b) a discretionary pay system (for eg, performance-related pay and merit pay) unless the pay system is properly structured and based on objective criteria; (c) different terms and conditions and non-basic pay for various groups of employees such as payments for overtime, unsocial hours and attendance allowances; (d) more than one pay system in the workplace; (e) log pay scales/ranges; (f) pay scales/ranges in terms of which the maximum point of the lower pay scale is higher than the minimum of the next pay scale which is higher; (g) managerial discretion in relation to commencing salaries; (h) market-based pay systems which are not supported by a job evaluation; (i) job evaluation systems

[609] The Equal Pay Statutory Code of Practice at paras 177-179.
[610] The Equal Pay Statutory Code of Practice at paras 181-182.

which have not been properly implemented or job evaluation systems which are not kept up to date; and (j) pay protection policies. The Equal Pay Statutory Code of Practice further states that equal pay risks normally arise as a result of pay systems not being reviewed and kept up to date rather than an intention to discriminate.[611]

Step 5: Develop an equal pay action plan with the aim of remedying pay discrimination whether direct or indirect

If it is found that the reason for the difference in pay is connected with an employee's sex and/or another prohibited ground then an employer will have to remedy this difference in pay by providing its employees with equal pay for the same/similar work, work rated as equivalent and work of equal value. If the difference in pay is as a result of a factor that has an adverse impact on females, then it has to be objectively justified. For instance, if an employee is entitled to payment for working unsocial hours in circumstances where fewer females than males are able to work the unsocial hours due to their caring responsibilities then this will amount to indirect discrimination unless the employer is able to prove that it is justified. An employer who does not find any pay inequality between male and female employees or who finds pay differences in circumstances where there are genuine non-discriminatory reasons should nonetheless keep their pay systems up to date by regularly reviewing it with the involvement of the trade union. Doing this will ensure that the employer's pay system remains free from bias (maintains equal pay).[612]

It is submitted that the use of an equal pay audit as a proactive measure under the United Kingdom equal pay law strengthens the argument made in paragraph 12 read with paragraph 13.11 of Chapter 2 of this thesis to the effect that an equal terms and conditions audit taken together with an equal pay audit as provided for in the Integration of Employment Equity Code constitutes a measure which falls within section 27(3) of the EEA which may be taken by an employer to progressively reduce unfair pay discrimination or disproportionate income differentials and which should be listed as such.

[611] The Equal Pay Statutory Code of Practice at paras 164-165.
[612] The Equal Pay Statutory Code of Practice at paras 184-185.

The following guidance can be extracted from the above discussion in order to assist with the research question as stated in (b) under paragraph 8 above relating to what guidance is provided to employers under the United Kingdom equal pay law regarding the taking and implementing of proactive measures to equal pay in order to learn lessons for section 27(3) of the EEA:

(a) While the Integration of Employment Equity Code provides guidance to employers on how to go about conducting an equal terms and conditions audit and an equal pay audit as argued for in paragraph 12 read with paragraph 13.11 of Chapter 2 of this thesis, it is submitted that the more detailed guidance relating to equal pay audits under the United Kingdom equal pay law discussed above can add to the guidance already contained in the Integration of Employment Equity Code and to this end should be mentioned in relation thereto;

(b) The statement under Step 1 above concerning the scope of the equal pay audit and identifying the required information relating to an employer considering involving an outside expert in the equal pay audit process provides valuable guidance for the equal pay audit process as a proactive measure under South African equal pay law as discussed under paragraph 12 of Chapter 2 of this thesis and to this end should be mentioned in relation thereto; and

(c) The statement under Step 4 above concerning identifying the cause/s of significant pay inequalities (if any) and determining the reasons therefore relating to a job evaluation system which has not been properly implemented or kept up to date being a common pay practice which poses a risk of potential non-compliance with an employer's equal pay obligations strengthens the argument made under paragraph 12 of Chapter 2 of this thesis to the effect that an objective job evaluation which is free from unfair discrimination in section 6(4) and disproportionate income differentials constitutes a measure which can be taken to progressively reduce unfair pay discrimination and disproportionate income differentials and should be listed as such under section 27(3) of the EEA.

8.2 Equality Act 2010 (Equal Pay Audits) Regulations 2014 (Equal Pay Audit ordered by the Employment Tribunal)

The Equality Act 2010 (Equal Pay Audits) Regulations 2014[613] ("Equal Pay Audit Regulations") were made in terms of section 139A of the Equality Act. Section 139A(1) of the Equality Act provides, *inter alia*, that Regulations may require an Employment Tribunal to order an employer to carry out an equal pay audit where it finds that an equal pay breach has been committed.[614] These Regulations are the Equal Pay Audit Regulations which came into force on 1 October 2014.[615] The Equal Pay Audit Regulations requires an Employment Tribunal to order an employer to carry out an equal pay audit where it finds that an equal pay breach has been committed unless there are circumstances which do not warrant an equal pay audit to be ordered in terms of regulation 3 or where the

613 SI 2014/2559 ("Equal Pay Audit Regulations").

614 Section 139A of the Equality Act provides the following: "(1) Regulations may make provision requiring an employment tribunal to order the respondent to carry out an equal pay audit in any case where the tribunal finds that there has been an equal pay breach. (2) An equal pay breach is—(a) a breach of an equality clause, or (b) a contravention in relation to pay of section 39(2), 49(6) or 50(6), so far as relating to sex discrimination. (3) An equal pay audit is an audit designed to identify action to be taken to avoid equal pay breaches occurring or continuing. (4) The regulations may make further provision about equal pay audits, including provision about—(a) the content of an audit; (b) the powers and duties of a tribunal for deciding whether its order has been complied with; (c) any circumstances in which an audit may be required to be published or maybe disclosed to any person. (5) The regulations must provide for an equal pay audit not to be ordered where the tribunal considers that—(a) an audit completed by the respondent in the previous 3 years meets requirements prescribed for this purpose, (b) it is clear without an audit whether any action is required to avoid equal pay breaches occurring or continuing, (c) the breach the tribunal has found gives no reason to think that there may be other breaches, or (d) the disadvantages of an equal pay audit would outweigh its benefits. (6) The regulations may provide for an employment tribunal to have power, where a person fails to comply with an order to carry out an equal pay audit, to order that person to pay a penalty to the Secretary of State of not more than an amount specified in the regulations. (7) The regulations may provide for that power—(a) to be exercisable in prescribed circumstances; (b) to be exercisable more than once, if the failure to comply continues. (8) The first regulations made by virtue of subsection (6) must not specify an amount of more than £5,000. (9) Sums received by the Secretary of State under the regulations must be paid into the Consolidated Fund. (10) The first regulations under this section must specify an exemption period during which the requirement to order an equal pay audit does not apply in the case of a business that—(a) had fewer than 10 employees immediately before a specified time, or (b) was begun as a new business in a specified period. (11) For the purposes of subsection (10)—(a) "specified" means specified in the regulations, and (b) the number of employees a business had or the time when a business was begun as a new business is to be determined in accordance with the regulations. (12) Before making regulations under this section, a Minister of the Crown must consult any other Minister of the Crown with responsibility for employment tribunals.]"

615 Regulation 1(1) of the Equal Pay Audit Regulations.

employer is exempted (for a certain period)[616] by reason of being a micro-business[617] or a new business[618] as set out in regulation 4.[619] Circumstances which would not warrant

---

[616] Item 4 of the Schedule : Exemption for Existing Micro-Businesses and New Businesses which is annexed to the Equal Pay Audit Regulations provides the following: "(1) The exemption period, in relation to an existing micro-business, is the period beginning with the commencement date and ending when the business is treated as ceasing to be a micro-business for the purpose of this paragraph or (if sooner) the day 10 years after the commencement date. (2) A business is treated as ceasing to be a micro-business for the purpose of this paragraph on the day after the assessment period if, during an assessment period, the number of days when the business is not a micro-business is greater than the number of days when the business is a micro-business. (3) An "assessment period", in relation to an existing micro-business, is a period of 6 months beginning with-(a) the first day after the commencement date on which the business ceases to be a micro-business; or (b) where, during an earlier assessment period, the number of days when the business is not a micro-business is less than or equal to the number of days when the business is a micro-business-(i) the day after the end of the earlier assessment period, if on that day the business is not a micro-business; or (ii) the first day after the end of the earlier assessment period on which the business ceases to be a micro-business, in any other case." Item 5 of the Schedule: Exemption for Existing Micro-Businesses and New Businesses which is annexed to the Equal Pay Audit Regulations provides the following: "(1) The exemption period, in relation to a new business, is the period beginning with the commencement date and ending with the date on which P ceases to carry on the business or (if sooner) the day 10 years after the commencement date. (2) If P is a number of persons in partnership, P is not to be taken for this purpose to cease to carry on the business if-(a) the members of the partnership change, or the partnership is dissolved; and (b) after the change or dissolution, the business is carried on by at least one of the persons who constituted P."

[617] Item 1 of the Schedule: Exemption for Existing Micro-Businesses and New Businesses which is annexed to the Equal Pay Audit Regulations provides the following: "A micro-business is a business that has fewer than 10 employees." Item 2 of the Schedule: Exemption for Existing Micro-Businesses and New Businesses which is annexed to the Equal Pay Audit Regulations provides the following: "An existing micro-business is a business that was a micro-business immediately before the date of judgment."

[618] Item 3 of the Schedule: Exemption for Existing Micro-Businesses and New Businesses which is annexed to the Equal Pay Audit Regulations provides the following: "(1) A new business is a business which a person, or a number of persons, ("P") begins to carry on during the period of 12 months ending with the date of complaint. (2) But a business is not a new business if-(a) P has, at any time during the period of 6 months ending immediately before the date on which P begins to carry on the business, carried on another business consisting of the activities of which the business consists (or most of them); or (b) P carries on the business as a result of a transfer (within the meaning of sub-paragraph (4)). (3) Sub-paragraph (2)(a) does not apply if the other business referred to in that paragraph was a new business (within the meaning of this Schedule). (4) P carries on a business as a result of a transfer if P begins to carry on the business on another person ceasing to carry on the activities of which it consists [of] (or most of them) in consequence of arrangements involving P and the other person. (5) For this purpose, P is to be taken to begin to carry on a business on another person ceasing to carry on such activities if-(a) the business begins to be carried on by P otherwise than in partnership on such activities ceasing to be carried on by persons in partnership; or (b) P is a number of persons in partnership who begin to carry on the business on such activities ceasing to be carried on-(i) by a person, or a number of persons, otherwise than in partnership; (ii) by persons in partnership who do not consist only of all the persons who constitute P; or (iii) partly as mentioned in paragraph (i) and partly as mentioned in paragraph (ii). (6) Sub-paragraph (2)(b) does not apply if the activities referred to in sub-paragraph (4) were, when carried on by the person who is not P referred to in that paragraph, activities of a new business (within the meaning of this Schedule). (7) P is not to be regarded as beginning to carry on a business for the purposes of sub-paragraph (1) if-(a) before P begins to carry on the business, P is a party to arrangements under which P may (at any time during the period of 5 years beginning with the commencement date) carry on, as part of the business, activities carried on by any other person; and

an equal pay audit to be ordered by an Employment Tribunal include the following: (a) where the Employment Tribunal is of the view that there is already an equal pay audit which has been completed by the employer in the past 3 years which deals with the same information which would be required to be dealt with if the Employment Tribunal were to order an equal pay audit; (b) where the Employment Tribunal is of the view that it is clear what action is required in order to avoid equal pay breaches from occurring or continuing without the need to order an equal pay audit; (c) where the Employment Tribunal is of the view that there is no reason to believe that there may be other equal pay breaches apart from the equal pay breach which it has found; or (d) where the Employment Tribunal is of the view that the disadvantages of ordering an equal pay audit would outweigh its benefits.[620]

An order made by an Employment Tribunal ordering an employer to carry out an equal pay audit must contain the following: (a) the description of persons in respect of whom relevant gender pay information must be included in the equal pay audit and the period to which the equal pay audit relates; and (b) the due date by which the equal pay audit must be received by the Employment Tribunal (the due date cannot be less than three months after the date of the order).[621]

Relevant gender pay information is defined as the pay information of males and females who are employed by the employer.[622] An equal pay audit must deal with the following: (a) the relevant gender pay information (pay information of males and females employed by the employer) in respect of the description of persons stated in the Employment

---

(b) the business would have been prevented by sub-paragraph (2)(b) from being a new business if-(i) P had begun to carry on the activities when beginning to carry on the business; and (ii) the other person had at that time ceased to carry them on. (8) “Arrangements” includes an agreement, understanding, scheme, transaction or series of transactions (whether or not legally enforceable).”

619 Regulations 2(1)-(2), 3-4 of the Equal Pay Audit Regulations. Regulation 4 of the Equal Pay Audit Regulations provides the following: “(1) A tribunal must not, within the applicable exemption period, order a respondent to carry out an audit in relation to persons employed for the purposes of a business where the respondent is carrying on that business and the business is-(a) an existing micro-business, or (b) a new business. …”

620 Regulation 3(1)(a)-(d) of the Equal Pay Audit Regulations.

621 Regulation 5(1)-(2) of the Equal Pay Audit Regulations.

622 Regulation 1(2) of the Equal Pay Audit Regulations.

Tribunal's order; (b) any pay differences between the descriptions of males and females stated in the Employment Tribunal's order and the reasons for the pay differences; (c) the reason/s for any potential equal pay breach identified as a result of the equal pay audit; and (d) the employer's plan to prevent equal pay breaches from occurring or continuing.[623]

Where an equal pay audit which was ordered by the Employment Tribunal is received by the due date then the Employment Tribunal must determine if the equal pay audit received complies with what should be contained in an equal pay audit as set out in regulation 6 of the Equal Pay Audit Regulations. If an Employment Tribunal is satisfied that the equal pay audit complies with the requirements of an equal pay audit as contained in regulation 6 then the Employment Tribunal must make an order stating that and a copy of the order should be provided to the employer. If on the other hand, an Employment Tribunal is not satisfied that the equal pay audit complies with the equal pay audit requirements as contained in regulation 6 then the Employment Tribunal must do the following: (a) set a hearing; (b) notify the employer of its reasons as to why it is dissatisfied with the audit for non-compliance with regulation 6 and the powers which are available to the Employment Tribunal; (c) notify the employer of the date of the hearing; and (d) notify the employer of its right to make representations at the hearing. If no equal pay audit has been received by the Employment Tribunal by the due date then the Employment Tribunal must make an order setting a new date by which the equal pay audit must be received by the Employment Tribunal.[624]

The following applies where an Employment Tribunal has held a hearing and considered representations by the employer due to the Tribunal not being satisfied with a previous equal pay audit. Where a second equal pay audit has been received by the Employment Tribunal then it must determine whether the second equal pay audit complies with what must be contained in an equal pay audit as set out in regulation 6 of the Equal Pay Audit Regulations. If the Employment Tribunal determines that the second equal pay audit

[623] Regulation 6(a)-(d) of the Equal Pay Audit Regulations.
[624] Regulation 7(1)-(3) of the Equal Pay Audit Regulations.

complies with the equal pay audit requirements then it must make an order stating that and provide a copy to the employer. If the second equal pay audit has not been received by the Employment Tribunal then the Tribunal must do the following: (a) make an order setting a new date for receipt of the second equal pay audit; (b) provide a copy of the order to the employer and; (c) consider making an order under regulation 11. Regulation 11 gives the Employment Tribunal the power to order the employer to pay a penalty where the employer fails to submit the second equal pay audit and where the Tribunal is of the view that the employer does not have a reasonable excuse for failing to do so. If the Employment Tribunal is of the view that the second equal pay audit fails to comply with the equal pay audit requirements then the Tribunal must do the following: (a) notify the employer as to the reasons for its determination; (b) provide the employer with a copy of the order; and (c) consider whether a penalty order under regulation 11 should be made.[625]

The following applies where an Employment Tribunal has made an order that an employer's equal pay audit (first or second as the case may be) complies with the equal pay audit requirements. The employer must publish the equal pay audit, not later than 28 days after the date of the order, as follows: (a) on its website for at least 3 years if it has a website; and (b) by notifying all those persons in respect of whom relevant gender pay information is found in the equal pay audit as to where a copy of the equal pay audit can be found. The employer must not later than 28 days after the date of publishing the equal pay audit send evidence of such publishing to the Employment Tribunal. If an employer

[625] Regulations 8(1)-(5), 11(1)(a)-(b) of the Equal Pay Audit Regulations. Regulation 11 of the Equal Pay Audit Regulations provides the following: "(1) Where a tribunal-(a) determines that a respondent has failed to comply with an order made under regulation 2 or 8; and (b) is of the opinion that the respondent has no reasonable excuse for failing to comply with the order, the tribunal may order the respondent to pay a penalty to the Secretary of State. (2) Where the respondent fails to comply with an order made following a hearing fixed in accordance with regulation 8(6), the tribunal may order the respondent to pay-(a) an additional penalty or a further additional penalty, if the tribunal previously ordered the respondent to pay a penalty or an additional penalty; or (b) a penalty, if the tribunal previously decided not to order the respondent to pay a penalty, because the tribunal was then of the opinion that there was a reasonable excuse for not complying with an earlier order or otherwise. (3) The tribunal must have regard to the respondent's ability to pay-(a) in deciding whether to order the respondent to pay a penalty or an additional penalty under this regulation; and (b) in deciding the amount of a penalty or an additional penalty. (4) The amount of each penalty or additional penalty ordered under this regulation must not exceed £5,000."

is of the view that publishing the equal pay audit in the manner stated above will result in a breach of a legal obligation then it must still publish the equal pay audit but with such revisions as it considers necessary in order to ensure compliance with the legal obligation in question but still ensuring compliance with the equal pay audit requirements set out in regulation 6. In such case, the employer must send evidence of the publishing of the equal pay audit to the Employment Tribunal not later than 28 days after such publishing as well as adequate reasons as to why it is of the view that publishing the equal pay audit in an unrevised manner will result in a breach of a legal obligation. If an employer is not able to publish the equal pay audit in a revised manner such as to not breach a legal obligation then it need not publish the equal pay audit, but in such case, it has to send to the Employment Tribunal adequate reasons setting out why it could not publish the equal pay audit in a revised manner such that it would not breach the legal obligation in question. This must be done no later than 28 days after the Employment Tribunal's order.[626]

Where the Employment Tribunal determines that the employer has complied with the publication requirements of the equal pay audit or where it is satisfied that the employer is not required to publish the equal pay audit then it must issue, in writing, a decision to the employer stating that the employer has complied with the equal pay audit publication requirements or that the employer is not required to do so. If an Employment Tribunal is not satisfied that the employer has complied with the equal pay audit publication requirements in circumstances where the employer is required to do so then it must do the following: (a) set a hearing in order to determine whether the employer has complied with the publication requirements; (b) inform the employer of the reasons as to why it is not satisfied that the employer has complied with the publication requirements; (c) inform the employer as to the date of the hearing; and (d) inform the employer of its right to make representations.[627]

[626] Regulation 9(1)-(6) of the Equal Pay Audit Regulations.
[627] Regulation 10(3)-(4) of the Equal Pay Audit Regulations.

Important guidance, although not specifically sought for in (a)-(d) under paragraph 8 above, can be extracted from the above discussion in order to assist with the proactive measures relating to equal pay in the South African context.

The Equal Pay Audit Regulations which require an Employment Tribunal to order an employer to carry out an equal pay audit where it finds that an equal pay breach has been committed unless there are circumstances which do not warrant an equal pay audit to be ordered amounts to the Employment Tribunal being empowered to order an employer to embark on a proactive measure in order to ensure equal pay. This provides valuable guidance to the possibility of the South African proactive equal pay measures featuring in a court order because this is not known in South African equal pay law. It is submitted that the Labour Court being empowered to order an employer to embark on a proactive measure in order to ensure equal pay in its organisation where it finds that an equal pay claimant has proved a case of unfair pay discrimination against such employer makes equal pay law effective as it forces an employer to correct other potential instances of unfair pay discrimination. It is submitted that this type of court order will only be able to be made where the Labour Court finds that pay discrimination has been committed with the attendant relief being ordered in favour of the equal pay claimant and is thus an additional order which can be made and should not be made as a single order. It is further submitted that the power to make such an order should specifically be stated in section 48 of the EEA, which sets out the powers of a commissioner in arbitration proceedings, where the CCMA has the power to entertain an unfair pay discrimination claim in terms of section 6(4) of the EEA, and in section 50(2) of the EEA which sets out the powers of the Labour Court with reference to this being mentioned in section 27 of the EEA with the condition as stated that it cannot be a single order but can only be a second order accompanying an order of unfair pay discrimination in favour of an equal pay claimant. It is lastly submitted that the court should decide which proactive measure should be ordered and should receive evidence and hear argument in this regard. The court should furthermore play a supervisory role as to whether its order regarding the carrying out of the proactive measure has been complied with and where it has not then it should be given the additional power in terms of section 50(2) of the EEA to order penalties against

the employer. No submission is made relating to the Labour Court being given the power to order that the employer publish the equal pay audit (or any other proactive measure) because this could contain pay related information which is restricted from being disclosed in terms of section 27(5) of the EEA.

The following can be extracted from the above discussion as well as the principle listed in (c) under paragraph 6.1.14 above in order to assist with the question relating to whether the progressive realisation of the right to equal pay is capable of featuring in a court order:

It is submitted that the Equal Pay Audit Regulations which empowers an Employment Tribunal to order an employer to carry out an equal pay audit amounts to the Tribunal ordering the employer to carry out a proactive measure and this power given to the Tribunal indirectly strengthens the argument made under paragraph 12 of Chapter 2 of this thesis to the effect that the court and CCMA should be empowered to order the progressive realisation of the right to equal pay where the employer is able to prove that it cannot immediately correct the unfair pay discrimination. The principle listed in (c) under paragraph 6.1.14 above provides the following further guidance to a court considering ordering the progressive realisation of the right to equal pay. If an employer seeks to rely on unaffordability as a ground of justification then it has to adduce evidence explaining the costs involved as well as the financial context in order to place the Employment Tribunal in a position where it can make an informed decision. It is submitted that this should be adapted to read that if an employer seeks an indulgence to correct the unfair pay discrimination in question then it has to adduce evidence explaining the costs involved as well as the financial context in order to place the Employment Tribunal in a position where it can make an informed decision as to how much time to afford the employer.

8.3 Equality Act 2010 (Gender Pay Gap Information) Regulations 2017 - Gender Pay Gap Reporting

The Equality Act 2010 (Gender Pay Gap Information) Regulations 2017[628] ("Gender Pay Gap Regulations") were made in terms of section 78 of the Equality Act. Section 78(1) of the Equality Act provides, *inter alia*, that Regulations may oblige employers to publish pay related information of its employees for the purpose of showing whether there are pay differences between its male and female employees. These Regulations are the Gender Pay Gap Regulations which came into force on 6 April 2017.[629] The Gender Pay Gap Regulations require an employer who employs 250 or more employees, known as a relevant employer, to publish yearly[630] the following information: (a) pay differences between male full-pay relevant employees and female full-pay relevant employees regarding the mean hourly rate; (b) pay differences between male full-pay relevant employees and female full-pay relevant employees regarding the median hourly rate; (c) pay differences between male full-pay relevant employees and female full-pay relevant employees regarding the mean bonus pay; (d) pay differences between male full-pay relevant employees and female full-pay relevant employees regarding the median bonus pay; (e) the proportions of male relevant employees and female relevant employees who received bonus pay; and (f) the proportions of male full-pay relevant employees and female full-pay relevant employees in the lower, lower middle, upper middle and upper quartile pay bands. A full-pay relevant employee is defined as a relevant employee who is not remunerated at a reduced rate or not remunerated at all as a result of being on leave. A relevant employee is defined as an employee employed by the employer on the date in the year in which the gender pay gap information is required (the date is 5 April).[631] Regulation 14 of the Gender Pay Gap Regulations requires that this information must be accompanied by a signed[632] written statement that confirms the accuracy of the

[628] SI 2017/172 ("Gender Pay Gap Regulations").
[629] Regulation 1(1) of the Gender Pay Gap Regulations.
[630] Regulation 2(2) of the Gender Pay Gap Regulations provides the following: "The relevant employer must publish the information required by paragraph (1) within the period of 12 months beginning with the snapshot date."
[631] Regulations 1(2), 2(1)(a)-(f) of the Gender Pay Gap Regulations.
[632] Regulation 14(2) of the Gender Pay Gap Regulations provides the following: "Where the relevant employer is-(a) a body corporate other than a limited liability partnership within the meaning of the

information so published.[633] Regulation 15 of the Gender Pay Gap Regulations then requires that the gender pay gap information and the written statement referred to in regulation 14 must be published on the employer's website in such manner that is accessible to the public and its employees and must be so available for at least three years. Regulation 15 further requires that a relevant employer should also publish the gender pay gap information together with the written statement on a website designated by the Secretary of State as well as the name and job title of the person who has signed the regulation 14 statement.[634]

Before proceeding with the discussion under this heading, it is apposite to state here that the information to be disclosed by the employer under the Gender Pay Gap Regulations could in the South African equal pay law context constitute information which the employer is obliged to submit to the Employment Conditions Commission in terms of section 27(1) of the EEA and which information cannot be disclosed to employees (including an equal pay claimant) except to the collective bargaining parties under certain circumstances.[635]

Based on this, it is submitted that no guidance can be extracted from the Gender Pay Gap Regulations for the proactive measures contemplated in section 27 of the EEA for the following reasons: (a) the law regarding the taking of proactive measures in terms of section 27 of the EEA is not well developed in South African equal pay law and is in need of development; (b) it is not appropriate at this stage to argue for the transplant, whether

---

Limited Liability Partnerships Act 2000, the written statement must be signed by a director (or equivalent); (b) a limited liability partnership, the written statement must be signed by a designated member (see section 8 of that Act); (c) the partners in a limited partnership registered under the Limited Partnerships Act 1907, the written statement must be signed by a general partner (see section 3 of that Act); (d) the partners in any other kind of partnership, the written statement must be signed by a partner; (e) the members or officers of an unincorporated body of persons other than a partnership, the written statement must be signed by a member of the governing body or a senior officer; (f) any other type of body, the written statement must be signed by the most senior employee. (3) In this regulation, "partnership" means-(a) a partnership within the Partnership Act 1890; (b) a limited partnership registered under the Limited Partnerships Act 1907; or (c) a firm, or an entity of a similar character, formed under the law of a country outside the United Kingdom."

[633] Regulation 14(1) of the Gender Pay Gap Regulations.

[634] Regulation 15(1)-(2) of the Gender Pay Gap Regulations.

[635] See para 9.1 of Chapter 2 of this thesis in this regard.

fully or partly, of the Gender Pay Gap Regulations of the United Kingdom into section 27 of the EEA as a proactive measure because the information required to be disclosed in terms of the Gender Pay Gap Regulations may constitute information which cannot be disclosed in terms of section 27 of the EEA; (c) an argument for the inclusion of the Gender Pay Gap Regulations into section 27 of the EEA, at this stage, might amount to an inappropriate transplant of foreign law into domestic law which may result in an abuse of foreign law (as discussed under paragraph 2 above).[636] Notwithstanding this, it is prudent to continue the discussion of the Gender Pay Gap Regulations as it places the United Kingdom equal pay legal framework in context.

The Gender Pay Gap Regulations provides the following guidance regarding calculating the pay differences relating to the mean hourly rate, the median hourly rate of pay, the mean bonus pay and the median bonus pay. Regulation 8 of the Gender Pay Gap Regulations states that the difference between the mean hourly rate of pay of male and female full-pay relevant employees must be shown as a percentage of the mean hourly rate of pay of male full pay relevant employees and should be determined as follows: A minus B divided by A times 100 (A-B/A x 100) – A reflects the mean hourly rate of all male full-pay relevant employees and B reflects the mean hourly rate of pay of all female full-pay relevant employees.[637] Regulation 9 of the Gender Pay Gap Regulations states that the difference between the median hourly rate of pay of male and female full-pay relevant employees must be shown as a percentage of the median pay of male full-pay relevant employees and should be determined as follows: A minus B divided by A times 100 (A-B/A x 100) – A reflects the median hourly rate of all male full-pay relevant employees and B reflects the median hourly rate of pay of all female full-pay relevant employees.[638]

Regulation 10 of the Gender Pay Gap Regulations states that the difference between the mean bonus pay paid to male and female relevant employees must be shown as a

---

[636] See *Sanderson v Attorney-General Eastern Cape* (CCT10/97) [1997] ZACC 18 at para 26 and Kahn-Freund O "On Uses and Misuses of Comparative Law" *The Modern Law Review* 1974 37(1) 1 at 27 discussed under para 2 above.
[637] Regulation 8 of the Gender Pay Gap Regulations.
[638] Regulation 9 of the Gender Pay Gap Regulations.

percentage of the mean bonus pay paid to male relevant employees and should be determined as follows: A minus B divided by A times 100 (A-B/A x 100) – A reflects the mean bonus pay paid to male relevant employees and B reflects the mean bonus pay paid to female relevant employees. Regulation 11 states that the difference between the median bonus pay paid to male and female relevant employees must be shown as a percentage of the median bonus pay paid to male relevant employees and should be determined as follows: A minus B divided by A times 100 (A-B/A x 100) – A reflects the median bonus pay paid to male relevant employees and B reflects the median bonus pay paid to female relevant employees.[639]

Regulation 12 of the Gender Pay Gap Regulations deals with the proportion of male and female relevant employees who received bonus pay as follows. The proportion of male relevant employees who received bonus pay must be reflected as a percentage of the male relevant employees and should be determined as follows: A divided by B times 100 (A/B x 100) – A reflects the number of male relevant employees who received bonus pay during the relevant period (the 12 month period ending with the date of 5 April in the year in which the gender pay gap information is required to be submitted) and B reflects the number of male relevant employees (those employees employed at 5 April in the year in which the gender pay gap information is required to be submitted). The proportion of female relevant employees who received bonus pay must be reflected as a percentage of the female relevant employees and should be determined as follows: A divided by B times 100 (A/B x 100) – A reflects the number of female relevant employees who received bonus pay during the relevant period (the 12 month period ending with the date of 5 April in the year in which the gender pay gap information is required to be submitted) and B reflects the number of female relevant employees (those employees employed at 5 April in the year in which the gender pay gap information is required to be submitted).[640]

[639] Regulations 10-11 of the Gender Pay Gap Regulations.
[640] Regulation 12(1)-(3) of the Gender Pay Gap Regulations read with the definitions of "relevant employee" and "snapshot date" in regulation 1(2) of the Gender Pay Gap Regulations.

Regulation 13 of the Gender Pay Gap Regulations deals with the proportion of male and female full-pay relevant employees according to quartile pay bands. The proportion of male full-pay relevant employees and female full-pay relevant employees in the lower, lower middle, upper middle and upper quartile bands should be determined as follows: (a) Firstly, determine the hourly rate of pay in respect of each male and female full-pay relevant employee and then arrange the employees from lowest paid to highest paid; (b) Secondly, divide the employees mentioned in (a) into four parts with each part containing an equal number of employees as far as possible in order to determine the lower, lower middle, upper middle and upper quartile pay bands; (c) Thirdly, the proportion of male full-pay relevant employees within each quartile pay band should be shown as a percentage of the full-pay relevant employees within that band as follows: (i) A divided by B times 100 (A/B x 100) – A reflects the number of male full-pay relevant employees in a quartile pay band and B reflects the number of full-pay relevant employees in the same quartile band; and (d) Fourthly, the proportion of female full-pay relevant employees within each quartile pay band should be shown as a percentage of the full-pay relevant employees within that band as follows: (i) A divided by B times 100 (A/B x 100) – A reflects the number of female full-pay relevant employees in a quartile pay band and B reflects the number of full-pay relevant employees in the same quartile band. The Gender Pay Gap Regulations goes on to state that if there are employees who fall within more than one quartile pay band then the employer must as far as possible make sure that when arranging the employees under the first step mentioned above, the relative proportion of male employees and female employees receiving that rate of pay is the same in each of the pay bands.[641]

The hourly rate of pay as referred to in Regulation 13 above is to be determined as follows:

(a) Identify all those amounts relating to ordinary pay and bonus pay which was paid to the employee during the relevant pay period (the pay period within which the submission

[641] Regulation 13(1)-(2) of the Gender Pay Gap Regulations.

date of the gender pay gap information is required to be submitted which is 5 April) (Ordinary pay includes the following types of pay: (i) basic pay; (ii) allowances (this includes any money paid with regard to any duty of an employee, the location of employment, the purchase, maintenance or lease of a car, the recruitment or retention of an employee, the purchase, maintenance or lease of an item); (iii) piecework pay; (iv) leave pay; (v) shift premium pay (the difference between basic pay and a higher rate of pay paid for work performed during different times of the day or night). Ordinary pay excludes the following from its ambit: (vi) overtime pay; (vii) redundancy pay; (viii) pay in lieu of leave; (ix) pay in a form other than money; (x) any payment to reimburse expenditure incurred by the employee in the course of his/her employment. Bonus pay includes the following: (i) remuneration in the form of money, securities, interest in securities, securities options, vouchers; (ii) remuneration relating to commission, incentive, productivity, profit sharing, performance. Bonus pay excludes the following from its ambit: (iii) ordinary pay; (iv) overtime pay; (v) redundancy pay; and (vi) termination pay.);

(b) Where the amount identified constitutes ordinary pay then exclude any amount that would fall outside the relevant pay period;

(c) Where the amount constitutes bonus pay and is paid with regard to a period which is not the length of the relevant pay period then the amount must be divided by the length in days of the bonus period and it must then be multiplied by the length in days of the relevant pay period;

(d) The amounts identified under paragraph (a) above (as adjusted, if necessary, under paras (b) and (c) above) must be added together;

(e) The amount added in paragraph (d) must then be multiplied by the appropriate multiplier (appropriate multiplier means 7 divided by the number of days in the relevant pay period); and

(f) The amount under paragraph (e) must then be divided by the employees working hours in a week.[642]

---

[642] Regulation 6(1)-(2) read with Regulations 3(1)-(3), 4(1)-(2), 5(2) of the Gender Pay Gap Regulations. Regulation 7 of the Gender Pay Gap Regulations provides the following with regard to how the number of an employee's working hours in a week should be determined for the purpose of para (e) above as follows: "(1) The number of working hours in a week for a relevant employee, for the purposes of Step

9. CONCLUSION

This Chapter has involved a lengthy discussion and analysis of the United Kingdom legal framework relating to equal pay with the focus being on seeking to assist with answering the research questions to the extent called for in paragraphs 13.1-13.11 of Chapter 2 of this thesis. It is necessary to hereunder summarise the guidance extracted from the United Kingdom equal pay law as sought for in relation to the research questions.

9.1 Terms and conditions of employment

The purpose of the discussion was to first of all seek guidance relating to the phrase "terms and conditions of employment" in section 6(4) of the EEA (paragraph 13.1 of Chapter 2) and specifically (a) Whether submissions can be made regarding the inclusion

---

6 in regulation 6, is to be determined as follows. (2) Subject to paragraph (6), where an employee has normal working hours that do not differ from week to week or over a longer period, the number of working hours in a week for a relevant employee is the number of the normal working hours in a week for that employee under the employee's contract of employment, or terms of employment, in force on the snapshot date. (3) Subject to paragraph (6), where the employee has no normal working hours, or the number of the normal working hours differs from week to week or over a longer period, the number of working hours in a week for the employee is-(a) the average number of working hours calculated by dividing by twelve the total number of the employee's working hours during the period of twelve weeks ending with the last complete week of the relevant pay period, or (b) where the employee has not been at work for a sufficient period, or for some other reason the employer is not reasonably able to make the calculation under paragraph (a), a number which fairly represents the number of working hours in a week having regard to such of the considerations specified in paragraph (5) as are appropriate in the circumstances. (4) In calculating the average number of working hours for the purposes of paragraph (3)(a), no account is to be taken of a week in which no hours were worked by the employee, and hours worked in earlier weeks must be brought in so as to bring up to twelve the number of weeks of which account is taken. (5) The considerations referred to in paragraph (3)(b) are-(a) the average number of working hours in a week which the employee could expect under the employee's contract of employment, or terms of employment; and (b) the average number of working hours of other employees engaged in comparable employment with the same employer. (6) Where the employee is paid on the basis of piecework, the number of working hours in a week for the employee is the number of hours of output work for that employee in the week during the relevant pay period within which the snapshot date falls, determined in accordance with Chapter 4 of Part 5 of the National Minimum Wage Regulations 2015. (7) In its application by virtue of paragraph (6), Chapter 4 of Part 5 of the National Minimum Wage Regulations 2015 has effect as if-(a) references to a worker were references to an employee, and (b) references to a pay reference period were references to a week. (8) In this regulation, "working hours"-(a) includes hours when an employee is available, and required to be available, at or near a place of work for the purposes of working unless the employee is at home, and (b) excludes any hours for which an employee is entitled to overtime pay. (9) In paragraph (8), hours when a worker is "available" only includes hours when the worker is awake for the purposes of working, even if a worker by arrangement sleeps at or near a place of work and the employer provides suitable facilities for sleeping."

of payments set out in the lists of payments in the BCEA Schedule under the phrase "terms and conditions of employment" in section 6(4) of the EEA based on the United Kingdom equal pay law; and (b) Whether the United Kingdom equal pay law can contribute further towards addressing the issue of what can fall within the phrase "terms and conditions of employment" under section 6(4) of the EEA.

The following guidance has been extracted in relation to (a) above:

It is submitted that the following payments in the lists of payments in the BCEA Schedule fall under the phrase "terms and conditions of employment" in section 6(4) of the EEA based on the United Kingdom equal pay law: (a) wages/salaries; (b) occupational pension benefits; and (c) use of a car.[643]

The following guidance has been extracted in relation to (b) above:

(a) It is submitted that whilst terms of work in the form of overtime pay, holiday pay, sick pay and leave entitlement (pay) as set out in the Equal Pay Statutory Code of Practice are not found in the lists of payments in the BCEA Schedule, these terms of work are found in the Integration of Employment Equity Code as overtime rates, annual leave (including holiday pay and leave entitlement) and sick leave and thus strengthens the submission made in Chapter 2 that these forms of terms and conditions of employment fall within the ambit of the phrase "terms and conditions of employment" under section 6(4) of the EEA;[644]

(b) It is submitted that the following list of payments (working conditions) under the United Kingdom equal pay law serves as an example of what has been found to fall within the ambit of terms of work for the purposes of an equal pay (terms and conditions) claim which can assist with determining whether such payments can fall within the ambit of "terms and conditions of employment" under section 6(4) of the EEA (and it should be

[643] See para 4.1 above.
[644] See paras 5.1 and 13.1 in Chapter 2 of this thesis and para 4.1.1 above.

listed as such): (i) shift payments; (ii) non-discretionary bonuses; (iii) access to social benefits and sports; and (iv) automatic increases in pay such as a seniority increment;[645]

(c) It is submitted that the requirement under the United Kingdom equal pay law to the effect that a term by term comparison is required in an equal pay claim because the focus of equal pay law is on the equality of terms and not on the total pay actually received coupled with the prohibition that it is incorrect to lump different terms together and consider them as one term for the purpose of comparison should be used under section 6(4) of the EEA and will have the result that every aspect of remuneration will constitute a term and condition of employment under section 6(4) of the EEA.[646] This should be mentioned in the Equal Pay Code;

(d) It is submitted that the restriction under the United Kingdom equal pay law to the effect that an employer is not allowed to lump different terms together (for the purpose of preventing a term by term comparison) and the restriction that a claimant is not allowed to subdivide a single term into more parts for the purpose of complaining about one part provides the following guidance for an equal pay claim under section 6(4) of the EEA: (i) an employer faced with an equal pay claim in terms of section 6(4) of the EEA should not be allowed to defeat such a claim from the outset by arguing that the term to which the complaint relates should be lumped with other terms in circumstances where the term is capable of being compared without being so lumped which then essentially prevents a term by term comparison from being carried out; and (ii) an equal pay claimant under section 6(4) of the EEA should, likewise, not be allowed to subdivide a single term into several parts and then launch a complaint against the one part because this will amount to comparing an element of a term and what is required to be compared is a term and not an element thereof.[647] This should be mentioned in the Equal Pay Code; and

---

[645] See para 4.1.1 above.

[646] See *Hayward v Cammell Laird Shipbuilders Ltd, McNeil & Others v Revenue and Customs Commissioners* and *St Helens & Knowsley Hospitals NHS Trust v Brownbill and Others* discussed under para 4.1.1 above.

[647] See *McNeil & Others v Revenue and Customs Commissioners* discussed under para 4.1.1 above.

(e) It is submitted that the following guidance from the United Kingdom equal pay law will provide the South African Labour Courts (including the CCMA) with the necessary guidance in order to determine whether or not an employer faced with an equal pay claim is (incorrectly) lumping the term to which the equal pay complaint relates with other terms in order to defeat such equal pay claim from the outset and whether or not an equal pay claimant is complaining about an element of a term and not the term itself which is not allowed (as stated in the immediate preceding paragraph): (i) the terms that fall to be compared must be such that it is natural to compare them; (ii) what should be compared is a common sense question; (iii) the terms should be realistically classified; (iv) there might be instances where it would be prudent to ask whether a term is itself a term or whether it is an element of a term of the contract; and (v) it is impermissible to subdivide one term into several parts for the purpose of complaining about one part. The guidance listed in (i)-(v) requires evaluation by the Court.[648] It is further submitted that this should be mentioned in the Equal Pay Code.

9.2 The Same Employer

No guidance can be extracted from the United Kingdom equal pay law for the research questions relating to the phrase “the same employer” in section 6(4) of the EEA as called for in paragraph 13.2 of Chapter 2 of this thesis.[649]

9.3 The Comparator (employees of the same employer)

The following questions were posed in order to seek guidance from the United Kingdom equal pay law relating to the phrase “employees of the same employer” and the choosing of a comparator (paragraph 13.3 of Chapter 2):

[648] See *Lloyds Banking Group Pensions Trustees Ltd v Lloyds Banking Plc & Others* discussed under para 4.1.1 above.

[649] See paras 4.2.1.1, 4.2.1.2 and 4.2.2 above.

(a) How the issue of contemporaneous employment of the claimant and comparator which relates to the use of a predecessor or successor comparator is dealt with under the United Kingdom equal pay law;

(b) Whether the arguments put forth relating to the use of a hypothetical comparator based on South African law can be supported by the United Kingdom equal pay law; and

(c) Whether the argument put forth relating to the use of a subordinate employee, who is engaged in work of lesser value than the equal pay claimant but who earns higher pay, as a comparator based on South African law can be supported by the United Kingdom equal pay law.

<u>The following guidance has been extracted in relation to (a) above:</u>

It is submitted that the phrase “employees of the same employer” under section 6(4) of the EEA should be interpreted to include the use of a predecessor comparator as such interpretation would be in accordance with the United Kingdom equal pay law. The inclusion of a predecessor comparator under section 6(4) of the EEA will also provide an equal pay claimant who can only prove unfair pay discrimination (including terms and conditions) by comparing her situation to that of a predecessor employee with the opportunity to do so where she would otherwise be unable to launch an equal pay claim in such circumstances.[650]

It is submitted that the phrase “employees of the same employer” under section 6(4) of the EEA should be interpreted to include the use of a successor comparator where a female claimant produces pay discrimination evidence in the form of comparing her pay situation to that of a successor comparator (including any other listed or unlisted ground of discrimination) as such interpretation would be in accordance with the argument made in the IDS Employment Law Guide to the effect that the use of a successor comparator is allowed under section 71 of the Equality Act. It should be stated that an equal pay

[650] See para 4.3.1.1 above.

claimant who has left the employer's employ will not be able to launch an equal pay claim using a successor comparator under section 6(4) of the EEA because she is no longer an employee of the relevant employer. It is thus submitted that the use of a successor comparator in an equal pay claim under section 6(4) of the EEA is confined to where the claimant employee is still in the employ of the relevant employer. This is an important qualification.[651]

The following guidance has been extracted in relation to (b) above:

It is submitted that the recognition of the use of a hypothetical comparator under section 71 of the Equality Act of the United Kingdom supports and strengthens the arguments put forth relating to the use of a hypothetical comparator under section 6(4) of the EEA in different scenarios based on South African law.[652]

The following guidance has been extracted in relation to (c) above:

It is submitted that the use of a subordinate comparator under the United Kingdom equal pay law strengthens the argument put forth relating to the use of a subordinate employee, who is engaged in work of lesser value than the equal pay claimant but who earns higher pay, as a comparator under section 6(4) of the EEA based on South African law.[653]

The following further guidance has been extracted:

(a) Under the United Kingdom equal pay law, a claimant employee has the prerogative to choose her own comparator and an Employment Tribunal cannot interfere with such choice by for example substituting such comparator but an irresponsible exercise of such prerogative by the claimant employee can be met with an adverse costs order and/or provide the employer with a defence to the equal pay claim. Unlike the United Kingdom

---

[651] See para 4.3.1.2 read with para 4.3.2 above.
[652] See para 4.3.2 above.
[653] See para 4.3.3 above.

relating to equal pay law, the South African equal pay legal framework does not specifically state that a claimant is free to choose her own comparator and neither does it state that the Labour Courts (including the CCMA) cannot substitute a claimant's choice in comparator for its own. Based on this, it is submitted that it should specifically be stated in the Equal Pay Code that an equal pay claimant under section 6(4) of the EEA has the prerogative to choose her own comparator and the Labour Courts (including the CCMA) are not allowed to substitute the claimant's choice of comparator for its own. It is further submitted that it should also be mentioned that an irresponsible exercise of such prerogative by the claimant employee under section 6(4) of the EEA can be met with an adverse costs order and/or provide the employer with a defence to the equal pay claim;[654]

(b) Under the United Kingdom equal pay law, there is no requirement that the chosen comparator must be representative of a group and cannot be anomalous and there is thus nothing to restrict an equal pay claimant from choosing an anomalous comparator (the so-called odd man out) but the fact that the claimant chooses such comparator may present an employer with a defence to an equal pay claim. Unlike the United Kingdom equal pay law, the South African equal pay legal framework does not mention whether an equal pay claimant is restricted from choosing an anomalous comparator and that the comparator chosen must be representative of a group. Based on this, it is submitted that it should specifically be stated in the Equal Pay Code that an equal pay claimant under section 6(4) of the EEA is not restricted from choosing an anomalous comparator but where she does so then it may present an employer with a defence to the equal pay claim;[655] and

(c) Under the United Kingdom equal pay law, a tribunal should be watchful to prevent claimants abusing equal pay for equal value claims by casting their net too wide and choosing too many comparators. Based on this, it is submitted that it should specifically be mentioned in the Equal Pay Code that the Labour Courts (including the CCMA) should be vigilant to prevent equal pay claimants from abusing equal pay claims by choosing too

[654] See para 4.3.4 above.
[655] See para 4.3.4 above.

many comparators and one way of doing this is by using pre-trial (arbitration) procedures to root out hopeless comparisons.[656]

9.4 Same work/substantially the same work, work rated as equivalent, work of equal value

The following guidance can be extracted from the United Kingdom equal pay law in order to learn lessons for the same work and substantially the same work under section 6(4) of the EEA as called for in paragraphs 13.4 and 13.5 of Chapter 2 of this thesis:

(a) Work does not have to be identical in every respect in order for it to constitute like work because if it did then it would be easy for an employer to avoid its equal pay liability by simply pointing to a minor unimportant difference;[657]

(b) Determining whether work amounts to like work involves a two-stage process. The first stage, looks at whether the claimant and the comparator are employed to perform work that is the same or broadly similar. This necessitates a general consideration of the work together with the skills and knowledge required to perform it (the claimant would need to prove that the work performed is the same or broadly similar). The second stage, provided that the work performed by the claimant and the comparator is shown to be the same or broadly similar and where there are differences between the work, looks at whether those differences are of practical importance having regard to: (a) "the frequency with which any differences occur in practice", and (b) "the nature and extent of those differences."[658]

---

[656] See para 4.3.4 above.

[657] Romney D *Equal Pay: Law and Practice* (Oxford University Press 2018) 66 as discussed under para 4.4.1 above.

[658] The Equal Pay Statutory Code of Practice at para 35 discussed under para 4.4.1 above. See also the cases of *Dugdale v Kraft Foods Ltd* [1976] IRLR 368 (EAT) at para 6; *Ahmed v BBC* Case No: 2206858/2018 (ET) at para 153 and paras 147-149 on pages 29-30 and paras 147-149 on pages 30-31; *Waddington v Leicester Council for Voluntary Services* [1997] IRLR 32 (EAT) at paras 7, 9; *Morgan v Middlesborough Council* [2005] EWCA Civ 1432 (CA) at paras 10-11; and *Capper Pass Ltd v Lawton* [1976] IRLR 366 (EAT) at para 11 discussed under para 4.4.1 above.

(c) In determining whether the work in question is the same or broadly similar and whether any differences are of practical importance the following is important for an Employment Tribunal: (i) a tribunal must not allow itself to get engaged in “fiddling detail or pernickity examination of differences which set against the broad picture fade into insignificance”;[659] (ii) a tribunal should take a broad commonsense judgment (a wide view) which is not too pedantic and it should not engage in a minute examination or find itself being constrained to make a finding that the work is not like work due to differences which are insignificant;[660] (iii) the test to determine like work is a rough test even though it is applied in a common-sense and unpedantic manner;[661] (iv) a job title and job specification may mean nothing or little to determine the same/similar work and common sense should apply;[662] and (v) the issue regarding whether the work being performed is like work is essentially a question of fact.[663]

It is submitted that the principles listed in (a)-(c) above provides valuable guidance for the Labour Court (including the CCMA) adjudicating equal pay for the same/substantially the same work claims under section 6(4) of the EEA regarding the approach that should be taken to determine whether or not work is the same or substantially the same. To this end, these principles should be listed under regulation 4 of the Employment Equity Regulations.[664]

(d) The legal burden of proving that the claimant is employed on like work with a comparator rests on the claimant. If the claimant is able to do this, then an evidential burden of showing that there are differences in the work actually performed by the claimant and comparator and that these differences are of practical importance rests upon

---

659 *Capper Pass Ltd v Lawton* [1976] IRLR 366 (EAT) at para 10 as discussed under para 4.4.1 above.
660 *Capper Pass Ltd v Lawton* [1976] IRLR 366 (EAT) at para 10 and *Dorothy Perkins Ltd v J Dance & Others* [1977] IRLR 226 (EAT) at para 9 as discussed under para 4.4.1 above.
661 *Maidment & Hardacre v Cooper & Co (Birmingham) Ltd* [1978] IRLR 462 (EAT) at paras 15 as discussed under para 4.4.1 above.
662 *Dorothy Perkins Ltd v J Dance & Others* [1977] IRLR 226 (EAT) at para 9 as discussed under para 4.4.1 above.
663 *Capper Pass Ltd v Allan* [1980] IRLR 236 (EAT) at para 13 as discussed under para 4.4.1 above.
664 See para 4.4.1 above.

the employer.[665] It is submitted that this provides guidance relating to who should prove what and it is submitted that the shift in evidential burden to the employer to show that the differences in the work are of practical importance will make the equal pay for the same/substantially the same work claim under section 6(4) of the EEA effective and to this end it should be listed under regulation 4 of the Employment Equity Regulations.[666]

(e) The following are examples of differences that can be of practical importance: (a) level of responsibility; (b) skills; (c) the time when the work is performed; (d) qualifications; (e) training; (f) physical effort; (g) additional duties; and (h) a difference in the workload of the claimant and the comparator where it evidences a difference in responsibility (or some other difference that is of practical importance);[667]

(f) Whether a difference in responsibility can amount to a difference of practical importance which can prevent the work in question from being like work is a matter for the Industrial Tribunal to decide. The amount of money handled where it is a larger amount (by the comparator) than money handled in another case (by the claimant) could very well give rise to a different and higher degree of responsibility;[668]

(g) While it is important to ascertain what work is done by the claimant and what work is done by the comparator, the circumstances under which the work is performed should not be ignored. The factor of responsibility might be decisive if it is able to place the comparator in a different grade from the claimant. An example of this is where there is a senior bookkeeper and a junior bookkeeper who work together and whose work is almost identical but the factor of responsibility may be important in such case;[669]

(h) The Equal Pay Act does not allow for a situation where a trainee who is performing the same work as his supervisor and under her training is entitled to be paid at the same

---

665 *E Coomes (Holdings) Ltd v Shields* [1978] IRLR 263 (CA) at para 65 read with the Equal Pay Statutory Code of Practice at para 36 discussed under para 4.4.1 above.
666 See para 4.4.1 above.
667 The Equal Pay Statutory Code of Practice at para 36 discussed under para 4.4.1 above.
668 *Capper Pass Ltd v Allan* [1980] IRLR 236 (EAT) at para 15 discussed under para 4.4.1 above.
669 *Eaton Ltd v J Nuttall* [1977] IRLR 71 (EAT) at para 9 as discussed under para 4.4.1 above.

rate as his supervisor. A probationer can thus not be employed on like work with his supervisor;[670]

(i) Performing like work only when deputising for a comparator does not result in the claimant performing like work to that of the comparator;[671] and

(j) A claimant and comparator are not engaged in the same or broadly similar work where the claimant is engaged in routine work which is lesser work than the strategic and managerial role which is undertaken by the comparator.[672]

It is submitted that the list of examples of differences that can be of practical importance as set out in (e) above and those instances referred to in (f)-(j) above provide valuable guidance for the same/substantially the same work cause of action under section 6(4) of the EEA and this list should be stated under regulation 4 of the Employment Equity Regulations.

(k) The time at which work is done should be ignored if this constitutes the only difference between the work performed by the claimant and that of the comparator but it should not be ignored where working at night attracts additional responsibilities to the extent that it is unreasonable to say that the claimant working during the day and the comparator working at night are performing like work even though they are performing similar physical acts but the reality is that the nature of the work performed at night is different. There is thus a difference between the work performed between the claimant and the comparator which is of practical importance.[673] It is submitted that this provides valuable guidance to the Labour Court (including the CCMA) on how to go about determining this aspect for

---

670 *De Brito v Standard Chartered Bank Ltd* [1978] ICR 650 (EAT) at 655A, 655E as discussed under para 4.4.1 above.

671 *Ford v R Weston (Chemists) Ltd* 1977 12 ITR 369 (EAT) at pages 2-3 as discussed under para 4.4.1 above.

672 *Morgan v Middlesbrough Council* [2005] EWCA Civ 1432 (CA) at para 9 as discussed under para 4.4.1 above.

673 *National Coal Board v Sherwin & Another* [1978] ICR 700 (EAT) at 703D-F, 704G-H read with *Thomas & Others v National Coal Board* [1987] IRLR 451 (EAT) at para 5 as discussed under para 4.4.1 above.

the same/substantially the same work under section 6(4) of the EEA. This should be listed under regulation 4 of the Employment Equity Regulations.[674]

(l) A contractual duty on the comparator to perform additional duties which is not actually performed by the comparator, or where it is performed by the comparator but not to a significant extent, will not affect a like work comparison because the focus of a like work comparison is on the work that is performed in practice. This does not mean that it is irrelevant to look at the contractual terms because this is the starting point with the primary focus being on what is done in practice.[675] It is submitted that this provides valuable guidance to the Labour Court (including the CCMA) on how to go about dealing with whether contractual duties are performed or not and its impact on determining whether or not the claimant and comparator are engaged in the same/substantially the same work. This should be mentioned under regulation 4 of the Employment Equity Regulations.[676]

(m) A difference in pay does not constitute a factor which can properly be taken into account in deciding whether or not the claimant and the comparator are engaged in like work;[677]

(n) Where the work in question is found to be of a broadly similar nature then there will inevitably be differences between the work performed by the claimant and that of the comparator.[678]

It is submitted that the principles in (m)-(n) above provide important guidance for equal pay for the same/substantially the same work causes of action under section 6(4) of the

---

674 See para 4.4.1 above.

675 IDS Employment Law Guide: The Equality Act 2010 (Income Data Services Limited 2010) 151 read with *Electrolux Ltd v AM Hutchinson & Others* [1976] IRLR 410 (EAT) at para 5 and *Redland Roof Tiles Ltd v Harper* [1977] ICR 349 (EAT) at 352H-353A as discussed under para 4.4.1 above. See also *Waddington v Leicester Council for Voluntary Services* [1997] IRLR 32 (EAT) at para 9 as discussed under para 4.4.1 above.

676 See para 4.4.1 above.

677 *Redland Roof Tiles Ltd v Harper* [1977] ICR 349 (EAT) at 351B as discussed under para 4.4.1 above.

678 *Capper Pass Ltd v Lawton* [1976] IRLR 366 (EAT) at para 10 as discussed under para 4.4.1 above.

EEA and should accordingly be mentioned under regulation 4 of the Employment Equity Regulations.[679]

(o) Unlike the United Kingdom equal pay law, the South African equal pay law does not explicitly state that there is no equal pay cause of action in terms of which a claimant is allowed to claim proportionate pay which goes beyond equal pay, in other words, a claimant can never claim higher pay than her chosen comparator proportionate to the superiority of her work as compared to that of the comparator. It is submitted that this should specifically be stated in the Equal Pay Code in order to make it clear that such complaint is not justiciable under section 6(4) of the EEA.[680]

9.5 Onus and access to pay related information

The guidance sought from the United Kingdom equal pay law for the research questions relating to the onus in section 11(1) of the EEA as called for in paragraph 13.7.1 of Chapter 2 of this thesis is as follows: (a) Whether the argument that section 11(1) only requires an equal pay claimant to produce sufficient evidence, which is more than making a bald (mere) allegation and less than establishing a *prima facie* case, in order to raise a credible possibility that unfair pay discrimination has taken place and if she succeeds in doing so then the onus is on the employer to prove its defence on a balance of probabilities as required by section 11(1) can be supported by the United Kingdom equal pay law; and (b) Whether there are any lessons for the onus provision in section 11(1) of the EEA that can be learnt from how the onus in equal pay is dealt with under the United Kingdom equal pay law. The guidance sought from the United Kingdom equal pay law for the research question relating to access to pay related information as called for in paragraph 13.8 of Chapter 2 of this thesis is as follows: (c) Whether there are any lessons that can be learnt from the United Kingdom equal pay law on the aspect of access to pay related information for South African equal pay law on this score.

[679] See para 4.4.1 above.
[680] See para 4.4 above.

The following is stated regarding (a) above:

No guidance can be extracted from the United Kingdom equal pay law in order to assist with the research question relating to the onus in section 11(1) of the EEA as called for in paragraph 13.7.1 of Chapter 2 of this thesis as stated in (a).[681]

The following is stated regarding (b) above:

No guidance can be extracted from the United Kingdom equal pay law in order to assist with the research question relating to the onus in section 11(1) of the EEA as called for in paragraph 13.7.1 of Chapter 2 of this thesis as stated in (b) as there are no lessons which can be learnt from the onus in equal pay law as dealt with under the United Kingdom for section 11(1) of the EEA.[682]

The following guidance has been extracted in relation to (c) above:

(a) The right afforded by section 77 of the Equality Act to employees to discuss their pay and the protection against victimisation is contained in South African law under section 78(1)(b) and 78(2) of the BCEA as discussed under paragraph 9.1 in Chapter 2 of this thesis. Based on this, it is submitted that section 77 of the Equality Act supports the argument made under paragraph 9.1 in Chapter 2 of this thesis to the effect that reference to the right of employees to discuss their terms and conditions of employment together with the protection of this right as contained in section 78(1)(b) read with 78(2) of the BCEA should specifically be mentioned in the EEA;[683] and

(b) The nub of the ACAS Guide is to allow employees the opportunity to pose questions to their employer regarding their pay and to allow an employer to respond to such questions. A fruitful engagement between the employee and employer in this regard

[681] See para 5.1 above.
[682] See para 5.1 above.
[683] See para 5.2.1 above.

constitutes a source of pay related information. South African law does not have a voluntary question and answer procedure as contained in the ACAS Guide. It is submitted that the question and answer procedure as contained in the ACAS Guide should be mentioned in the South African Equal Pay Code with reference thereto being made in the EEA. The inclusion of such procedure improves an employee's access to pay related information and is thus beneficial. The written questions and answer process would also be voluntary and it should specifically be mentioned that a non-response may be a contributory factor which is taken into account by the Labour Court (including the CCMA) when it makes its overall decision regarding the employee's pay discrimination claim.[684]

9.6 Grounds of Justification

The guidance sought from the United Kingdom equal pay law for the research questions relating to the grounds of justification to equal pay claims (paragraph 13.9 of Chapter 2) were set out as follows:

(a) To test the arguments made based on South African law to the effect that affirmative action and the inherent requirements of the job as contained in section 6(2) of the EEA are not suitable grounds of justification to equal pay claims by analysing the grounds of justification in the United Kingdom equal pay law;

(b) To ascertain what the position is under the United Kingdom equal pay law regarding the progressive realisation of the right to equal pay for the benefit of the argument made based on South African law to the effect that it will be difficult to refuse to recognise the progressive realisation of the right to equal pay as a ground of justification, falling under regulation 7(1)(g) of the Employment Equity Regulations, where it is genuine and in circumstances where it gives effect to section 27(2) of the EEA;

(c) What the position under the United Kingdom equal pay law is regarding the factor of responsibility operating as a ground of justification to an equal pay claim before a

[684] See para 5.2.2 above.

submission can be made as to whether or not this factor should fall under regulation 7(1)(g) of the Employment Equity Regulations as a ground of justification;

(d) What the position under the United Kingdom equal pay law is regarding the factor of different wage setting structures resulting in a pay difference operating as a ground of justification to an equal pay claim before a submission can be made as to whether or not this factor should fall under regulation 7(1)(g) of the Employment Equity Regulations as a ground of justification; and

(e) Any further lessons that can be learnt from the United Kingdom equal pay law for the South African equal pay law relating to the grounds of justification to equal pay claims.

<u>The following guidance has been extracted in relation to (a) above:</u>

The United Kingdom equal pay law does not mention affirmative action and/or the inherent requirements of the job operating as grounds of justification to equal pay claims and this strengthens the argument made based on South African law to the effect that affirmative action and the inherent requirements of the job are not suitable grounds of justification to equal pay claims.[685]

<u>The following guidance has been extracted in relation to (b) above:</u>

It is submitted that the argument made based on South African law to the effect that it will be difficult to refuse to recognise the progressive realisation of the right to equal pay as a ground of justification, falling under regulation 7(1)(g) of the Employment Equity Regulations, where it is genuine and in circumstances where it gives effect to section 27(2) of the EEA is strengthened by the United Kingdom equal pay law which recognises the principle of the progressive realisation of the right to equal pay by stating that the long-

[685] See para 6 above.

term objective of reducing pay inequality should always be regarded as a legitimate aim.[686]

The following guidance has been extracted in relation to (c) above:

An employer may place greater emphasis on one factor for assessing the value of the work in question as opposed to other factors and then remunerate a comparator with the greater factor more than the equal pay claimant and this will amount to a material factor defence. It is submitted this this one factor can for example be responsibility as it is a common factor used to assess the value of work. Based on this, it is submitted that the factor of responsibility falls under regulation 7(1)(g) of the Employment Equity Regulations as any other relevant factor that is not unfairly discriminatory in terms of section 6(1) of the EEA and it should specifically be listed as a ground of justification under regulation 7 because it is specifically listed as a factor for assessing work in regulation 6(1)(a) of the Employment Equity Regulations.[687]

The following guidance has been extracted in relation to (d) above:

(a) The mere existence of different pay structures as well as different negotiating machinery are not in and of itself capable of constituting a material factor defence for the pay differential;[688] and

(b) The existence of two separate collective agreements which are on their own not discriminatory will not on its own prevent a finding of *prima facie* pay discrimination and this is important in order to prevent employers from circumventing the principle of equal pay.[689]

---

686 See para 6.1.15 above.

687 See para 6.1.12 above.

688 See *British Coal Corporation v Smith & Others* [1996] IRLR 404 (HL) discussed under para 6.1.7.2 above.

689 See *British Road Services Ltd v Loughran & Others* [1997] IRLR 92 (NICA) and *Redcar & Cleveland Borough Council v Bainbridge & Others* (No.2) [2008] IRLR 776 (CA) discussed under para 6.1.7.2 above.

The nub of the principles in (a)-(b) is that an employer is not allowed to rely on separate collective bargaining processes as a ground of justification to unequal pay. The international labour law regarding the issue of separate collective bargaining agreements as a ground of justification to unequal pay as discussed in paragraphs 6.7 and 9.6 of Chapter 3 of this thesis is essentially the same as the position in the United Kingdom equal pay law on this score. This being the case the research question posed in (d) under paragraph 6 above (repeated above under this paragraph 9.6) can now be squarely answered here. It is submitted that the non-listing of separate collective bargaining agreements in regulation 7 of the Employment Equity Regulations is strengthened by its rejection as a ground of justification to pay discrimination in both international labour law and the United Kingdom equal pay law.[690]

<u>The following guidance has been extracted in relation to (e) above:</u>

(a) Unlike the United Kingdom equal pay law, the South African equal pay law does not explicitly state that an employer will establish a ground of justification to an equal pay claim where it is able to prove that the claimant and her chosen comparator are not engaged in the same/similar work or work of equal value or that the comparator is not a permissible comparator in law. It is submitted that regulation 7 of the Employment Equity Regulations should specifically refer to these two grounds of justification.[691]

(b) Service-related pay scales which are pay scales that increase pay according to an employee's length of service are commonplace and an employer is generally not under an obligation to provide justification for the adoption of a service-related pay scale because the law acknowledges that length of service (experience) allows an employee to work better;[692]

---

690 See para 6.1.7.2 above.
691 See para 6.1 above.
692 See para 6.1.1 above.

(c) There is no obligation on an employer to objectively justify the pay differential resulting from a service-related pay scale unless the equal pay claimant is able to tender evidence that raises serious doubts regarding the appropriateness of the pay scale to achieve the aim of rewarding experience;[693] and

(d) An equal pay claimant can challenge both the adoption and use of a service-related pay scale and this can result in an employer having to provide objective justification for the adoption as well as the use of a service-related pay scale.[694]

Based on the principles listed in (b)-(d) it is submitted that the listing of the factor of seniority operating as a ground of justification to an equal pay claim in regulation 7(1)(a) of the Employment Equity Regulations is strengthened by its use in the United Kingdom equal pay law. It is further submitted that the approach in South African law to the use of seniority as a ground of justification to an equal pay claim is to a large extent in accordance with the approach under the United Kingdom equal pay law because South African law also regards seniority as a ground of justification to an equal pay claim without the need for further justification provided that it does not give rise to indirect unfair pay discrimination as set out in regulation 7(2) of the Employment Equity Regulations.[695] To this end, it is submitted that the principles set out in (b)-(c) should be mentioned under regulation 7 of the Employment Equity Regulations in relation to the factor of seniority. It is submitted that the principle mentioned in (d) to the effect that an equal pay claimant can challenge both the adoption and use of a service-related pay scale and this can result in an employer having to provide objective justification for the adoption as well as the use of a service-related pay scale is not dealt with in South African equal pay law and thus provides important guidance for the operation of the factor of seniority as a ground of justification to an equal pay claim. Based on this, it is submitted that the principle listed in (d) should be mentioned under regulation 7 of the Employment Equity Regulations in relation to the factor of seniority.[696]

---

[693] See para 6.1.1 above.
[694] See para 6.1.1 above.
[695] See para 10.2 of Chapter 2 of this thesis.
[696] See para 6.1.1 above.

(e) It is submitted that the listing of the factor of performance (quantity or quality of work) operating as a ground of justification to an equal pay claim in regulation 7(1)(c) of the Employment Equity Regulations is strengthened by its use in the United Kingdom equal pay law, *albeit*, in the form of productivity;[697]

(f) An employer is allowed to prove that a pay differential is due to a bonus productivity scheme and this amounts to a material factor defence;[698]

(g) Where there is a bonus scheme in place which rewards productivity then the correct approach is to seek to question whether there was an increase in productivity as a result of the bonus scheme;[699]

(h) Where an employer cannot prove that the whole of the pay differential is due to the bonus productivity scheme then it is allowed to prove that a portion of the pay differential is due to the bonus productivity scheme, if it is able to do so;[700] and

(i) An employer will not be able to prove a material factor defence as well as objective justification for the pay differential in circumstances where it is found that the link between the bonus scheme and the productivity factor has ceased.[701]

It is submitted that the principles extracted in (f)-(i) above should be mentioned under this ground of justification relating to performance (quantity or quality of work) in regulation 7 of the Employment Equity Regulations.[702]

---

[697] See para 6.1.2 above.
[698] See *Cumbria County Council v Dow & Others* [2008] IRLR 91 (EAT) read with *Council of the City of Sunderland v Brennan & Others* [2012] IRLR 507 (CA) as discussed under para 6.1.2 above.
[699] See *Cumbria County Council v Dow & Others* [2008] IRLR 91 (EAT) as discussed under para 6.1.2 above.
[700] See *Cumbria County Council v Dow & Others* [2008] IRLR 91 (EAT) as discussed under para 6.1.2 above.
[701] See *Council of the City of Sunderland v Brennan & Others* [2012] IRLR 507 (CA) as discussed under para 6.1.2 above.
[702] See para 6.1.2 above.

(j) It is submitted that the listing of the factor of the existence of a shortage of relevant skill operating as a ground of justification to an equal pay claim in regulation 7(1)(f) of the Employment Equity Regulations is strengthened by the United Kingdom equal pay law which has recognised it, *albeit*, as administrative efficiency which is the need to attract employees in order for the business to run efficiently;[703]

(k) The United Kingdom equal pay law provides guidance for the factor relating to the existence of a shortage of relevant skill as a ground of justification under regulation 7(1)(f) of the Employment Equity Regulations by stating that in a case where there is no direct or indirect pay discrimination then a pay differential which is caused by economic factors relating to the efficient running of the employer's business may be relevant as a ground of justification to an equal pay claim. It is submitted that this is important guidance which should be mentioned in regulation 7 of the Employment Equity Regulations;[704] and

(l) The United Kingdom equal pay law states that the proper enquiry to be undertaken regarding the ground of justification of administrative efficiency does not consider why the claimant is being paid less than the comparator but rather considers why the comparator is being paid more. This provides further guidance for the factor relating to the existence of a shortage of relevant skill as a ground of justification under regulation 7(1)(f) of the Employment Equity Regulations and should thus be mentioned under regulation 7 of the Employment Equity Regulations.[705]

(m) It is submitted that the listing of the factor of market value in a particular job classification including the existence of a shortage of relevant skill (market forces) operating as a ground of justification to an equal pay claim in regulation 7(1)(f) of the Employment Equity Regulations is strengthened by its use in the United Kingdom equal pay law;[706]

---

[703] See para 6.1.3 above.
[704] See para 6.1.3 above.
[705] See para 6.1.3 above.
[706] See para 6.1.4 above.

(n) It is contrary to equal pay law to allow an employer to justify a pay differential by simply stating that it paid a male comparator a higher wage because he asked for it or it paid a female claimant a lesser wage because she was willing to work for less;[707]

(o) The reducing of a female's wages to a rate below that of a comparator male employee's wages in order to compete for a tender with rival tenderers does not amount to a material factor defence based on market forces;[708]

(p) It is just and desirable to allow reliance on a market forces defence to be fully ventilated in circumstances where it can properly be advanced to provide an explanation for either the whole or part of the pay differential;[709]

(q) It is the responsibility of the employer to prove that the market demanded the higher pay and it is not the responsibility of the claimant employee to prove that the comparator's pay was too high;[710] and

(r) Unless a market forces defence can be shown to have ceased operating in the sense of being historical it continues to operate as a material factor defence.[711]

It is submitted that the principles listed in (n)-(r) above provides valuable guidance which should be mentioned under the ground of justification relating to market forces in regulation 7 of the Employment Equity Regulations.[712]

(s) It is submitted that the listing of the factor of an employee being demoted as a result of organisational restructuring of for any other legitimate reason without a pay reduction

---

[707] See *Fletcher v Clay Cross (Quarry Services) Ltd* [1978] IRLR 361 (CA) discussed under para 6.1.4 above.

[708] See *Ratcliffe & Others v North Yorkshire County Council* [1995] IRLR 439 (HL) discussed under para 6.1.4 above.

[709] See *Cumbria County Council v Dow & Others* [2008] IRLR 91 (EAT) discussed under para 6.1.4 above.

[710] See *Cumbria County Council v Dow & Others* [2008] IRLR 91 (EAT) discussed under para 6.1.4 above.

[711] See Walker v Co-operative Group Limited & Another [2020] EWCA Civ 1075 discussed under para 6.1.4 above.

[712] See para 6.1.4 above.

and the fixing of such employee's pay at this level until the remuneration of other employees in the same job category reaches the same level, commonly referred to as red-circling, operating as a ground of justification to an equal pay claim in regulation 7(1)(d) of the Employment Equity Regulations is strengthened by its use in the United Kingdom equal pay law;[713]

(t) It might be necessary at times to protect the wages of an employee or employees who are transferred from a higher paying job to a worse paying job as a result of the higher paying job no longer being available. It is customary to circle these employees in red on a wage table in order to show that their pay is protected and this gives rise to the phrase red-circling;[714]

(u) The correct approach to the practice known as red-circling is as follows: (i) It is important to ascertain whether the red-circling in question is of a permanent nature, a temporary nature, whether it is being phased out and if the origin of the red-circling is rooted in sex discrimination; (ii) It is further important to ascertain whether the group of employees who are red-circled constitute a closed group of employees and whether the red-circling has been negotiated at the workplace with the employees' views being taken into account; (iii) An employer cannot be permitted to successfully prove that a pay differential between the equal pay claimant and the comparator is genuinely due to a material difference in circumstances where past sex discrimination has contributed to the pay differential;[715] (iv) When deciding whether an employer has proved a genuine material factor defence based on red-circling it is relevant for the Industrial Tribunal to take into account the time that has expired since the red-circling was first introduced and whether the employer by continuing with the red-circling has acted in line with good industrial practice; (v) If there is a long period of red-circling which goes against good industrial practice then this may in all the circumstances lead to a doubt as to whether the employer has been able to prove its material factor defence;[716] (vi) An employer who wishes to

---

713 See para 6.1.5 above.

714 *Outlook Supplies Ltd v Parry* [1978] IRLR 12 (EAT) as discussed under para 6.1.5 above.

715 *Snoxell & Davies v Vauxhall Motors* Ltd [1977] IRLR 123 (EAT) as discussed under para 6.1.5 above.

716 *Outlook Supplies Ltd v Parry* [1978] IRLR 12 (EAT) as discussed under para 6.1.5 above.

prove a material factor defence by relying on red-circling must prove this in relation to every employee who it claims is within the red-circle. Such employer should further prove that the higher rate of pay of the comparator employee was based on considerations unrelated to sex at the time when the employee was allowed into the red-circle. Where appropriate, an employer can place reliance on a presumption that those considerations which apply to employees within the red-circle also applied to later employees who were allowed into the red- circle;[717] (vii) Whether an employer's pay protection scheme unfairly discriminates against female employees is a matter to be dealt with objectively as a question of fact; (viii) Whether or not the employer knew that it was discriminating against the female claimant employees is irrelevant. Issues of knowledge, intention and motive are relevant at the justification stage but are irrelevant at the stage of determining whether the pay protection scheme is *prima facie* discriminatory;[718] (ix) In order for an initial material factor defence to qualify as a concurrent material factor defence to an equal pay claim, an examination of the defence must be made at the time when the pay differential is being challenged. If this is not the case, then it will open the door for unscrupulous employers to continue implementing a pay differential in circumstances where the initial reason for the pay differential has ceased; and (x) The onus of proving a material factor defence rests on the employer at all times who must prove that it continues to exist. It is incorrect to assume that the indefinite continuation of red-circling is justified solely because the implementation thereof was justified and the reasons for its continued application is important to justify its continued application;[719] and

(v) The red-circling of wages which is done for good reasons causes a lot of misunderstanding which intensifies with the length of time and it is thus desirable to make arrangements to phase out the red-circling. It is desirable to have joint consultation when a practice of red-circling is introduced and where it is sought to be continued.[720]

---

[717] *United Biscuits Ltd v Young* [1978] IRLR 15 (EAT) as discussed under para 6.1.5 above.

[718] *Redcar & Cleveland Borough Council v Bainbridge & Others* (No.2) [2008] IRLR 776 (CA) discussed under para 6.1.5 above.

[719] *Fearnon & Others v Smurfit Corrugated Cases (Lurgan) Ltd* [2009] IRLR 132 (NICA) discussed under para 6.1.5 above.

[720] *Snoxell & Davies v Vauxhall Motors* Ltd [1977] IRLR 123 (EAT) and *Outlook Supplies Ltd v Parry* [1978] IRLR 12 (EAT) as discussed under para 6.1.5 above.

It is submitted that the principles set out in (t)-(v) should be mentioned under regulation 7 of the Employment Equity Regulations in relation to the factor of red-circling. These principles are sorely needed under regulation 7 as South African law has not dealt with the defence of red-circling in relation to an equal pay claim and there are no principles that can be extracted from the South African equal pay law in this regard.[721]

(w) It is submitted that the non-listing of union hostility/intransigence (good industrial relations) in regulation 7 of the Employment Equity Regulations and its absence in South African case law is strengthened by the United Kingdom equal pay law which in essence states that the reliance on union hostility/intransigence (good industrial relations) by an employer as a defence to unequal pay is not sustainable and there is no place for such an argument to constitute a material factor defence in the equal pay law jurisprudence.[722]

(x) It is submitted that the non-listing of collective agreements in regulation 7 of the Employment Equity Regulations is strengthened by its rejection as a ground of justification to pay discrimination in the United Kingdom equal pay law;[723]

(y) An Employment Tribunal should not allow itself to be influenced by the fact that the pay differential in question has its origin in a collective agreement;[724] and

(z) The Equal Pay Act requires collective bargaining negotiators to pay attention to the fact that pay differentials can have a disparate impact on employees who belong to one gender. If the collective bargaining negotiators omit to pay attention to this then where a group of employees' equal pay rights are breached then the negotiators omission/oversight will not be capable of objectively justifying the pay differential by relying on the resultant collective agreement.[725]

---

721 See para 6.1.5 above.
722 See para 6.1.6 above.
723 See para 6.1.7.1 above.
724 See para 6.1.7.1 above.
725 See para 6.1.7.1 above.

(aa) Regulation 7(1)-(2) of the Employment Equity Regulations does not list a job evaluation scheme as a ground of justification to an equal pay claim. It is submitted that this is a serious omission in regulation 7 for the following reasons: (i) It has been argued under paragraphs 12 read with 13.11 of Chapter 2 of this thesis that an objective job evaluation system as mentioned in the Integration of Employment Equity Code and which is free from unfair discrimination in section 6(4) of the EEA and disproportionate income differentials will assist in complying with the aims of section 27 of the EEA and constitutes a measure which can be taken to progressively reduce unfair pay discrimination and disproportionate income differentials and should specifically be listed as such under section 27(3) of the EEA; (ii) To allow an employee to successfully challenge an objective job evaluation which is free from unfair discrimination in effect removes the status of such job evaluation as being a proactive measure to achieving equal pay and renders the causes of action in section 6(4) of the EEA and the taking of proactive measures as required by section 27(3) of the EEA internally incoherent which leads to legal uncertainty; and (iii) To allow this will result in employers not wanting to embark on job evaluation schemes which are objective if they are not allowed to rely on it to resist an equal pay claim which has the opposite effect of achieving equal pay by implementing proactive measures. Based on this, it is submitted that an objective job evaluation scheme which is free from unfair discrimination should specifically be listed under regulation 7 of the Employment Equity Regulations as a ground of justification to an equal pay claim and the following guidance extracted from *National Vulcan Engineering Insurance Group Ltd* should be stated in regulation 7 in relation to an objective job evaluation scheme:[726] (i) a grading scheme (job evaluation scheme) which operates according to the experience, skill and ability of employees forms an essential part of good business management provided that it is applied in a manner that is fair and genuine regardless of an employee's sex and such scheme should not be susceptible to a successful challenge under the Equal Pay Act; and (ii) to allow a successful challenge to a genuine and fair grading scheme (job evaluation scheme) which is free from unfair discrimination will have serious deleterious consequences for the employer because any lower paid female employee engaged in the same work would be able to successfully claim equal pay with the highest

[726] See para 6.1.8 above.

paid male employee and *vice versa* with the result that all employees would have to be paid at the rate of the highest paid employee.[727]

(bb) Regulation 7(1)-(2) of the Employment Equity Regulations does not list the reliance on the comparator being placed on a higher spinal point in terms of an incremental pay scale as a ground of justification to an equal pay claim. It is submitted that this is an omission because the use of an incremental pay scale in order to determine employees' pay is common in the workplace and it not being mentioned presents legal incoherence between its common usage in the workplace and its non-mentioning under regulation 7 of the Employment Equity Regulations. Based on this, it is submitted that the reliance on the comparator being placed on a higher spinal point in terms of an incremental pay scale should specifically be listed under regulation 7 of the Employment Equity Regulations as a ground of justification to an equal pay claim and the following guidance extracted from *Bowling* should be stated in regulation 7 in relation to the reliance on the comparator being placed on a higher spinal point in terms of an incremental pay scale:[728] (i) the nature of an incremental pay scale is that if an employee commences employment on a higher spinal point as opposed to his colleagues then his pay will be higher in each year as opposed to his colleagues until they reach the top of the spinal point; and (ii) a pay differential will thus be built in and if the original reason for the pay differential was not sex tainted then it follows that the pay differential in later years will also not be sex tainted.[729]

(cc) It is submitted that the non-listing of payments prescribed by law which gives rise to different pay for the claimants and comparators in respect of the same work, substantially the same work or work of equal value in regulation 7 of the Employment Equity Regulations and its absence in South African case law is strengthened by the United Kingdom equal pay law which states that the obligation by law to pay the prescribed wage is not enough on its own to constitute a material factor defence unrelated to sex as a

---

[727] See para 6.1.8 above.
[728] See para 6.1.9 above.
[729] See para 6.1.9 above.

finding as to whether or not it can constitute a valid defence can only be decided after a factual enquiry into same.[730]

(dd) It is submitted that whilst a genuine mistake is not listed under regulation 7 of the Employment Equity Regulations as a ground of justification it should not be listed under regulation 7 but it should rather have the potential to constitute such ground of justification by falling under regulation 7(1)(g) of the Employment Equity Regulations which relates to any other relevant factor that is not unfairly discriminatory in terms of section 6(1) of the EEA. It is further submitted that the reliance on a genuine mistake as a ground of justification under regulation 7(1)(g) of the Employment Equity Regulations will be subject to regulation 7(2) which is in accordance with *Tyldesley* and which will not require further justification where it is relied on provided that it does not give rise to indirect unfair pay discrimination as set out in regulation 7(2) of the Employment Equity Regulations. It is further submitted that the suggestion that a genuine mistake should not specifically be listed under regulation 7(1) as a ground of justification to an equal pay claim is because this does not seem to be a common ground of justification and an employer faced with an equal pay claim will not see this ground of justification being foreshadowed in regulation 7 which may lend credence to the genuineness of the raising of such ground of justification.[731]

(ee) Regulation 7(1)-(2) of the Employment Equity Regulations does not list the factors for assessing whether work is the same/substantially the same or of equal value as a ground of justification to an equal pay claim. It is submitted that this is an omission in regulation 7 because it will be legally incoherent if an employer is not allowed to rely on the fact that the claimant employee's work has been given a lesser value in terms of one or more factors for assessing her work and that is the reason why she is paid less than her comparator, in circumstances where regulation 6 of the Employment Equity Regulations specifically states that an assessment of the relevant factors for assessing whether work is the same/substantially the same or of equal value should be made. It is

[730] See para 6.1.10 above.
[731] See para 6.1.11 above.

further submitted that the factors for assessing whether work is the same/substantially the same or of equal value as set out in regulation 6 of the Employment Equity Regulations should specifically be listed as a ground of justification under regulation 7 of the Employment Equity Regulations. It is submitted that the following principles extracted from *Davies v McCartneys*[732] should be mentioned under this ground of justification in regulation 7 of the Employment Equity Regulations: (i) the factors for assessing work can be used as a genuine material factor defence provided that it is genuine and the pay difference is due to such material factor which is not related to unfair discrimination; and (ii) an employer is not allowed to simply say that it values one demand factor so highly that it pays more because of it as it has to, in addition, show that it is genuine and the pay difference is due to such material factor which is not related to unfair discrimination.[733]

(ff) An employer may place greater emphasis on one factor for assessing the value of the work in question as opposed to other factors and then remunerate a comparator with the greater factor more than the equal pay claimant and this will amount to a material factor defence. It is submitted that this falls under regulation 7(1)(g) of the Employment Equity Regulations as any other relevant factor that is not unfairly discriminatory in terms of section 6(1) of the EEA and it should specifically be listed as a ground of justification under regulation 7.[734]

(gg) *Benveniste* makes it clear that an employer is allowed to rely on financial constraints as a material factor defence to an equal pay claim by an employee in circumstances where the maximum salary that it can pay the employee is below the salary that would have been offered to her if the financial constraints were absent and where the employee is aware of this. It also makes it clear that where the financial constraints ceases to exist then it no longer amounts to a ground of justification to an equal pay claim which is able to justify the lower salary paid to the claimant employee. Based on this, it submitted that whilst financial constraints is not listed under regulation 7 of the Employment Equity

732 [1989] IRLR 439 (EAT).
733 See para 6.1.12 above.
734 See para 6.1.12 above.

Regulations as a ground of justification it should not be listed under regulation 7 but it should rather have the potential to constitute such ground of justification by falling under regulation 7(1)(g) of the Employment Equity Regulations which relates to any other relevant factor that is not unfairly discriminatory in terms of section 6(1) of the EEA. It is further submitted that the reliance on financial constraints will only constitute a ground of justification to an equal pay claim for the period in which the financial constraints persist and ceases operating as such once the financial constraints come to an end. It is further submitted that the suggestion that financial constraints should not specifically be listed under regulation 7(1) as a ground of justification to an equal pay claim is because an employer faced with an equal pay claim will not see this ground of justification being foreshadowed in regulation 7 which may lend credence to the genuineness of the raising of such ground of justification.[735]

(hh) It is submitted that the non-listing of budgetary considerations, increased costs and the curtailing of public expenditure in regulation 7 of the Employment Equity Regulations and its absence in South African case law is strengthened by its rejection as a ground of justification to equal pay claims in international labour law coupled with the fact that increased costs to correct unfair pay discrimination is not clearly regarded as a ground of justification according to the United Kingdom equal pay principles set out in (i)-(ii) as follows:[736] (i) an employer cannot succeed in a genuine material factor defence by solely relying on a financial burden but it can argue the issue of financial burden together with other factors in order to successfully prove the genuine material factor defence;[737] and (ii) an employer is not allowed to automatically justify its failure to fully address pay discrimination by setting aside a certain amount of money to address it and then stating that the money is depleted.[738]

---

[735] See para 6.1.13 above.
[736] See para 6.1.14 above.
[737] See *Redcar & Cleveland Borough Council v Bainbridge & Others* [2007] IRLR 91 (EAT) discussed under para 6.1.14 above.
[738] See *Pulham & Others v London Borough of Barking & Dagenham* [2010] IRLR 184 (EAT) discussed under para 6.1.14 above.

9.7 Equal pay for non-standard (atypical) employees

9.7.1 Agency employees (temporary service employees)

The guidance sought from the United Kingdom equal pay law for the research questions relating to temporary service employees (paragraph 13.10.1 of Chapter 2) was set out as follows:

(a) Whether the United Kingdom equal pay law can provide guidance to the two arguments made relating to the interpretation to be accorded to the phrase “must be treated on the whole not less favourably” in section 198A(5) of the LRA which entails on the one hand, that the phrase can be interpreted to mean the *same terms and conditions of employment* and, on the other hand, that the phrase can be interpreted to mean that an employer is allowed to provide the deemed employee with a package on condition that it does not result in treatment that is on the whole not less favourable;

(b) Whether guidance can be gained regarding how it approaches the same work or similar work (substantially the same work); and

(c) Any further lessons that can be learnt from the United Kingdom equal pay law for the South African equal pay law relating to temporary service employees under section 198A of the LRA.

<u>The following guidance has been extracted in relation to (a) above:</u>

It is submitted that the principle that the Agency Workers Regulations requires a term by term approach and not a package-based approach even though it applies to an agency worker who works temporarily as opposed to section 198A of the LRA which applies to an agency employee who is deemed to be employed on indefinite employment can still provide the following guidance. It supports the argument put forth that the phrase “must be treated on the whole not less favourably” in section 198A(5) of the LRA can be

interpreted to mean the *same terms and conditions of employment* and supports a rejection of the other argument made that the phrase "must be treated on the whole not less favourably" in section 198A(5) of the LRA can be interpreted to mean that an employer is allowed to provide the deemed employee with a package on condition that it does not result in treatment that is on the whole not less favourable.[739]

The following guidance has been extracted in relation to (b) above:

Whilst the Agency Workers Regulations is restricted to the same work or broadly similar work as is evident from regulation 5(4)(a)(i)-(ii) of the Agency Workers Regulations and this is the same position under section 198A(5) of the LRA, it is submitted that the guidance regarding how the same work or similar work issue should be approached under section 198A(5) of the LRA can be found in paragraphs 5.4-5.5 in Chapter 2 of this thesis as read with paragraph 4.4.1 above.[740]

The following is stated with regard to (c) above:

No guidance can be extracted for the research question relating to temporary service employees as called for in paragraph 13.10.1 of Chapter 2 of this thesis as stated in (c).[741]

9.7.2 Fixed-term contract employees

The guidance sought from the United Kingdom equal pay law for the research questions relating to fixed-term contract employees as called for in paragraph 13.10.2 of Chapter 2 of this thesis is as follows:

(a) Whether the United Kingdom equal pay law can provide guidance to the uncertainty regarding whether the phrase "must not be treated less favourably" in section 198B(8)(a)

---

739 See para 7.1 above.
740 See para 7.1 above.
741 See para 7.1 above.

of the LRA must be interpreted to mean treatment that is the same or treatment that is on the whole not less favourably; and whether a fixed-term employee whose contract is deemed to be of an indefinite duration as contemplated in section 198B(5) of the LRA and a fixed-term employee whose contract is for a fixed-term which complies with section 198B must be provided with the same treatment as compared to a comparable permanent employee as contemplated in section 198B(8)(a) of the LRA;

(b) Whether guidance can be gained regarding how it approaches the same work or similar work (substantially the same work) issue; and

(c) Any further lessons that can be learnt from the United Kingdom equal pay law for the South African equal pay law relating to fixed-term contract employees under section 198B(8)(a) of the LRA.

<u>The following guidance has been extracted in relation to (a) above:</u>

(a) The Fixed-term Employees Regulations only deals with the treatment to be accorded to fixed-term employees who are employed for a fixed-term and does not deal with a fixed-term employee who is deemed to be employed on an indefinite basis and it thus does not provide a direct answer to the part of the research questions as stated in (a) dealing with the treatment to be accorded to a fixed-term employee whose contract is deemed to be of an indefinite duration as contemplated in section 198B(5) of the LRA read with section 198B(8)(a) of the LRA. This question thus remains;[742] and

(b) It is submitted that the phrase “must not be treated less favourably” in section 198B(8)(a) of the LRA should be interpreted to refer to treatment that is the same and treatment that is the same subject to the *pro rata temporis* principle. It is further submitted that treatment that is the same will apply in the case of indivisible benefits as it cannot be granted *pro rata temporis* whereas treatment that is the same subject to the *pro rata temporis* principle will apply to divisible benefits which can be granted *pro rata temporis*.

[742] See para 7.2 above.

This should, however, be mentioned and explained in the Equal Pay Code with reference to the Code in this regard being made under section 198B of the LRA.[743]

The following guidance has been extracted in relation to (b) above:

Whilst the Fixed-term Employees Regulations is restricted to the same/similar work and this is the same position under section 198B(8)(a) of the LRA, it is submitted that the guidance regarding how the same work or similar work issue should be approached under section 198B(8)(a) of the LRA as called for in (b) can be found in paragraphs 5.4-5.5 in Chapter 2 of this thesis as read with paragraph 4.4.1 above.[744]

The following guidance has been extracted in relation to (c) above:

(a) It is submitted that the following instances of when less favourable treatment can occur as set out in the Fixed-term Guide provides invaluable guidance on this score for section 198B(8)(a) of the LRA and should be mentioned and explained in the Equal Pay Code with reference to the Code in this regard being made under section 198B of the LRA:

(i) When a fixed-term employee is not provided with a benefit be it contractual or non-contractual that a comparable permanent employee receives;
(ii) The fixed-term employee is offered a benefit on less favourable terms;
(iii) If the employer fails to do something for a fixed-term employee that is done for a permanent employee;
(iv) Where the fixed-term employee is given less paid holidays than a comparable permanent employee;
(v) Where the contracts of the fixed-term employee and the comparable permanent employee are the same but the permanent employee is provided with extra benefits which are not provided to the fixed-term employee (for eg a non-contractual bonus); and

743 See para 7.2 above.
744 See para 7.2 above.

(vi) Where training is accessible to permanent employees but not to fixed-term employees.[745]

(b) An employer may justify the less favourable treatment of the fixed-term employee regarding a term/s by showing that the package given to the fixed-term employee is on the whole at least as favourable as the terms enjoyed by the comparable permanent employee;[746]

(c) The package approach allows an employer to balance a less favourable term against a more favourable one on condition that it ensures that the fixed-term employee's overall employment package is not less favourable as compared to that of the comparable permanent employee;[747] and

(d) The allowance of an employer to rely on a package approach instead of a term by term approach is suitable in cases where the employer pays the fixed-term employee more, for instance a higher hourly rate, in order to reflect the fact that the fixed-term employee does not qualify for longer term benefits. The package approach means that the employer is not prohibited from paying higher up-front rewards to the fixed-term employee in return for reduced benefits elsewhere provided that the fixed-term employee's overall package is not less favourable. The value of the benefits should be assessed having regard to their objective monetary value and not to the value which the employer or employee perceives them to have.[748]

It is submitted that the allowance of an employer to justify the less favourable treatment of the fixed-term employee regarding a term/s by relying on treatment that is on the whole not less favourable (the package approach) as compared to the terms enjoyed by the comparable permanent employee in the United Kingdom equal pay law should be used as a ground of justification to differential treatment of a fixed-term employee under section

745 See para 7.2 above.
746 See para 7.2 above.
747 See para 7.2 above.
748 See para 7.2 above.

198D of the LRA. It is submitted that the appropriateness of using this ground of justification is set out in the principles listed in (b)-(d) above. It is further submitted that the principles listed in (b)-(d) above should be mentioned in the Equal Pay Code with reference thereto being made in section 198D of the LRA which deals with justifiable reasons (grounds of justification) that can be relied on for differential treatment.[749]

(e) Less favourable treatment will be objectively justified provided that the following is shown by the employer: (i) it is to achieve a legitimate objective; (ii) it is necessary to achieve that objective; and (iii) it is an appropriate means to achieve that objective;[750]

(f) An employer has to, on a case-by-case basis, consider whether the less favourable treatment in question is objectively justified;[751]

(g) If the cost to an employer of affording a benefit to a fixed-term employee is disproportionate to the benefit that the fixed-term employee would receive then different treatment may be objectively justified;[752] and

(h) An employer is allowed to try and objectively justify the less favourable treatment by relying on the differences between the job roles of the fixed-term employee and the comparable permanent employee even where the work performed is broadly similar and such differences may be able to justify the less favourable treatment.[753]

It is submitted that the principles listed in (e)-(f) provides general guidance for section 198D of the LRA. It is further submitted that the principles listed in (g)-(h) provides specific guidance for section 198D of the LRA which should be mentioned in the Equal Pay Code with reference thereto being made in section 198D of the LRA.[754]

749 See para 7.2 above.
750 See para 7.2 above.
751 See para 7.2 above.
752 See para 7.2 above.
753 See para 7.2 above.
754 See para 7.2 above.

(i) It is submitted that the following three-step approach together with the guidance that progression from one step to the next step can only be made if the prior step has been met provides valuable guidance which should be mentioned in relation to section 198B read with section 198D of the LRA: (i) the first step looks at whether the fixed-term employee and the comparable permanent employee are engaged in the same or broadly similar work; (ii) the second step looks at whether the less favourable treatment is on the ground that the fixed-term employee claimant is a fixed-term employee; and (iii) the third step looks at whether the less favourable treatment can be justified on objective grounds. It is submitted that this should be mentioned in the Equal Pay Code with reference thereto being made in section 198B of the LRA.[755]

9.7.3 Part-time employees

The guidance sought from the United Kingdom equal pay law relating to part-time employees (paragraph 13.10.3 of Chapter 2) was:

(a) Whether the United Kingdom equal pay law can provide guidance relating to what is meant by the phrase "must treat a part-time employee on the whole not less favourably" in section 198C(3)(a) of the LRA, and related to this is, whether the United Kingdom equal pay law can provide guidance relating to how the working hours of the part-time employee should be taken into account when providing her with treatment that is on the whole not less favourable;

(b) Whether guidance can be gained regarding how it approaches the same work or similar work (substantially the same work) issue; and

(c) Any further lessons that can be learnt from the United Kingdom equal pay law for the South African equal pay law relating to part-time employees under section 198C(3)(a) of the LRA.

[755] See para 7.2 above.

The following guidance has been extracted in relation to (a) above:

A part-time worker is entitled to all forms of payment and benefits that a comparable permanent employee is entitled to but the payment should be granted to the part-time employee in accordance with the *pro rata* principle which is essentially the *pro rata temporis* principle and which requires the calculation of benefits proportionate to working time. It is submitted that the phrase "must treat a part-time employee on the whole not less favourably" in section 198C(3)(a) of the LRA read with the requirement under section 198C(3)(a) of the LRA to take the working hours of the part-time employee into account when providing her with such treatment should be interpreted to mean that a part-time employee is entitled to all forms of payment *pro rata temporis* to which a comparable permanent full-time employee is entitled to. It is further submitted that section 198C(3)(a) of the LRA should be amended to reflect this clearly and an explanation should be provided in the Equal Pay Code.[756]

The following guidance has been extracted in relation to (b) above:

Whilst the Part-time Workers Regulations is restricted to the same or similar work and this is the same position under section 198C(3)(a) of the LRA, it is submitted that the guidance regarding how the same work or similar work issue should be approached under section 198C(3)(a) of the LRA as called for in (b) can be found in paragraphs 5.4-5.5 in Chapter 2 of this thesis as read with paragraph 4.4.1 above.[757]

The following guidance has been extracted in relation to (c) above:

(a) The *pro rata* principle entitles a part-time employee to be provided with the same terms and conditions of employment *in proportion* to their working hours, where this is applicable, and to this extent the reference to treatment that is on the whole not less favourable in section 198C(3)(a) does not reflect the purpose of the section which is to

[756] See para 7.3 above.
[757] See para 7.3 above.

provide a part-time employee with the same terms and conditions of employment as a comparable permanent employee taking the part-time workers hours of work into account (*pro rata temporis*) where this is applicable. It is submitted that section 198C(3)(a) of the LRA should be amended to reflect this and reference to treatment that is on the whole not less favourable should accordingly be removed;[758]

(b) The guidance under the United Kingdom equal pay law relating to a part-time worker not being required to prove that her part-time status is the sole reason for the less favourable treatment and only being required to show that her part-time status is one of the reasons for the less favourable treatment in the sense that it is the predominant and effective cause of such treatment is a principle that is not unknown in South African discrimination law but should be stated in the Equal Pay Code with reference thereto being made in section 198C of the LRA for the sake of completeness;[759]

(c) Less favourable treatment is capable of being justified on objective grounds if the following can be shown: (i) the less favourable treatment seeks to achieve a legitimate objective such as a genuine business objective; (ii) the less favourable treatment is necessary in order to achieve that objective; and (iii) the less favourable treatment is an appropriate manner in order to achieve the objective;[760] and

(d) An employer will not be allowed to justify less favourable treatment on the sole basis that the elimination thereof will involve increased costs as the saving or avoidance of costs, on its own without more, will not amount to the achieving of a legitimate aim.[761]

It is submitted that the principle listed in (c) provides general guidance for section 198D of the LRA. It is further submitted that the principle listed in (d) provides specific guidance for section 198D of the LRA which should be mentioned in the Equal Pay Code with reference thereto being made in section 198D of the LRA.

---

[758] See para 7.3 above.
[759] See para 7.3 above.
[760] See para 7.3 above.
[761] See para 7.3 above.

(e) It is submitted that the principle relating to an employer not being able to rely on a package approach to justify less favourable treatment of a part-time worker under the Part-time Workers Regulations should not be incorporated into section 198D of the LRA for the following reasons. There might be instances where an employer may be justified in using the package approach with regard to the less favourable treatment of a part-time employee such as its use in relation to fixed-term employees as discussed under paragraph 7.2 above where for example an employer pays a fixed-term employee a higher hourly rate, in order to reflect the fact that the fixed-term employee does not qualify for longer term benefits. The inclusion of the package approach (together with its rules) as a ground of justification in relation to less favourable treatment of fixed-term employees under section 198D of the LRA has been argued for under paragraph 7.2 above and there is thus no reason why it should not be used in relation to part-time employees. It is further submitted that the allowance of an employer to justify the less favourable treatment of the fixed-term employee regarding a term/s by relying on treatment that is on the whole not less favourable (the package approach) as compared to the terms enjoyed by the comparable permanent employee in the United Kingdom equal pay law should be used as a ground of justification to differential treatment of a part-time employee under section 198D of the LRA. It is further submitted that the appropriateness of using this ground of justification as set out in the principles listed in (a)-(c) under paragraph 7.2 above applies *mutatis mutandis* in relation to part-time employees under section 198D of the LRA.[762]

(f) In determining whether the less favourable treatment of the part-time employee is solely because the appellant is a part-time worker, the intention of the employer must be examined. In examining the intention of the employer, it is legitimate to consider hypothetical scenarios with the aim of testing the true intention of the employer. It is submitted that this provides valuable guidance for the Labour Court (including the CCMA) when they deal with this issue under section 198D of the LRA and this guidance should be mentioned in the Equal Pay Code with reference thereto being made under section 198D of the LRA.[763]

[762] See para 7.3 above.
[763] See para 7.3 above.

(g) Whilst the following approach relating to what a part-time employee needs to show and what an employer needs to show under the Part-time Workers Regulations seems obvious, it is submitted that the approach provides valuable guidance which should be mentioned in relation to section 198C read with section 198D of the LRA: (i) it is for the claimant part-time worker to choose a comparable full-time worker, show less favourable treatment and satisfy the Tribunal that the less favourable treatment is on the ground that the claimant is a part-time worker; and (ii) once this has been shown, the onus shifts to the employer to show that there is an objectively justifiable reason for the less favourable treatment. It is submitted that this should be mentioned in the Equal Pay Code with reference thereto being made in section 198C of the LRA.[764]

(h) The statement by Lockton relating to the Part-time Workers Regulations providing a quick and speedy remedy available to part-time workers who suffer less favourable treatment provides guidance for equal pay relating to certain part-time employees under section 198C of the LRA and should accordingly be mentioned in the Equal Pay Code with reference thereto being made in section 198C of the LRA.[765]

9.8 Proactive measures relating to equal pay

The guidance sought from the United Kingdom equal pay law relating to proactive measures (paragraph 13.11 of Chapter 2) related to:

(a) Which proactive measures relating to equal pay are mentioned under the United Kingdom equal pay law in order to strengthen the proactive measures listed in section 27(3) of the EEA;
(b) What guidance is provided to employers under the United Kingdom equal pay law regarding the taking and implementing of proactive measures to equal pay in order to learn lessons for section 27(3) of the EEA;

[764] See para 7.3 above.
[765] See para 7.3 above.

(c) Whether an employer is allowed under the United Kingdom equal pay law to address pay differentials by reducing the pay of employees (downward equalisation); and
(d) Whether the progressive realisation of the right to equal pay is capable of featuring in a court order.

The following guidance has been extracted in relation to (a) above:

(a) It is submitted that the use of an equal pay audit as a proactive measure under the United Kingdom equal pay law strengthens the argument made in paragraph 12 read with paragraph 13.11 of Chapter 2 of this thesis to the effect that an equal terms and conditions audit taken together with an equal pay audit as provided for in the Integration of Employment Equity Code constitutes a measure which falls within section 27(3) of the EEA which may be taken by an employer to progressively reduce unfair pay discrimination or disproportionate income differentials and which should be listed as such;[766] and

(b) It is submitted that although a job evaluation study/scheme is not specifically mentioned as a proactive measure to achieving equal pay under the United Kingdom equal pay law it does amount to a proactive measure to equal pay and this is supported by it featuring under the second equal pay cause of action which is equal pay for work rated as equivalent and where it can be relied on as a material factor defence to an equal pay claim under section 69 of the Equality Act. It is further submitted that this strengthens the argument made in paragraph 12 read with paragraph 13.11 of Chapter 2 of this thesis to the effect that an objective job evaluation system as mentioned in the Integration of Employment Equity Code which is free from unfair discrimination in section 6(4) of the EEA and disproportionate income differentials constitutes a measure which falls within section 27(3) of the EEA which may be taken by an employer to progressively reduce unfair pay discrimination or disproportionate income differentials and which should be listed as such;[767]

---

[766] See para 8.1 above.
[767] See para 8 above.

The following guidance has been extracted in relation to (b) above:

(a) While the Integration of Employment Equity Code provides guidance for employers on how to go about conducting an equal terms and conditions audit and an equal pay audit as argued for in paragraph 12 read with paragraph 13.11 of Chapter 2 of this thesis, it is submitted that the more detailed guidance relating to equal pay audits under the United Kingdom equal pay law discussed above can augment the guidance already contained in the Integration of Employment Equity Code and to this end should be mentioned in relation thereto;[768]

(b) The consideration of involving an outside expert in the equal pay audit process under the Equal Pay Statutory Code of Practice provides valuable guidance for the equal pay audit process as a proactive measure under South African equal pay law as discussed under paragraph 12 of Chapter 2 of this thesis and to this end should be mentioned in relation thereto;[769] and

(c) The statement contained in the Equal Pay Statutory Code of Practice relating to a job evaluation system which has not properly been implemented or kept up to date being a common pay practice which poses a risk of potential non-compliance with an employer's equal pay obligations strengthens the argument made under paragraph 12 in Chapter 2 of this thesis to the effect that an objective job evaluation which is free from unfair discrimination in section 6(4) and disproportionate income differentials constitutes a measure which can be taken to progressively reduce unfair discrimination and disproportionate income differentials and should be listed as such under section 27(3) of the EEA.[770]

[768] See para 8.1 above.
[769] See para 8.1 above.
[770] See para 8.1 above.

The following is stated regarding (c) above:

No guidance has been extracted for the research question relating to whether an employer is allowed to address pay differentials by reducing the pay of employees (downward equalisation) as called for in paragraph 13.11 of Chapter 2 of this thesis as stated in (c).

The following guidance has been extracted in relation to (d) above:

(a) It is submitted that the Equal Pay Audit Regulations which empowers an Employment Tribunal to order an employer to carry out an equal pay audit amounts to the tribunal ordering the employer to carry out a proactive measure and this power given to the tribunal indirectly strengthens the argument made under paragraph 12 in Chapter 2 of this thesis to the effect that the Labour Court (including the CCMA) should be empowered to order the progressive realisation of the right to equal pay where the employer is able to prove that it cannot immediately correct the unfair pay discrimination;[771] and

(b) The principle listed in (c) under paragraph 6.1.14 above to the effect that if an employer seeks to rely on unaffordability as a ground of justification, then it has to adduce evidence explaining the costs involved as well as the financial context in order to place the Employment Tribunal in a position where it can make an informed decision provides the following further guidance to the Labour Court (including the CCMA) considering ordering the progressive realisation of the right to equal pay. It is submitted that the principle should be adapted to read that if an employer seeks an indulgence to correct the unfair pay discrimination in question then it has to adduce evidence explaining the costs involved as well as the financial context in order to place the Labour Court (including the CCMA) in a position where it can make an informed decision as to how much time to afford the employer.[772]

---

[771] See para 8.2 above.
[772] See para 8.2 above.

<u>The following further guidance can be extracted:</u>

The Equal Pay Audit Regulations which require an Employment Tribunal to order an employer to carry out an equal pay audit where it finds that an equal pay breach has been committed unless there are circumstances which do not warrant an equal pay audit to be ordered amounts to the Employment Tribunal being empowered to order an employer to embark on a proactive measure in order to ensure equal pay. This provides valuable guidance to the South African proactive equal pay measures featuring in a court order because this is not known in South African equal pay law. It is submitted that the Labour Court being empowered to order an employer to embark on a proactive measure in order to ensure equal pay in its organisation where it finds that an equal pay claimant has proved a case of unfair pay discrimination against such employer makes equal pay law effective as it forces an employer to correct other potential instances of unfair pay discrimination. It is submitted that this type of court order will only be able to be made where the Labour Court finds that pay discrimination has been committed with the attendant relief being ordered in favour of the equal pay claimant and is thus an additional order which can be made and should not be made as a single order. It is further submitted that the power to make such an order should specifically be stated in section 48 of the EEA which sets out the powers of a commissioner in arbitration proceedings, where the CCMA has the power to entertain an unfair pay discrimination claim in terms of section 6(4) of the EEA, and in section 50(2) of the EEA which sets out the powers of the Labour Court with reference to this being mentioned in section 27 of the EEA with the condition as stated that it cannot be a single order but can only be a second order accompanying an order of unfair pay discrimination in favour of an equal pay claimant. It is lastly submitted that the court (including the CCMA) should decide which proactive measure should be ordered and should hear evidence and argument to this end. The court (including the CCMA) should furthermore play a supervisory role as to whether its order regarding the carrying out of the proactive measure has been complied with and where it

has not then it should be given the additional power in terms of sections 48 and 50(2) of the EEA respectively, to order penalties against the employer.[773]

[773] See para 8.2 above.

CHAPTER 5 – CONCLUSIONS AND RECOMMENDATIONS

1. INTRODUCTION

The purpose of this Chapter is to summarise the conclusions and recommendations reached in Chapters 1-4 of this thesis. As the conclusions and recommendations reached relate to the answering of the research questions as stated in Chapter 1 of this thesis (as well as the related questions which arose in Chapter 2 of this thesis) it is thus important to set out the research questions followed by the conclusions and recommendations.

2. THE CAUSES OF ACTION

2.1 Terms and Conditions of Employment

The issue raised here concerns what can fall within the ambit of "terms and conditions of employment" in section 6(4) of the EEA as there is no definition provided therefor in the EEA, the Employment Equity Regulations or the Equal Pay Code. The importance attached to this issue is that it is imperative to know what can fall within the ambit of terms and conditions of employment as one of the elements an equal pay claimant has to prove is that there is "a difference in the terms and conditions of employment."[1]

2.1.1 South African law

It is argued based on South African law that the following list of terms and conditions of employment contained in the Integration of Employment Equity Code falls within the ambit of "terms and conditions of employment" under section 6(4) of the EEA:

(i) working time and rest periods;
(ii) annual leave;

[1] See para 2 of Chapter 1 and para 13.1 of Chapter 2 of this thesis.

(iii) sick leave;
(iv) maternity leave;
(v) family responsibility leave;
(vi) any other types of leave;
(vii) rates of pay;
(viii) overtime rates;
(ix) allowances;
(x) retirement schemes;
(xi) medical aid; and
(xii) other benefits.[2]

It is recommended that the list of terms and conditions of employment set out in (i)-(xii) above should specifically be set out in the Equal Pay Code in order to promote legal certainty regarding what can fall within the ambit of terms and conditions of employment under section 6(4) of the EEA.[3]

2.1.2 International labour law

It is argued based on international labour law that the following payments in the lists of payments in the BCEA Schedule falls under the phrase “terms and conditions of employment” in section 6(4) of the EEA:

(i) a housing or accommodation allowance including housing or accommodation provided as a benefit in kind;
(ii) a car or travel allowance including a car being provided;
(iii) employer’s contributions to medical aid, pension, provident fund or similar schemes;
(iv) employer’s contributions to death benefit schemes (which may include funeral benefits);
(v) gratuities (for example, tips received from customers);

[2] These terms and conditions of employment are listed in the Integration of Employment Equity Code - See paras 5.1 and 13.1 of Chapter 2 of this thesis.
[3] See paras 5.1 and 13.1 of Chapter 2 of this thesis.

(vi) share incentive schemes;
(vii) discretionary payments not related to an employee's hours of work or performance (for example, a discretionary profit-sharing scheme); and
(viii) a relocation allowance.[4]

It is argued that the following list of payments in the BCEA Schedule whilst not mentioned under international labour law are still capable of falling within the ambit of "terms and conditions of employment" under section 6(4) of the EEA provided that they arise out of or are connected to the employment relationship which is the test used in international labour law to determine whether or not a payment (working conditions) falls within the ambit of pay (or working conditions) for the purpose of equal pay (terms and conditions):

(i) any cash payments made to an employee;
(ii) any other payment in kind received by an employee;
(iii) any cash payment/payment in kind provided in order to enable the employee to work;
(iv) an equipment (tool) allowance;
(v) an entertainment allowance; and
(vi) an education allowance.[5]

It is argued that whilst the elements of remuneration in the form of the basic wage, minimum wage, ordinary wage, overtime pay, sick leave pay and maternity leave pay as contained under international labour law are not found in the lists of payments in the BCEA Schedule, these forms of remuneration are found in the Integration of Employment Equity Code as rates of pay, overtime rates, sick leave (which is normally paid leave) and maternity leave (which normally attracts maternity leave pay) and thus strengthens the submission made in Chapter 2 of this thesis that these forms of remuneration fall within the ambit of the phrase "terms and conditions of employment" under section 6(4) of the EEA.[6]

---

4 See para 9.1 of Chapter 3 of this thesis.
5 See para 9.1 of Chapter 3 of this thesis.
6 See para 9.1 of Chapter 3 of this thesis.

It is recommended that the test used in international labour law to determine whether a payment falls within the definition of remuneration, which test is, whether the payment arises out of or is connected with the worker's employment should be used to determine whether terms and conditions (including pay) fall within the phrase "terms and conditions of employment" under section 6(4) of the EEA where there is a dispute regarding this.[7] It is further recommended that this should be mentioned in the Equal Pay Code.

It is argued that the following list of payments under international labour law serves as an example of what has been found to fall within the ambit of pay (and working conditions) which can assist with determining whether such payments can fall within the ambit of "terms and conditions of employment" in section 6(4) of the EEA and it is recommended that it should be listed in the Equal Pay Code as such:

(i) a monthly salary supplement;
(ii) inconvenient-hours supplement;
(iii) annual bonus (Christmas bonus);
(iv) redundancy payment;
(v) additional redundancy payment;
(vi) termination payments (such as a bridging allowance and severance grant);
(vii) loss of earnings, overtime pay and paid leave all received as a result of an employee attending a training course relating to his/her employment;
(viii) entitlement to a pay increase for an employee who is on maternity leave;
(ix) a travel concession granted to spouses/partners and a special travel facility granted for spouses and dependent children;
(x) a subsidised nursery scheme; and
(xi) breastfeeding leave.[8]

It is argued that the requirement under international labour law to the effect that equal pay must be applied to each of the elements of remuneration and not on the basis of a

7 See para 9.1 of Chapter 3 of this thesis.
8 See para 9.1 of Chapter 3 of this thesis.

comprehensive assessment of pay should be applied to equal pay (terms and conditions) claims under section 6(4) of the EEA, and to this end, should be mentioned in the Equal Pay Code.[9]

2.1.3 United Kingdom equal pay law

It is argued based on the United Kingdom equal pay law that the following payments in the lists of payments in the BCEA Schedule fall under the phrase “terms and conditions of employment” in section 6(4) of the EEA:

(i) wages/salaries;
(ii) occupational pension benefits; and
(iii) use of a car.[10]

Whilst terms of work in the form of overtime pay, holiday pay, sick pay and leave entitlement (pay) as set out in the Equal Pay Statutory Code of Practice are not found in the lists of payments in the BCEA Schedule, these terms of work are found in the Integration of Employment Equity Code as overtime rates, annual leave (including holiday pay and leave entitlement) and sick leave and thus strengthens the submission made in Chapter 2 of this thesis that these forms of terms and conditions of employment fall within the ambit of the phrase “terms and conditions of employment” under section 6(4) of the EEA.[11]

It is argued that the following list of payments (working conditions) under the United Kingdom equal pay law serves as an example of what has been found to fall within the ambit of terms of work for the purposes of an equal pay (terms and conditions) claim which can assist with determining whether such payments can fall within the ambit of “terms and conditions of employment” under section 6(4) of the EEA and it is recommended that it should be listed in the Equal Pay Code as such:

---

9 See para 9.1 of Chapter 3 of this thesis.
10 See para 9.1 of Chapter 4 of this thesis.
11 See para 9.1 of Chapter 4 of this thesis.

(i) shift payments;
(ii) non-discretionary bonuses;
(iii) access to social benefits and sports; and
(iv) automatic increases in pay such as a seniority increment.[12]

It is argued that the requirement under the United Kingdom equal pay law to the effect that a term by term comparison is required in an equal pay claim because the focus of equal pay law is on the equality of terms and not on the total pay actually received coupled with the prohibition that it is incorrect to lump different terms together and consider them as one term for the purpose of comparison should be used under section 6(4) of the EEA and will have the result that every aspect of remuneration will constitute a term and condition of employment under section 6(4) of the EEA. It is recommended that this should be mentioned in the Equal Pay Code.[13]

It is argued that the restriction under the United Kingdom equal pay law to the effect that an employer is not allowed to lump different terms together (for the purpose of preventing a term by term comparison) and the restriction that a claimant is not allowed to subdivide a single term into more parts for the purpose of complaining about one part provides the following guidance for an equal pay claim under section 6(4) of the EEA:

(a) An employer faced with an equal pay claim in terms of section 6(4) of the EEA should not be allowed to defeat such claim from the outset by arguing that the term to which the complaint relates should be lumped with other terms in circumstances where the term is capable of being compared without being so lumped which would then essentially prevent a term by term comparison from being carried out; and

(b) An equal pay claimant under section 6(4) of the EEA should, likewise, not be allowed to subdivide a single term into several parts and then launch a complaint against the one part because this will amount to comparing an element of a term and what is required to

[12] See para 9.1 of Chapter 4 of this thesis.
[13] See para 9.1 of Chapter 4 of this thesis.

be compared is a term and not an element thereof. It is recommended that the guidance set out in (a)-(b) should be mentioned in the Equal Pay Code.[14]

It is argued that the following guidance from the United Kingdom equal pay law will provide the South African Labour Courts (including the CCMA) with the necessary guidance in order to determine whether or not an employer faced with an equal pay claim is (incorrectly) lumping the term to which the equal pay complaint relates with other terms in order to defeat such equal pay claim from the outset and whether or not an equal pay claimant is complaining about an element of a term and not the term itself which is not allowed (as stated in the immediate preceding paragraph):

- the terms that fall to be compared must be such that it is natural to compare them;
- what should be compared is a common sense question;
- the terms should be realistically classified;
- there might be instances where it would be prudent to ask whether a term is itself a term or whether it is an element of a term of the contract; and
- it is impermissible to subdivide one term into several parts for the purpose of complaining about one part.[15]

These matters require evaluation by the Court.[16] It is recommended that this should be mentioned in the Equal Pay Code.

2.2 Same Employer

There is no definition in the EEA or the Employment Equity Regulations and the Equal Pay Code of what or who would constitute “the same employer”. This phrase raises a number of questions. Does it mean the same company owned by the same employer at the same location? Does it cover the same company owned by the same employer at a

[14] See para 9.1 of Chapter 4 of this thesis.
[15] See para 9.1 of Chapter 4 of this thesis.
[16] See para 9.1 of Chapter 4 of this thesis.

different location? With regard to the State, is the State the same employer or is the State different employers depending on for example the different Departments and the different geographical locations? It is important to know what would fall within the meaning of "the same employer" as this too is one of the elements of the three causes of action that has to be proved by a claimant. The questions posed in essence deal with who is the "same employer" in the private sector as well as the public sector.[17]

2.2.1 South African law

South African law can contribute towards answering the questions in the following manner:

An employer in the private sector who owns different branches of the same company will be regarded as the "same employer" of all the employees employed in the various branches including those based at its head office; and

The State is the employer of everyone in the public service (sector). This means the following: (i) employees employed in different Departments in the same province are employed by the "same employer" which is the State; (ii) employees employed in the same Department but in different provinces are employed by the "same employer" which is the State; and (iii) employees employed in different Departments in different provinces are employed by the "same employer" which is the State.[18]

It is recommended that this should be mentioned in the Equal Pay Code.

2.2.2 International labour law

The single source rule developed by the European Court of Justice is a useful test to determine whether the employer against whom an equal pay claim is launched falls within

---

[17] See para 2 of Chapter 1 of this thesis.
[18] See paras 5.2 and 13.2 of Chapter 2 of this thesis.

the ambit of the phrase "the same employer" under section 6(4) of the EEA for the following reasons. Firstly, the test does not allow another employer who is not connected to the claimant employee's employer to fall within the ambit of the phrase "the same employer" as it looks for the body who/which is responsible for the pay difference. Secondly, the test has the ability to deal with difficulties which may arise as to who the employer is for the purpose of "the same employer" under section 6(4) of the EEA by only looking for the body who/which is responsible for the pay difference in question.[19]

Based on this, it is recommended that the single source rule test should be used in order to determine whether an employer falls within the ambit of the phrase "the same employer" under section 6(4) of the EEA and this should be mentioned in the Equal Pay Code.[20]

2.2.3 United Kingdom equal pay law

No guidance could be extracted from the United Kingdom equal pay law for the research questions relating to the phrase "the same employer" in section 6(4) of the EEA as stated under paragraph 2.2 above.[21]

2.3 The Comparator (employees of the same employer)

In the EEA, the Employment Equity Regulations and the Equal Pay Code there are no parameters provided for choosing a suitable comparator as required under section 6(4) of the EEA and as a result thereof the following questions were raised: Whether the comparator must be employed at the same time as the claimant (must their employment be contemporaneous)? Put differently, is it possible for a claimant to compare herself/himself with a comparator who is a successor or predecessor? Is it possible for a claimant to compare himself/herself with a hypothetical comparator? Is it possible for a claimant to choose a comparator who is a job applicant and who was offered a higher

[19] See paras 4.2 and 9.2 of Chapter 3 of this thesis.
[20] See paras 4.2 and 9.2 of Chapter 3 of this thesis.
[21] See paras 4.2.1.1, 4.2.1.2, 4.2.2 and 9.2 of Chapter 4 of this thesis.

salary than that offered to her but who refused employment? Is it possible for a claimant to choose a comparator who is her subordinate (engaged in work of lesser value) but who is paid more than the claimant?[22]

2.3.1 South African law

It is argued that South African law allows for the use of a hypothetical comparator in the following three scenarios:

(i) Where an equal pay claimant bases her claim on a job evaluation system then it is possible for her to launch an equal pay claim and compare herself with the system based hypothetical comparator;

(ii) An equal pay claimant will not need to choose a comparator where she is able to prove that her employer has a racist employment practice in place regarding the computation of salary and her salary has been computed in line with the racist practice resulting in unfair pay discrimination relating to race. A hypothetical comparator can arise here where the claimant in proving the existence of a racist employment practice shows that had she been white then she would have received the salary that she asked for and as such compares her position to that of a white hypothetical comparator. It should be noted that this is not restricted to unfair pay discrimination based on race and can include other prohibited grounds of discrimination both listed and arbitrary and the claimant does not need to show that the hypothetical comparator would have been employed on the same work, substantially the same work or work of equal value; and

(iii) An equal pay claimant can base her equal pay claim on the ground that if a male employee was hired to perform her work then he would have been employed on better terms and conditions of employment/higher pay. The equal pay claimant makes use of a hypothetical comparator in this scenario. An example of this is where a job applicant is

[22] See para 2 of Chapter 1 and para 13.3 of Chapter 2 of this thesis.

offered a higher salary than that enjoyed by the claimant and the job applicant does not subsequently become an employee of the same employer. It should be noted that this is not restricted to unfair pay discrimination based on sex and can include other prohibited grounds of discrimination both listed and arbitrary. It should, however, be noted that this scenario does not apply to equal pay for work of equal value but is restricted to equal pay for the same work and substantially the same work.[23]

An equal pay claimant can compare herself with an employee who is a subordinate to her and who is engaged in work of a lesser value but who earns higher pay than her. Such comparator is a suitable comparator in the circumstances.[24]

It is recommended that the guidance above should be mentioned in the Equal Pay Code.

No guidance could be extracted from South African law in order to answer the questions relating to the possibility of a claimant comparing herself/himself with a comparator who is a successor or predecessor as stated in paragraph 2.3 above.[25]

2.3.2 International labour law

International labour law does not deal with the issue of whether a successor comparator can be an appropriate comparator in an equal pay claim and this question could not be answered based on international labour law.[26]

It is argued that the phrase “employees of the same employer” under section 6(4) of the EEA should be interpreted to include the use of a predecessor comparator as such interpretation will be in accordance with international labour law. The inclusion of a predecessor comparator under section 6(4) of the EEA will also provide an equal pay claimant who can only prove unfair pay discrimination (including terms and conditions) by

---

[23] See paras 5.3 and 13.3 of Chapter 2 of this thesis.
[24] See paras 5.3 and 13.3 of Chapter 2 of this thesis.
[25] See paras 5.3 and 13.3 of Chapter 2 of this thesis.
[26] See paras 4.3.1 and 9.3 of Chapter 3 of this thesis.

comparing her situation to that of a predecessor employee with the opportunity to do so where she would otherwise be unable to launch an equal pay claim in such circumstances.[27] It is recommended that this should be mentioned in the Equal Pay Code.

It is argued that the recognition of the use of a hypothetical comparator under international labour law supports and strengthens the arguments put forth relating to the use of a hypothetical comparator under section 6(4) of the EEA in different scenarios based on South African law.[28]

It is argued that the recognition under international labour law of the use of a comparator who is engaged in work of lesser value than the claimant but who receives higher pay supports and strengthens the argument put forth relating to the use of a subordinate employee, who is engaged in work of lesser value than the equal pay claimant but who earns higher pay, as a comparator under section 6(4) of the EEA based on South African law.[29]

The issue of dispensing with the need for a comparator in an equal pay claim in certain circumstances has not been dealt with in South African equal pay law. An equal pay claimant is allowed under international labour law to prove her equal pay claim, in the total absence of a comparator, by relying on legislative provisions or collective agreements where the unfair discrimination can be identified on the basis of a purely legal analysis arising from such legislative provisions or collective agreements. Based on this, it is argued that the phrase "employees of the same employer" under section 6(4) of the EEA should be interpreted to include the allowance of an equal pay claimant to prove her equal pay claim by solely relying on legislative provisions, collective agreements including any other sources, in the total absence of a comparator, where the unfair pay discrimination can be identified on the basis of a purely legal analysis of such legislative

[27] See paras 4.3.1 and 9.3 of Chapter 3 of this thesis.
[28] See paras 4.3.2 and 9.3 of Chapter 3 of this thesis.
[29] See paras 4.3.3 and 9.3 of Chapter 3 of this thesis.

provisions, collective agreements or other sources.[30] It is recommended that this should be mentioned in the Equal Pay Code.

2.3.3 United Kingdom equal pay law

It is argued that the phrase "employees of the same employer" under section 6(4) of the EEA should be interpreted to include the use of a predecessor comparator as such interpretation would be in accordance with the United Kingdom equal pay law. The inclusion of a predecessor comparator under section 6(4) of the EEA will also provide an equal pay claimant who can only prove unfair pay discrimination (including terms and conditions) by comparing her situation to that of a predecessor employee with the opportunity to do so where she would otherwise be unable to launch an equal pay claim in such circumstances.[31] It is recommended that this should be mentioned in the Equal Pay Code.

It is argued that the phrase "employees of the same employer" under section 6(4) of the EEA should be interpreted to include the use of a successor comparator where a female claimant produces pay discrimination evidence in the form of comparing her pay situation to that of a (male) successor comparator (including any other listed or unlisted ground of discrimination) as such interpretation will be in accordance with the argument made in the IDS Employment Law Guide to the effect that the use of a successor comparator is allowed under section 71 of the Equality Act. It should be stated that an equal pay claimant who has left the employer's employ will not be able to launch an equal pay claim using a successor comparator under section 6(4) of the EEA because she is no longer an employee of the relevant employer. It is thus argued that the use of a successor comparator in an equal pay claim under section 6(4) of the EEA is confined to where the claimant employee is still in the employ of the relevant employer. This is an important qualification.[32] It is recommended that this should be mentioned in the Equal Pay Code.

---

[30] See paras 4.3.4 and 9.3 of Chapter 3 of this thesis.
[31] See paras 4.3.1.1 and 9.3 of Chapter 4 of this thesis.
[32] See para 4.3.1.2 read with para 4.3.2 and para 9.3 of Chapter 4 of this thesis.

The recognition of the use of a hypothetical comparator under section 71 of the Equality Act supports and strengthens the arguments put forth relating to the use of a hypothetical comparator under section 6(4) of the EEA in different scenarios based on South African law.[33]

It is argued that the use of a subordinate comparator under the United Kingdom equal pay law strengthens the argument put forth relating to the use of a subordinate employee, who is engaged in work of lesser value than the equal pay claimant but who earns higher pay, as a comparator under section 6(4) of the EEA based on South African law.[34]

Under the United Kingdom equal pay law, a claimant employee has the prerogative to choose her own comparator and an Employment Tribunal cannot interfere with such choice by for example substituting such comparator, but an irresponsible exercise of such prerogative by the claimant employee can be met with an adverse costs order and/or provide the employer with a defence to the equal pay claim. Unlike the United Kingdom equal pay law, the South African equal pay legal framework does not specifically state that a claimant is free to choose her own comparator and neither does it state that the Labour Courts (including the CCMA) cannot substitute a claimant's choice in comparator for its own. Based on this, it is recommended that it should specifically be stated in the Equal Pay Code that an equal pay claimant under section 6(4) of the EEA has the prerogative to choose her own comparator and the Labour Courts (including the CCMA) are not allowed to substitute the claimant's choice of comparator for its own. It is further recommended that it should also be mentioned in the Equal Pay Code that an irresponsible exercise of such prerogative by the claimant employee under section 6(4) of the EEA can be met with an adverse costs order and/or provide the employer with a defence to the equal pay claim.[35]

33 See paras 4.3.2 and 9.3 of Chapter 4 of this thesis.
34 See paras 4.3.3 and 9.3 of Chapter 4 of this thesis.
35 See paras 4.3.4 and 9.3 of Chapter 4 of this thesis.

Under the United Kingdom equal pay law, there is no requirement that the chosen comparator must be representative of a group and cannot be anomalous and there is thus nothing to restrict an equal pay claimant from choosing an anomalous comparator (the so-called odd man out) but the fact that the claimant chooses such comparator may present an employer with a defence to an equal pay claim. Unlike the United Kingdom equal pay law, the South African equal pay legal framework does not mention whether an equal pay claimant is restricted from choosing an anomalous comparator and that the comparator chosen must be representative of a group. Based on this, it is recommended that it should specifically be stated in the Equal Pay Code that an equal pay claimant under section 6(4) of the EEA is not restricted from choosing an anomalous comparator but where she does so then it may present an employer with a defence to the equal pay claim.[36]

Under the United Kingdom equal pay law, a tribunal should be watchful to prevent claimants abusing equal pay for equal value claims by casting their net too wide and choosing too many comparators. Based on this, it is recommended that it should specifically be mentioned in the Equal Pay Code that the Labour Courts (including the CCMA) should be vigilant to prevent equal pay claimants from abusing equal pay claims by choosing too many comparators and one way of doing this is by using pre-trial (arbitration) procedures to root out hopeless comparisons.[37]

2.4 Same work and substantially the same work

The issue raised here is that there is no definition given in the EEA, the Employment Equity Regulations or the Equal Pay Code as to what would constitute "work that is interchangeable" under regulation 4(1) of the Employment Equity Regulations which provides a definition of the same work for the purpose of the first cause of action, equal terms and conditions (pay) for the same work and what would constitute "work that is sufficiently similar" under regulation 4(2) of the Employment Equity Regulations which

[36] See paras 4.3.4 and 9.3 of Chapter 4 of this thesis.
[37] See paras 4.3.4 and 9.3 of Chapter 4 of this thesis.

provides a definition of work that is substantially the same for the purpose of the second cause of action, equal terms and conditions (pay) for substantially the same work. It is important to know what would fall within the meaning of "work that is interchangeable" and "work that is sufficiently similar" as these are elements that will have to be proved by a claimant in respect of the two causes of action.[38]

2.4.1 South African law

It is argued that the word *interchangeable* referred to under regulation 4(1) of the Employment Equity Regulations relating to equal terms and conditions (pay) for the same work should be accorded its dictionary meaning which is *able to be exchanged with each other without making any difference or without being noticed*.[39]

It is further argued that the words *sufficiently similar* referred to under regulation 4(2) of the Employment Equity Regulations relating to equal terms and conditions (pay) for substantially the same work should be accorded its dictionary meaning which is *enough for a particular purpose* and *looking or being almost the same, although not exactly*.[40]

It is recommended that this guidance should be mentioned in the Equal Pay Code.

2.4.2 International labour law

Guidance from international labour law on the "same work and substantially the same work" for these terms under section 6(4) of the EEA should be included in the Equal Pay Code as follows:

(a) The classification of employees being in the same job category is not sufficient on its own to find that they perform the same work and has to be corroborated by factors which

---

[38] See para 2 of Chapter 1 of this thesis, paras 5.4, 5.5, 13.4 and 13.5 of Chapter 2 of this thesis.
[39] See paras 5.4 and 13.4 of Chapter 2 of this thesis.
[40] See paras 5.5 and 13.5 of Chapter 2 of this thesis.

are based on the activities which are actually performed by the employees in question; and

(b) A ground of justification may also be a criteria to determine whether the same work is being performed.[41]

2.4.3 United Kingdom equal pay law

It is argued that the following guidance can be extracted from the United Kingdom equal pay law in order to learn lessons for the same work and substantially the same work under section 6(4) of the EEA:

(a) Work does not have to be identical in every respect in order for it to constitute like work because if it did then it would be easy for an employer to avoid its equal pay liability by simply pointing to a minor unimportant difference;[42]

(b) Determining whether work amounts to like work involves a two-stage process. The first stage, looks at whether the claimant and the comparator are employed to perform work that is the same or broadly similar. This necessitates a general consideration of the work together with the skills and knowledge required to perform it (the claimant would need to prove that the work performed is the same or broadly similar). The second stage, provided that the work performed by the claimant and the comparator is shown to be the same or broadly similar and where there are differences between the work, looks at whether those differences are of practical importance having regard to: (a) "the frequency with which any differences occur in practice", and (b) "the nature and extent of those differences;"[43] and

---

41 See paras 4.4.1 and 9.4 of Chapter 3 of this thesis.
42 See para 4.4.1 of Chapter 4 of this thesis.
43 See para 4.4.1 of Chapter 4 of this thesis.

(c) In determining whether the work in question is the same or broadly similar and whether any differences are of practical importance the following is important for an Employment Tribunal: (i) a tribunal must not allow itself to get engaged in "fiddling detail or pernickity examination of differences which set against the broad picture fade into insignificance"; (ii) a tribunal should take a broad commonsense judgment (a wide view) which is not too pedantic and it should not engage in a minute examination or find itself being constrained to make a finding that the work is not like work due to differences which are insignificant; (iii) the test to determine like work is a rough test even though it is applied in a common-sense and unpedantic manner; (iv) a job title and job specification may mean nothing or little to determine the same/similar work and common sense should apply; and (v) the issue regarding whether the work being performed is like work is essentially a question of fact.[44]

It is argued that the principles listed in (a)-(c) above provides valuable guidance for the Labour Court (including the CCMA) adjudicating equal pay for same same/substantially the same work claims under section 6(4) of the EEA regarding the approach that should be taken to determine whether or not work is the same or substantially the same work. To this end, it is recommended that these principles should be listed under regulation 4 of the Employment Equity Regulations.[45]

(d) The legal burden of proving that the claimant is employed on like work with a comparator rests on the claimant. If the claimant is able to do this, then an evidential burden of showing that there are differences in the work actually performed by the claimant and comparator and that these differences are of practical importance rests upon the employer. It is submitted that this provides guidance relating to who should prove what and it is submitted that the shift in evidential burden to the employer to show that the differences in the work are of practical importance will make the equal pay for the same/substantially the same work claim under section 6(4) of the EEA effective, and to

[44] See para 4.4.1 of Chapter 4 of this thesis.
[45] See para 4.4.1 of Chapter 4 of this thesis.

this end, it is recommended that it should be listed under regulation 4 of the Employment Equity Regulations;[46]

(e) The following are examples of differences that can be of practical importance: (i) level of responsibility; (ii) skills; (iii) the time when the work is performed; (iv) qualifications; (v) training; (vi) physical effort; (vii) additional duties; and (viii) a difference in the workload of the claimant and the comparator where it evidences a difference in responsibility (or some other difference that is of practical importance);[47]

(f) Whether a difference in responsibility can amount to a difference of practical importance which can prevent the work in question from being like work is a matter for the Industrial Tribunal to decide. The amount of money handled where it is a larger amount (by the comparator) than the amount of money handled in another case (by the claimant) could very well give rise to a different and higher degree of responsibility;[48]

(g) While it is important to ascertain what work is done by the claimant and what work is done by the comparator, the circumstances under which the work is performed should not be ignored. The factor of responsibility might be decisive if it is able to place the comparator in a different grade from the claimant. An example of this is where there is a senior bookkeeper and a junior bookkeeper who work together and whose work is almost identical, but the factor of responsibility may be important in such case;[49]

(h) The Equal Pay Act did not allow for a situation where a trainee who is performing the same work as his supervisor and under her training is entitled to be paid at the same rate as his supervisor. A probationer can thus not be employed on like work with his supervisor;[50]

---

46 See para 4.4.1 of Chapter 4 of this thesis.
47 See para 4.4.1 of Chapter 4 of this thesis.
48 See para 4.4.1 of Chapter 4 of this thesis.
49 See para 4.4.1 of Chapter 4 of this thesis.
50 See para 4.4.1 of Chapter 4 of this thesis.

(i) Performing like work only when deputising for a comparator does not result in the claimant performing like work to that of the comparator;[51] and

(j) A claimant and comparator are not engaged in the same or broadly similar work where the claimant is engaged in routine work which is lesser work than the strategic and managerial role which is undertaken by the comparator.[52]

It is submitted that the list of examples of differences that can be of practical importance as set out in (e) above and those instances referred to in (f)-(j) above provide valuable guidance for the same/substantially the same work cause of action under section 6(4) of the EEA and it is recommended that it should be mentioned under regulation 4 of the Employment Equity Regulations.

(k) The time at which work is done should be ignored if this constitutes the only difference between the work performed by the claimant and that of the comparator but it should not be ignored where working at night attracts additional responsibilities to the extent that it is unreasonable to say that the claimant working during the day and the comparator working at night are performing like work even though they are performing similar physical acts but the reality is that the nature of the work performed at night is different. There is thus a difference between the work performed between the claimant and comparator which is of practical importance.[53] It is submitted that this provides valuable guidance to the Labour Court (including the CCMA) on how to go about determining this aspect for the same/substantially the same work under section 6(4) of the EEA. It is recommended that this should be mentioned under regulation 4 of the Employment Equity Regulations;[54]

(l) A contractual duty on the comparator to perform additional duties which is not actually performed by the comparator, or where it is performed by the comparator but not to a significant extent, will not affect a like work comparison because the focus of a like work

[51] See para 4.4.1 of Chapter 4 of this thesis.
[52] See para 4.4.1 of Chapter 4 of this thesis.
[53] See para 4.4.1 of Chapter 4 of this thesis.
[54] See para 4.4.1 of Chapter 4 of this thesis.

comparison is on the work that is performed in practice. This does not mean that it is irrelevant to look at the contractual terms because this is the starting point with the primary focus being on what is done in practice. It is submitted that this provides valuable guidance to the Labour Court (including the CCMA) on how to go about dealing with whether contractual duties are performed or not and its impact on determining whether or not the claimant and comparator are engaged in the same/substantially the same work. It is recommended that this should be mentioned under regulation 4 of the Employment Equity Regulations;[55]

(m) A difference in pay does not constitute a factor which can properly be taken into account in deciding whether or not the claimant and the comparator are engaged in like work;[56] and

(n) Where the work in question is found to be of a broadly similar nature then there will inevitably be differences between the work performed by the claimant and that of the comparator.[57]

It is submitted that the principles in (m)-(n) above provide important guidance for equal pay for the same/substantially the same work causes of action under section 6(4) of the EEA and it is recommended that it should accordingly be mentioned under regulation 4 of the Employment Equity Regulations.[58]

(o) Unlike the United Kingdom equal pay law, the South African equal pay law does not explicitly state that there is no equal pay cause of action in terms of which a claimant is allowed to claim proportionate pay which goes beyond equal pay, in other words, a claimant can never claim higher pay than her chosen comparator proportionate to the superiority of her work as compared to that of the comparator. It is recommended that this

55 See para 4.4.1 of Chapter 4 of this thesis.
56 See para 4.4.1 of Chapter 4 of this thesis.
57 See para 4.4.1 of Chapter 4 of this thesis.
58 See para 4.4.1 of Chapter 4 of this thesis.

should specifically be stated in the Equal Pay Code in order to make it clear that such complaint is not justiciable under section 6(4) of the EEA.[59]

3. DOES SECTION 6(4) ONLY APPLY TO LISTED GROUNDS?

Section 6(4) of the EEA requires that the difference must be based on one or more of the "grounds listed" in section 6(1) of the EEA. This raises the question as to whether an equal pay claim in terms of section 6(4) can be based on an arbitrary (unlisted) ground of discrimination or not.[60]

3.1 South African law

It is argued based on *Pioneer Foods* that the interpretation to be accorded to the phrase in section 6(4) of the EEA which states "… based on any one or more of the grounds listed in subsection (1), is unfair discrimination" should be interpreted to also include arbitrary grounds of discrimination and is not limited to the listed grounds. This argument made is the final conclusion on the issue and no reference to international labour law and United Kingdom law was made as the question could definitively be answered from the domestic law itself without more.[61]

4. ONUS

4.1 Research question concerning section 11(1)(a)-(b) of the EEA relating to proving unfair discrimination on a listed ground

The issues raised concerning section 11(1)(a)-(b) of the EEA are as follows: (a) Section 11(1)(a) of the EEA states that upon an *allegation* of unfair discrimination on a listed ground, the employer must prove on a balance of probabilities that the discrimination did

[59] See para 4.4 of Chapter 4 of this thesis.
[60] See para 2 of Chapter 1 of this thesis.
[61] See para 13.6 of Chapter 2 of this thesis.

not take place or is rational and not unfair, or is otherwise justifiable. The question which arises is whether a *mere allegation* of unfair discrimination is sufficient to shift the onus to the employer; (b) Section 11(1)(b) of the EEA refers to a justification that can be proffered by the employer which is "rational and not unfair, or is otherwise justifiable." The questions which arise is whether the phrase adds to the grounds of justification in section 6(2) of the EEA? Whether rational and not unfair means something different from the grounds of justification in section 6(2) of the EEA and whether the phrase "or is otherwise justifiable" creates an open-ended ground of justification?[62]

4.2 Research question concerning section 11(2) of the EEA relating to proving unfair discrimination on an arbitrary ground

The questions raised concerning section 11(2) of the EEA are as follows: (a) Is the adding of the phrase "arbitrary ground" in section 6(1) as read with section 11(2) of the EEA a third ground on which an unfair discrimination claim can be brought or is it the same as an unlisted ground; (b) Where does the *Harksen* test fit in with regard to proving unfair discrimination on an unlisted ground? and (c) Is the proving of "irrationality" something different to proving unfair discrimination?[63]

4.3 South African law

4.3.1 Section 11(1)(a)-(b) of the EEA relating to proving unfair discrimination on a listed ground

With regard to the question whether a mere allegation of unfair discrimination is sufficient to shift the onus to the employer, paragraph 4.1 above, the approach argued for by Du Toit is important. He argues that the word *alleged* in section 11(1) of the EEA means something less than making out a *prima facie* case as this would be required in the normal course where the burden of proof is not reversed as is the case in section 11(1) and this

[62] See para 3 of Chapter 1 and para 13.7.1 of Chapter 2 of this thesis.
[63] See para 3 of Chapter 1 and para 13.7.2 of Chapter 2 of this thesis.

something less is for the claimant employee to produce evidence which is sufficient to raise a credible possibility that unfair discrimination has taken place and this will then call for the employer to prove the contrary, and this argument fits more contextually within section 11(1) of the EEA for the following two reasons:

(a) It does not follow the literal meaning to be attached to the phrase *mere allegation* which if followed would lead to employers being required to answer meritless equal pay claims in the absence of the claimant adducing an iota of evidence; and

(b) It does not follow the equal pay case law cited which requires an equal pay claimant to at least establish a *prima facie* case of discrimination and this is correct because if this was required by section 11(1) then it could simply have been stated that the claimant must establish a *prima facie* case in order to put the employer on its defence.

Du Toit's approach should be followed and to this end section 11(1) only requires an equal pay claimant to produce sufficient evidence in order to raise a credible possibility that unfair pay discrimination has taken place and if she succeeds in doing so then the onus is on the employer to prove its defence on a balance of probabilities as required by section 11(1). The *sufficient evidence* should be more than the making of a bald allegation and less than establishing a *prima facie* case.[64] It is recommended that this guidance should be mentioned in the Equal Pay Code.

With regard to the meaning of "rational and not unfair, or is otherwise justifiable" (paragraph 4.1 above), Du Toit is correct in his view that "rational" and "not unfair" and "is otherwise justifiable" as referred to in section 11(1)(b) of the EEA refers to the grounds of justification in section 6(2) of the EEA.[65]

The phrase "rational and not unfair, or is otherwise justifiable" does not add to the grounds of justification in section 6(2) of the EEA, neither does the phrase "or is otherwise

---

64 See paras 8 and 13.7.1 of Chapter 2 of this thesis.
65 See paras 8 and 13.7.1 of Chapter 2 of this thesis.

justifiable" create an open-ended ground of justification.[66]

As it is argued that the grounds of justification in section 6(2) of the EEA are not applicable to equal pay claims, it is recommended that section 11(1)(b) of the EEA should be read to refer to regulation 7(1)(a)-(g) of the Employment Equity Regulations which lists the specific grounds of justification to equal pay claims and regulation 7(2)(a)-(b) of the Employment Equity Regulations which provides guidance relating to when a pay difference based on the specific grounds listed therein will be *fair* and *rational* when established in accordance with the onus provision in section 11 of the EEA.[67]

An employer who attracts the onus under section 11(1)(b) of the EEA read with regulation 7 of the Employment Equity Regulations also has to prove that the factor which it relies on for the pay differential does not amount to indirect discrimination as referred to in regulation 7(2)(a)-(b) of the Employment Equity Regulations.[68]

It is recommended that the above guidance should be mentioned in the Equal Pay Code.

4.3.2 Section 11(2) of the EEA relating to proving unfair discrimination on an arbitrary ground

The adding of the phrase "arbitrary ground" in section 6(1) as read with section 11(2) of the EEA does not create a third ground on which an unfair discrimination claim can be brought and it is synonymous with an unlisted ground of unfair discrimination. A claimant who relies on an arbitrary ground is obliged to specifically state what that ground is and cannot baldly claim unfair pay discrimination on an arbitrary ground.[69]

Section 11(2) of the EEA must be read with the test for unfair discrimination based on unlisted grounds in *Harksen v Lane* and this requires a claimant to prove that the arbitrary

[66] See paras 8 and 13.7.1 of Chapter 2 of this thesis.
[67] See paras 8 and 13.7.1 of Chapter 2 of this thesis.
[68] See paras 8 and 13.7.1 of Chapter 2 of this thesis.
[69] See paras 8 and 13.7.2 of Chapter 2 of this thesis.

ground is based on attributes or characteristics which has the potential to impair his/her dignity or affect him/her in a comparably serious manner. This is the relevance of the *Harksen* test with regard to proving unfair discrimination on an unlisted ground.[70]

Rationality forms part of the enquiry regarding whether or not the discrimination is unfair and does not constitute a test on its own. The test for unfair discrimination includes the sub-test of rationality but rationality is not the test for unfair discrimination in and of itself.[71]

It is recommended that this guidance should be mentioned in the Equal Pay Code.

The submissions made here are the final conclusions to be given on the issues raised and no reference to international labour law and United Kingdom law was made as these are issues which could definitively be answered from the domestic law itself without more.[72]

4.4 International labour law

It is submitted that the argument relating to section 11(1) of the EEA only requiring an equal pay claimant to produce sufficient evidence, which is more than making a bald (mere) allegation and less than establishing a *prima facie* case, in order to raise a credible possibility that unfair pay discrimination has taken place to put the employer on its defence, which is quintessentially a reversal of the normal burden of proof, is not only supported by international labour law but is also used in international labour law, *albeit*, in a different form and is regarded as a key aspect which makes unfair pay discrimination law effective.[73]

The reversal of the burden of proof in international labour law relating to equal pay is regarded as indispensable to the success of an equal pay claim because it has the ability

[70] See paras 8 and 13.7.2 of Chapter 2 of this thesis.
[71] See paras 8 and 13.7.2 of Chapter 2 of this thesis.
[72] See paras 8 and 13.7.2 of Chapter 2 of this thesis.
[73] See paras 5.1 and 9.5 of Chapter 3 of this thesis.

to remove the obstacle of a lack of access to pay related information. It is submitted that the reverse onus in section 11(1) of the EEA as argued for in paragraph 13.7.1 of Chapter 2 of this thesis should be viewed in the same way as it is viewed under international labour law and it is recommended that mention of this should be made in the Equal Pay Code.[74]

Based on international labour law, it is submitted that where an equal pay claimant under section 6(4) of the EEA provides statistics which are significant or the only ones available, which shows that there is a difference in pay (working conditions) between employees engaged in the same work, substantially the same work or work of equal value where the one group who receives the higher pay are for example males or white as opposed to the other group who receives the lower pay who are females or black, then the claimant has produced sufficient evidence (which is more than making a bald (mere) allegation and less than establishing a *prima facie* case) in order to raise a credible possibility that indirect unfair pay discrimination has taken place to put the employer on its defence. This is not restricted to unfair pay discrimination based on sex or race. It is recommended that this should be mentioned in the Equal Pay Code.[75]

It is further submitted, based on international labour law, that where a female employee claimant under section 6(4) of the EEA is able to establish, having regard to a large number of employees performing the same work (including similar work or work of equal value), that the average pay for female employees is less than the average pay for male employees where the pay system used by the employer is lacking in transparency, then the claimant has (within the meaning of section 11 of the EEA) produced sufficient evidence (which is more than making a bald (mere) allegation and less than establishing a *prima facie* case) in order to raise a credible possibility that unfair pay discrimination has taken place to put the employer on its defence (to prove that the pay system in question is not discriminatory). This is not restricted to unfair pay discrimination based on sex. It is recommended that this should be mentioned in the Equal Pay Code.[76]

---

[74] See paras 5.1 and 9.5 of Chapter 3 of this thesis.
[75] See paras 5.2 and 9.5 of Chapter 3 of this thesis.
[76] See paras 5.3 and 9.5 of Chapter 3 of this thesis.

4.5 United Kingdom equal pay law

No guidance could be extracted from the United Kingdom equal pay law in order to assist with the research question relating to the onus in section 11(1) of the EEA as stated in (a) and (b) under paragraph 4.1 above.[77]

5. THE RIGHT TO ACCESS PAY RELATED INFORMATION

The issue raised here relates to the lack of provisions in the EEA, the Employment Equity Regulations and the Equal Pay Code relating to accessing pay related information.[78]

5.1 South African law

(a) It is recommended that section 78(1)(b) of the BCEA which gives employees the right to discuss their terms and conditions of employment with each other, their employer or any other person and section 78(2) of the BCEA which protects this right should specifically be mentioned in the EEA;[79]

(b) An employee will not be able to access the remuneration and benefits statement which the employer is obliged to submit in terms of section 27(1) of the EEA in order to found a claim for equal pay because the Employment Conditions Commission is not allowed to disclose any information pertaining to individual employees or employers. While a party to collective bargaining is able to request such information, such information will not be admissible as evidence in an equal pay claim as the disclosure thereof is limited to collective bargaining;[80]

---

77 See paras 5.1 and 9.5 of Chapter 4 of this thesis.
78 See para 4 of Chapter 1 and para 13.8 of Chapter 2 of this thesis.
79 See paras 9.1 and 13.8 of Chapter 2 of this thesis.
80 See paras 9.1 and 13.8 of Chapter 2 of this thesis.

(c) An employee of a public body will be able to access pay related information (classification, salary scale, remuneration and responsibilities of the position held or services performed) of a fellow employee (comparator) or a former employee (predecessor comparator) in terms of PAIA and access to this information cannot be refused in terms of the Act. In order to access this information, the employee will have to comply with the procedural requirements relating to a request for access to that record of information;[81]

(d) An employee of a private body will be able to access pay related information (classification, salary scale, remuneration and responsibilities of the position held or services performed) of a fellow employee (comparator) or former employee (predecessor comparator) in terms of PAIA and the Act specifically states that access to this type of information cannot be refused. In order to access this information, the employee will have to comply with the procedural requirements relating to a request for access to that information and prove that the record is required for the exercise or protection of his/her rights;[82]

(e) If an institution or functionary performs a public function or exercises a public power in terms of any legislation as contemplated under the definition of "public body" in section 1 of PAIA then the following two scenarios can occur with regard to an employee accessing pay related information from such institution or functionary:

- Firstly, if the functionary or institution produces a record pursuant to the exercise of a public power or performance of a public function and/or which involves funds from the public purse and which relates to information about an employee (including a former employee) concerning his/her " … classification, salary scale, remuneration and responsibilities of the position held or services performed by the individual" then an equal pay claimant will be able to access this information by complying with the procedural requirements which in essence relates to the form

[81] See paras 9.2.1(a) and 13.8 of Chapter 2 of this thesis.
[82] See paras 9.2.1(b) and 13.8 of Chapter 2 of this thesis.

of the request and the fees payable. Access to this information cannot be refused as it is not prohibited in terms of any ground of refusal and is specifically listed as one of the records to which access cannot be refused;[83] and

- Secondly, if on the other hand, the functionary or institution produces a record outside the exercise of a public power or performance of a public function and/or which does not involve funds from the public purse and which relates to information about an employee (including a former employee) concerning his/her " … classification, salary scale, remuneration and responsibilities of the position held or services performed by the individual" then the functionary or institution is regarded as a private body with regard to such record and an equal pay claimant will not be able to access this record as being that of a public body – he/she will have to access this record as being that of a private body and will have to, in addition to the requirements required for access to a record of a public body, prove that the information is required for the exercise or protection of his/her rights.[84]

(f) It is recommended that the right of an employee to access pay related information from both a public body and private body in terms of PAIA as summarised under paragraphs (c)-(e) above should specifically be mentioned in the EEA with an explanation being given in the Equal Pay Code;[85] and

(g) It is recommended that the process to follow where access to a record of a public body or a private body is refused should be mentioned in the EEA as well as the bodies and courts that may be approached in the process. It is further recommended that it should also be mentioned in the EEA that the Labour Court is one such court which can be approached by an employee.[86]

---

83 See paras 9.2.1(a) and 13.8 of Chapter 2 of this thesis.
84 See paras 9.2.1(a) and 13.8 of Chapter 2 of this thesis.
85 See para 13.8 of Chapter 2 of this thesis.
86 See paragraphs 9.2.1(c), 9.2.1(c)(i), 9.2.1(c)(ii) and 13.8 of Chapter 2 of this thesis.

5.2 International labour law

It is argued that the guidance from international labour law relating to an employee requesting pay related information which includes pay levels according to gender, pay levels for employees performing the same work and those performing work of equal value can be used in the South African equal pay legal framework without interfering with the restrictions imposed under sections 27(5)-(6) of the EEA, as follows. It is recommended that a provision should be included under the EEA affording an employee the right to request generic pay related information in the form of pay levels according to gender, pay levels for employees performing the same work and those performing work of equal value. The generic nature of the pay related information sought and provided will not interfere with the restrictions relating to pay related information as imposed under sections 27(5)-(6) of the EEA.[87]

5.3 United Kingdom equal pay law

The right afforded by section 77 of the Equality Act to employees to discuss their pay and the protection against victimisation is contained in South African law under sections 78(1)(b) and 78(2) of the BCEA as discussed under paragraph 9.1 in Chapter 2 of this thesis. Based on this, it is submitted that section 77 of the Equality Act supports the argument made under paragraph 9.1 in Chapter 2 of this thesis to the effect that reference to the right of employees to discuss their terms and conditions of employment together with the protection of this right as contained in section 78(1)(b) read with section 78(2) of the BCEA should specifically be mentioned in the EEA;[88] and

The nub of the ACAS Guide is to allow employees the opportunity to pose questions to their employer regarding their pay and to allow an employer to respond to such questions. A fruitful engagement between the employee and employer in this regard constitutes a source of pay related information. South African law does not have a voluntary question

---

87 See paras 5.1 and 9.5 of Chapter 3 of this thesis.

88 See paras 5.2.1 and 9.5 of Chapter 4 of this thesis.

and answer procedure as contained in the ACAS Guide. It is recommended that the question and answer procedure as contained in the ACAS Guide should be mentioned in the South African Equal Pay Code with reference thereto being made in the EEA. The inclusion of such procedure improves an employee's access to pay related information and is thus beneficial. The written questions and answer process would also be voluntary and it should specifically be mentioned that a non-response may be a contributory factor which is taken into account by the Labour Court (including CCMA) when it makes its overall decision regarding the employee's pay discrimination claim.[89]

6. GROUNDS OF JUSTIFICATION

The following uncertainties raised here concern the grounds of justification to equal pay claims as follows:

(a) The first uncertainty is whether the grounds of justification in section 6(2) of the EEA can apply to equal pay claims in terms of section 6(4) of the EEA;

(b) The second uncertainty is whether the grounds of affirmative action and/or the inherent requirements of the job are capable of falling within the ambit of regulation 7(1)(g) of the Regulations which refers to "any other relevant factor that is not unfairly discriminatory in section 6(1) of the EEA" and in this way operate as grounds of justification to equal pay claims;

(c) The third uncertainty is whether an employer can rely on measures taken in terms of section 27(2) of the EEA as a ground of justification falling under "any other relevant factor that is not unfairly discriminatory in terms of section 6(1) of the Act" in terms of regulation 7(1)(g) of the Employment Equity Regulations? and

89 See paras 5.2.2 and 9.5 of Chapter 4 of this thesis.

(d) Any further lessons that can be learnt from international labour law and the United Kingdom equal pay law for the South African equal pay law relating to the grounds of justification to equal pay claims.[90]

(e) During the discussion relating to the grounds of justification under the Employment Equity Regulations in paragraph 10.2 of Chapter 2 of this thesis, the question that transpired was whether the factor of *responsibility* can fall under the ambit of "any other relevant factor that is not unfairly discriminatory in terms of section 6(1) of the Act" in terms of regulation 7(1)(g) of the Employment Equity Regulations as it is not listed under regulation 7(1) of the Employment Equity Regulations but it has been referred to as being a ground of justification to unequal pay (pay differentials) by the Labour Court in *TGWU*;[91] and

(f) Further, during the discussion relating to the grounds of justification under the Employment Equity Regulations the question arose as to whether the factor of different wage setting structures resulting in a pay difference between employees engaged in the same work can fall under the ambit of "any other relevant factor that is not unfairly discriminatory in terms of section 6(1) of the Act" in terms of regulation 7(1)(g) of the Employment Equity Regulations as it is not listed under regulation 7(1) of the Employment Equity Regulations but it has, in essence, been found to be a ground of justification to unequal pay by the Labour Court in *Heynsen*.[92]

6.1 South African law

With regard to the uncertainties stated in (a)-(c) under paragraph 6 above it can be concluded that affirmative action and the inherent requirements of the job are not suitable grounds of justification to equal pay claims. These cannot fall under the ambit of "any other relevant factor that is not unfairly discriminatory in terms of section 6(1) of the Act"

---

[90] See paras 5 and 7 of Chapter 1 and para 13.9 of Chapter 2 of this thesis.
[91] See para 13.9 of Chapter 2 of this thesis.
[92] See para 13.9 of Chapter 2 of this thesis.

as set out in regulation 7(1)(g) of the Employment Equity Regulations and in this way operate as grounds of justification to equal pay claims because of unsuitability. It is further held that it will be difficult to refuse to recognise the progressive realisation of the right to equal pay as a ground of justification, falling under regulation 7(1)(g) of the Employment Equity Regulations, where it is genuine and in circumstances where it gives effect to section 27(2) of the EEA. It is recommended that the taking of measures in terms of section 27(2) of the EEA in order to progressively reduce disproportionate income differentials and/or unfair pay discrimination in section 6(4) of the EEA should specifically be listed as a ground of justification under regulation 7(1) of the Employment Equity Regulations.[93]

6.2 International labour law

International labour law does not mention affirmative action and/or the inherent requirements of the job operating as grounds of justification to equal pay claims and this strengthens the arguments made based on South African law to the effect that affirmative action and the inherent requirements of the job are not suitable grounds of justification to equal pay claims.[94]

International labour law can provide some insight to resolve the uncertainty about whether an employer can rely on measures taken in terms of section 27(2) of the EEA as a ground of justification which would fall under "any other relevant factor that is not unfairly discriminatory in terms of section 6(1) of the Act" in terms of regulation 7(1)(g) of the Employment Equity Regulations.

The general rule is that unequal pay must be corrected immediately but where this is not feasible then it must be corrected on a progressive basis by decreasing the differentials.[95]

---

93 See paras 10.1-10.3 and para 13.9 of Chapter 2 of this thesis.
94 See paras 6 and 9.6 of Chapter 3 of this thesis.
95 See paras 6.8 and 9.6 of Chapter 3 of this thesis.

It is submitted that the argument that the progressive realisation of the right to equal pay should be recognised as a justification ground in terms of regulation 7(1)(g) of the Employment Equity Regulations, where it is genuine and in circumstances where it gives effect to section 27(2) of the EEA, is strengthened by international labour law which recognises the principle of the progressive realisation of the right to equal pay where unequal pay cannot immediately be corrected.[96]

No guidance could be extracted from international labour law for the question raised in (d) under paragraph 6 above because it does not deal with the factor of responsibility operating as a ground of justification to an equal pay claim.[97]

International labour law does not allow an employer to rely on separate collective bargaining processes as a ground of justification to unequal pay.[98]

The following further lessons can also be learnt from international labour law:

(a) It is submitted that the listing of the factor of seniority operating as a ground of justification to an equal pay claim in regulation 7(1)(a) of the Employment Equity Regulations is strengthened by its use in international labour law. It is further submitted that the approach in South African law to the use of seniority as a ground of justification to an equal pay claim is in accordance with the approach under international labour law because South African law also regards seniority as a ground of justification to an equal pay claim without the need for further justification provided that it does not give rise to indirect unfair pay discrimination as set out in regulation 7(2) of the Employment Equity Regulations;[99]

(b) It is submitted that the listing of the factor of performance (quantity or quality of work) operating as a ground of justification to an equal pay claim in regulation 7(1)(c) of the

---

[96] See paras 6.8 and 9.6 of Chapter 3 of this thesis.
[97] See paras 6 and 9.6 of Chapter 3 of this thesis.
[98] See paras 6.7 and 9.6 of Chapter 3 of this thesis.
[99] See paras 6.1 and 9.6 of Chapter 3 of this thesis.

Employment Equity Regulations is strengthened by its use in international labour law. International labour law provides guidance for the factor of performance (quantity of quality of work) as a ground of justification under regulation 7(1)(c) of the Employment Equity Regulations by stating that the issue of performance can only be assessed after an employee is appointed and can thus not be relied on as a ground of justification to unequal pay right from the commencement of employment because this is not capable of being objectively determined at the point at which the employee is appointed. It is recommended that this should specifically be mentioned under regulation 7 of the Employment Equity Regulations;[100]

(c) International labour law provides guidance to any other grounds of justification to equal pay claims in South African law which are not capable of justifying pay differentials from the commencement of employment but which can only become relevant after an employee is appointed by barring an employer from relying on it as justification to unequal pay from the commencement of employment. It is recommended that this should specifically be mentioned under regulation 7 of the Employment Equity Regulations;[101]

(d) It is submitted that the listing of the factor of market value in a particular job classification including the existence of a shortage of relevant skill operating as a ground of justification to an equal pay claim in regulation 7(1)(f) of the Employment Equity Regulations is strengthened by its use in international labour law. International labour law provides guidance for the factor of market value in a particular job classification including the existence of a shortage of relevant skill as a ground of justification under regulation 7(1)(f) of the Employment Equity Regulations by stating that the market forces which leads an employer to increase the pay of certain positions so as to attract job applicants can amount to an objectively justified economic ground.[102] International labour law provides further guidance by stating that the court must determine whether the role of market forces in establishing rates of pay provides a complete or partial justification for

---

[100] See paras 6.2 and 9.6 of Chapter 3 of this thesis.
[101] See paras 6.2 and 9.6 of Chapter 3 of this thesis.
[102] See paras 6.3 and 9.6 of Chapter 3 of this thesis.

the difference in pay rates, and must to this end, determine to what extent the shortage of job applicants and the need to attract them by paying higher salaries constitutes an objectively justified economic ground for the pay differential. It is submitted that this bears relevance to regulation 7(2) of the Employment Equity Regulations which refers to establishing whether a difference in pay (terms and conditions) based on the grounds listed in regulation 7 including the factor of market value is not biased against employees based on prohibited grounds and is applied in a proportionate manner. It is recommended that this should specifically be mentioned under regulation 7 of the Employment Equity Regulations. International labour law cautions that market forces should not be used to justify pay differentials arising from discrimination for example where an employer is allowed to argue that it pays the market rate for work in circumstances where the market rate undervalues work performed by women. It is recommended that this is invaluable guidance which should be mentioned in regulation 7 of the Employment Equity Regulations. International labour law also states that an employer is not allowed to rely on market forces and avoid its equal pay obligations by relying on the fact that the female employee was prepared to work for a lesser rate. It is recommended that this is important guidance which should be mentioned in regulation 7 of the Employment Equity Regulations;[103]

(e) It is submitted that the non-listing of budgetary considerations, increased costs, and the curtailing of public expenditure in regulation 7 of the Employment Equity Regulations and its absence in South African case law is strengthened by its rejection as a ground of justification to equal pay claims in international labour law;[104]

(f) It is submitted that while international labour law allows an employer to rely on a ground which corresponds to a real business need with the condition that it is appropriate and necessary to justify unequal pay, it is not suitable to be used as a ground of justification under regulation 7(1)(g) of the Employment Equity Regulations as another relevant factor which can justify unequal pay. The unsuitability of this ground of justification is also

[103] See paras 6.3 and 9.6 of Chapter 3 of this thesis.
[104] See paras 6.4 and 9.6 of Chapter 3 of this thesis.

supported by the rejection of the use of budgetary considerations and increased costs which can easily fall within the ambit of a real business need;[105]

(g) It is submitted that the non-listing of good industrial relations in regulation 7 of the Employment Equity Regulations and its absence in South African case law is strengthened by international labour law which states that the interests of good industrial relations cannot constitute the only basis for justifying discrimination in pay;[106] and

(h) It is submitted that the non-listing of collective agreements in regulation 7 of the Employment Equity Regulations is strengthened by its rejection as a sole ground of justification to pay discrimination in international labour law.[107]

6.3 United Kingdom equal pay law

The United Kingdom equal pay law does not mention affirmative action and/or the inherent requirements of the job operating as grounds of justification to equal pay claims and this strengthens the argument made based on South African law to the effect that affirmative action and the inherent requirements of the job are not suitable grounds of justification to equal pay claims.[108]

The following guidance has been extracted to determine whether an employer can rely on measures taken in terms of section 27(2) of the EEA as a ground of justification falling under "any other relevant factor that is not unfairly discriminatory in terms of section 6(1) of the Act".

It is submitted that the argument made based on South African law to the effect that it will be difficult to refuse to recognise the progressive realisation of the right to equal pay as a ground of justification, falling under regulation 7(1)(g) of the Employment Equity

[105] See paras 6.5 and 9.6 of Chapter 3 of this thesis.
[106] See paras 6.6 and 9.6 of Chapter 3 of this thesis.
[107] See paras 6.7 and 9.6 of Chapter 3 of this thesis.
[108] See paras 6 and 9.6 of Chapter 4 of this thesis.

Regulations, where it is genuine and in circumstances where it gives effect to section 27(2) of the EEA is strengthened by the United Kingdom equal pay law which recognises the principle of the progressive realisation of the right to equal pay by stating that the long-term objective of reducing pay inequality should always be regarded as a legitimate aim.[109]

An employer may place greater emphasis on one factor for assessing the value of the work in question as opposed to other factors and then remunerate a comparator with the greater factor more than the equal pay claimant and this will amount to a material factor defence. It is submitted that this one factor can for example be responsibility as it is a common factor used to assess the value of work. Based on this, it is recommended that the factor of responsibility falls under regulation 7(1)(g) of the Employment Equity Regulations as any other relevant factor that is not unfairly discriminatory in terms of section 6(1) of the EEA and it is recommended that it should specifically be listed as a ground of justification under regulation 7 because it is specifically listed as a factor for assessing work in regulation 6(1)(a) of the Employment Equity Regulations.[110]

The following guidance has been extracted in relation to the issue of whether different wage setting structures resulting in a pay difference between employees engaged in the same work can fall under the ambit of "any other relevant factor that is not unfairly discriminatory in terms of section 6(1) of the Act".

The mere existence of different pay structures as well as different negotiating machinery are not in and of itself capable of constituting a material factor defence for the pay differential.[111] The existence of two separate collective agreements which are on their own not discriminatory will not on its own prevent a finding of *prima facie* pay discrimination and this is important in order to prevent employers from circumventing the principle of equal pay.[112]

[109] See paras 6.1.15 and 9.6 of Chapter 4 of this thesis.
[110] See paras 6.1.12 and 9.6 of Chapter 4 of this thesis.
[111] See paras 6.1.7.2 and 9.6 of Chapter 4 of this thesis.
[112] See paras 6.1.7.2 and 9.6 of Chapter 4 of this thesis.

The nub of these principles is that an employer is not allowed to rely on separate collective bargaining processes as a ground of justification to unequal pay. The international labour law regarding the issue of separate collective bargaining agreements as a ground of justification to unequal pay as discussed in paragraphs 6.7 and 9.6 of Chapter 3 of this thesis is essentially the same as the position in the United Kingdom equal pay law on this score. This being the case, it is submitted that the non-listing of separate collective bargaining agreements in regulation 7 of the Employment Equity Regulations is strengthened by its rejection as a ground of justification to pay discrimination in both international labour law and the United Kingdom equal pay law.[113]

The United Kingdom equal pay law also provides some further lessons for the South African equal pay law relating to the grounds of justification to equal pay claims.

(a) Unlike the United Kingdom equal pay law, the South African equal pay law does not explicitly state that an employer will establish a ground of justification to an equal pay claim where it is able to prove that the claimant and her chosen comparator are not engaged in the same/similar work or work of equal value or that the comparator is not a permissible comparator in law. It is recommended that regulation 7 of the Employment Equity Regulations should specifically refer to these two grounds of justification;[114]

(b) Service-related pay scales which are pay scales that increase pay according to an employee's length of service are commonplace and an employer is generally not under an obligation to provide justification for the adoption of a service-related pay scale because the law acknowledges that length of service (experience) allows an employee to work better;[115]

(c) There is no obligation on an employer to objectively justify the pay differential resulting from a service-related pay scale unless the equal pay claimant is able to tender evidence

[113] See paras 6.1.7.2 and 9.6 of Chapter 4 of this thesis.
[114] See paras 6.1 and 9.6 of Chapter 4 of this thesis.
[115] See paras 6.1.1 and 9.6 of Chapter 4 of this thesis.

that raises serious doubts regarding the appropriateness of the pay scale to achieve the aim of rewarding experience;[116] and

(d) An equal pay claimant can challenge both the adoption and use of a service-related pay scale and this can result in an employer having to provide objective justification for the adoption as well as the use of a service-related pay scale.[117]

Based on the principles listed in (b)-(d) above, it is submitted that the listing of the factor of seniority operating as a ground of justification to an equal pay claim in regulation 7(1)(a) of the Employment Equity Regulations is strengthened by its use in the United Kingdom equal pay law. It is further submitted that the approach in South African law to the use of seniority as a ground of justification to an equal pay claim is to a large extent in accordance with the approach under the United Kingdom equal pay law because South African law also regards seniority as a ground of justification to an equal pay claim without the need for further justification provided that it does not give rise to indirect unfair pay discrimination as set out in regulation 7(2) of the Employment Equity Regulations.[118] To this end, it is recommended that the principles set out in (b)-(c) should be mentioned under regulation 7 of the Employment Equity Regulations in relation to the factor of seniority. It is submitted that the principle mentioned in (d) to the effect that an equal pay claimant can challenge both the adoption and use of a service-related pay scale and this can result in an employer having to provide objective justification for the adoption as well as the use of a service-related pay scale is not dealt with in South African equal pay law and thus provides important guidance for the operation of the factor of seniority as a ground of justification to an equal pay claim. Based on this, it is recommended that the principle listed in (d) should be mentioned under regulation 7 of the Employment Equity Regulations in relation to the factor of seniority.[119]

[116] See paras 6.1.1 and 9.6 of Chapter 4 of this thesis.
[117] See paras 6.1.1 and 9.6 of Chapter 4 of this thesis.
[118] See para 10.2 of Chapter 2 of this thesis.
[119] See paras 6.1.1 and 9.6 of Chapter 4 of this thesis.

(e) It is submitted that the listing of the factor of performance (quantity or quality of work) operating as a ground of justification to an equal pay claim in regulation 7(1)(c) of the Employment Equity Regulations is strengthened by its use in the United Kingdom equal pay law, *albeit*, in the form of productivity;[120]

(f) An employer is allowed to prove that a pay differential is due to a bonus productivity scheme and this amounts to a material factor defence;[121]

(g) Where there is a bonus scheme in place which rewards productivity then the correct approach is to seek to question whether there was an increase in productivity as a result of the bonus scheme;[122]

(h) Where an employer cannot prove that the whole of the pay differential is due to the bonus productivity scheme then it is allowed to prove that a portion of the pay differential is due to the bonus productivity scheme, if it is able to do so;[123] and

(i) An employer will not be able to prove a material factor defence as well as objective justification for the pay differential in circumstances where it is found that the link between the bonus scheme and the productivity factor has ceased.[124]

It is submitted that the principles extracted in (f)-(i) above should be mentioned under this ground of justification relating to performance (quantity or quality of work) in regulation 7 of the Employment Equity Regulations.[125]

(j) It is submitted that the listing of the factor of the existence of a shortage of relevant skill operating as a ground of justification to an equal pay claim in regulation 7(1)(f) of the Employment Equity Regulations is strengthened by the United Kingdom equal pay law

---

[120] See paras 6.1.2 and 9.6 of Chapter 4 of this thesis.
[121] See paras 6.1.2 and 9.6 of Chapter 4 of this thesis.
[122] See paras 6.1.2 and 9.6 of Chapter 4 of this thesis.
[123] See paras 6.1.2 and 9.6 of Chapter 4 of this thesis.
[124] See paras 6.1.2 and 9.6 of Chapter 4 of this thesis.
[125] See paras 6.1.2 and 9.6 of Chapter 4 of this thesis.

which has recognised it, *albeit*, as administrative efficiency which is the need to attract employees in order for the business to run efficiently;[126]

(k) The United Kingdom equal pay law provides guidance for the factor relating to the existence of a shortage of relevant skill as a ground of justification under regulation 7(1)(f) of the Employment Equity Regulations by stating that in a case where there is no direct or indirect pay discrimination then a pay differential which is caused by economic factors relating to the efficient running of the employer's business may be relevant as a ground of justification to an equal pay claim. It is submitted that this is important guidance which should be mentioned in regulation 7 of the Employment Equity Regulations;[127] and

(l) The United Kingdom equal pay law states that the proper enquiry to be undertaken regarding the ground of justification of administrative efficiency does not consider why the claimant is being paid less than the comparator but rather considers why the comparator is being paid more. This provides further guidance for the factor relating to the existence of a shortage of relevant skill as a ground of justification under regulation 7(1)(f) of the Employment Equity Regulations and it is recommended that it should thus be mentioned under regulation 7 of the Employment Equity Regulations.[128]

(m) It is submitted that the listing of the factor of market value in a particular job classification including the existence of a shortage of relevant skill (market forces) operating as a ground of justification to an equal pay claim in regulation 7(1)(f) of the Employment Equity Regulations is strengthened by its use in the United Kingdom equal pay law.[129]

(n) It is contrary to equal pay law to allow an employer to justify a pay differential by simply stating that it paid a male comparator a higher wage because he asked for it or it paid a

[126] See paras 6.1.3 and 9.6 of Chapter 4 of this thesis.
[127] See paras 6.1.3 and 9.6 of Chapter 4 of this thesis.
[128] See paras 6.1.3 and 9.6 of Chapter 4 of this thesis.
[129] See paras 6.1.4 and 9.6 of Chapter 4 of this thesis.

female claimant a lesser wage because she was willing to work for less;[130]

(o) The reducing of a female's wages to a rate below that of a comparator male employee's wages in order to compete for a tender with rival tenderers does not amount to a material factor defence based on market forces;[131]

(p) It is just and desirable to allow reliance on a market forces defence to be fully ventilated in circumstances where it can properly be advanced to provide an explanation for either the whole or part of the pay differential;[132]

(q) It is the responsibility of the employer to prove that the market demanded the higher pay and it is not the responsibility of the claimant employee to prove that the comparator's pay was too high;[133] and

(r) Unless a market forces defence can be shown to have ceased operating in the sense of being historical it continues to operate as a material factor defence.[134]

It is submitted that the principles listed in (n)-(r) above provides valuable guidance which should be mentioned under the ground of justification relating to market forces in regulation 7 of the Employment Equity Regulations.[135]

(s) It is submitted that the listing of the factor of an employee being demoted as a result of organisational restructuring of for any other legitimate reason without a pay reduction and the fixing of such employee's pay at this level until the remuneration of other employees in the same job category reaches the same level, commonly referred to as red-circling, operating as a ground of justification to an equal pay claim in regulation

---

130 See paras 6.1.4 and 9.6 of Chapter 4 of this thesis.
131 See paras 6.1.4 and 9.6 of Chapter 4 of this thesis.
132 See paras 6.1.4 and 9.6 of Chapter 4 of this thesis.
133 See paras 6.1.4 and 9.6 of Chapter 4 of this thesis.
134 See paras 6.1.4 and 9.6 of Chapter 4 of this thesis.
135 See paras 6.1.4 and 9.6 of Chapter 4 of this thesis.

7(1)(d) of the Employment Equity Regulations is strengthened by its use in the United Kingdom equal pay law;[136]

(t) It might be necessary at times to protect the wages of an employee or employees who are transferred from a higher paying job to a worse paying job as a result of the higher paying job no longer being available. It is customary to circle these employees in red on a wage table in order to show that their pay is protected and this gives rise to the phrase red-circling;[137]

(u) The correct approach to the practice known as red-circling is as follows: (i) it is important to ascertain whether the red-circling in question is of a permanent nature, a temporary nature, whether it is being phased out and if the origin of the red-circling is rooted in sex discrimination; (ii) it is further important to ascertain whether the group of employees who are red-circled constitute a closed group of employees and whether the red-circling has been negotiated at the workplace with the employees' views being taken into account; (iii) an employer cannot be permitted to successfully prove that a pay differential between the equal pay claimant and the comparator is genuinely due to a material difference in circumstances where past sex discrimination has contributed to the pay differential;[138] (iv) when deciding whether an employer has proved a genuine material factor defence based on red-circling it is relevant for the Industrial Tribunal to take into account the time that has expired since the red-circling was first introduced and whether the employer by continuing with the red-circling has acted in line with good industrial practice; (v) if there is a long period of red-circling which goes against good industrial practice then this may in all the circumstances lead to a doubt as to whether the employer has been able to prove its material factor defence;[139] (vi) an employer who wishes to prove a material factor defence by relying on red-circling must prove this in relation to every employee who it claims is within the red circle. Such employer should further prove that the higher rate of pay of the comparator employee was based on considerations

[136] See paras 6.1.5 and 9.6 of Chapter 4 of this thesis.
[137] See paras 6.1.5 and 9.6 of Chapter 4 of this thesis.
[138] See paras 6.1.5 and 9.6 of Chapter 4 of this thesis.
[139] See paras 6.1.5 and 9.6 of Chapter 4 of this thesis.

unrelated to sex at the time when the employee was allowed into the red circle. Where appropriate, an employer can place reliance on a presumption that those considerations which apply to employees within the red circle also applied to later employees who were allowed into the red circle;[140] (vii) whether an employer's pay protection scheme unfairly discriminates against female employees is a matter to be dealt with objectively as a question of fact; (viii) whether or not the employer knew that it was discriminating against the female claimant employees is irrelevant. Issues of knowledge, intention and motive are relevant at the justification stage but are irrelevant at the stage of determining whether the pay protection scheme is *prima facie* discriminatory;[141] (ix) in order for an initial material factor defence to qualify as a concurrent material factor defence to an equal pay claim, an examination of the defence must be made at the time when the pay differential is being challenged. If this is not the case, then it will open the door for unscrupulous employers to continue implementing a pay differential in circumstances where the initial reason for the pay differential has ceased; and (x) the onus of proving a material factor defence rests on the employer at all times who must prove that it continues to exist. It is incorrect to assume that the indefinite continuation of red-circling is justified solely because the implementation thereof was justified and the reasons for its continued application is important to justify its continued application;[142] and

(v) The red-circling of wages which is done for good reasons causes a lot of misunderstanding which intensifies with the length of time and it is thus desirable to make arrangements to phase out the red-circling. It is desirable to have joint consultation when a practice of red-circling is introduced and where it is sought to be continued.[143]

It is submitted that the principles set out in (t)-(v) should be mentioned under regulation 7 of the Employment Equity Regulations in relation to the factor of red-circling. These principles are sorely needed under regulation 7 as South African law has not dealt with

[140] See paras 6.1.5 and 9.6 of Chapter 4 of this thesis.
[141] See paras 6.1.5 and 9.6 of Chapter 4 of this thesis.
[142] See paras 6.1.5 and 9.6 of Chapter 4 of this thesis.
[143] See paras 6.1.5 and 9.6 of Chapter 4 of this thesis.

the defence of red-circling in relation to an equal pay claim and there are no principles that can be extracted from the South African equal pay law in this regard.[144]

(w) It is submitted that the non-listing of union hostility/intransigence (good industrial relations) in regulation 7 of the Employment Equity Regulations and its absence in South African case law is strengthened by the United Kingdom equal pay law which in essence states that the reliance on union hostility/intransigence (good industrial relations) by an employer as a defence to unequal pay is not sustainable and there is no place for such an argument to constitute a material factor defence in the equal pay law jurisprudence;[145]

(x) It is submitted that the non-listing of collective agreements in regulation 7 of the Employment Equity Regulations is strengthened by its rejection as a ground of justification to pay discrimination in the United Kingdom equal pay law;[146]

(y) An Employment Tribunal should not allow itself to be influenced by the fact that the pay differential in question has its origin in a collective agreement;[147] and

(z) The Equal Pay Act required collective bargaining negotiators to pay attention to the fact that pay differentials can have a disparate impact on employees who belong to one gender. If the collective bargaining negotiators omitted to pay attention to this then where a group of employees' equal pay rights were breached then the negotiators omission/oversight would not be capable of objectively justifying the pay differential by relying on the resultant collective agreement.[148]

(aa) Regulation 7(1)-(2) of the Employment Equity Regulations does not list a job evaluation scheme as a ground of justification to an equal pay claim. It is submitted that this is a serious omission in regulation 7 for the following reasons: (i) it has been argued

---

[144] See paras 6.1.5 and 9.6 of Chapter 4 of this thesis.
[145] See paras 6.1.6 and 9.6 of Chapter 4 of this thesis.
[146] See paras 6.1.7.1 and 9.6 of Chapter 4 of this thesis.
[147] See paras 6.1.7.1 and 9.6 of Chapter 4 of this thesis.
[148] See paras 6.1.7.1 and 9.6 of Chapter 4 of this thesis.

under paragraphs 12 read with 13.11 of Chapter 2 of this thesis that an objective job evaluation system as mentioned in the Integration of Employment Equity Code and which is free from unfair discrimination in section 6(4) of the EEA and disproportionate income differentials will assist in complying with the aims of section 27 of the EEA and constitutes a measure which can be taken to progressively reduce unfair pay discrimination and disproportionate income differentials and should specifically be listed as such under section 27(3) of the EEA; (ii) to allow an employee to successfully challenge an objective job evaluation which is free from unfair discrimination in effect removes the status of such job evaluation as being a proactive measure to achieving equal pay and renders the causes of action in section 6(4) of the EEA and the taking of proactive measures as required by section 27(3) of the EEA internally incoherent which leads to legal uncertainty; and (iii) to allow this will result in employers not wanting to embark on job evaluation schemes which are objective if they are not allowed to rely on it to resist an equal pay claim which has the opposite effect of achieving equal pay by implementing proactive measures. Based on this, it is recommended that an objective job evaluation scheme which is free from unfair discrimination should specifically be listed under regulation 7 of the Employment Equity Regulations as a ground of justification to an equal pay claim and the following guidance extracted from *National Vulcan Engineering Insurance Group Ltd* should be stated under regulation 7 in relation to an objective job evaluation scheme:[149] (i) a grading scheme (job evaluation scheme) which operates according to the experience, skill and ability of employees forms an essential part of good business management provided that it is applied in a manner that is fair and genuine regardless of an employee's sex and such scheme should not be susceptible to a successful challenge under the Equal Pay Act (Equality Act); and (ii) to allow a successful challenge to a genuine and fair grading scheme (job evaluation scheme) which is free from unfair discrimination will have serious deleterious consequences for the employer because any lower paid female employee engaged in the same work would be able to successfully claim equal pay with the highest paid male employee and *vice versa* with the result that all employees would have to be paid at the rate of the highest paid employee.[150]

[149] See paras 6.1.8 and 9.6 of Chapter 4 of this thesis.
[150] See paras 6.1.8 and 9.6 of Chapter 4 of this thesis.

(bb) Regulation 7(1)-(2) of the Employment Equity Regulations does not list the reliance on the comparator being placed on a higher spinal point in terms of an incremental pay scale as a ground of justification to an equal pay claim. It is submitted that this is an omission because the use of an incremental pay scale in order to determine employees' pay is common in the workplace and it not being mentioned presents legal incoherence between its common usage in the workplace and its non-mentioning under regulation 7 of the Employment Equity Regulations. Based on this, it is recommended that the reliance on the comparator being placed on a higher spinal point in terms of an incremental pay scale should specifically be listed under regulation 7 of the Employment Equity Regulations as a ground of justification to an equal pay claim and the following guidance extracted from *Bowling* should be stated in regulation 7 in relation to the reliance on the comparator being placed on a higher spinal point in terms of an incremental pay scale:[151] (i) the nature of an incremental pay scale is that if an employee commences employment on a higher spinal point as opposed to his colleagues then his pay will be higher in each year as opposed to his colleagues until they reach the top of the spinal point; and (ii) a pay differential will thus be built in and if the original reason for the pay differential was not sex tainted then it follows that the pay differential in later years will also not be sex tainted.[152]

(cc) It is submitted that the non-listing of payments prescribed by law which gives rise to different pay for the claimants and comparators in respect of the same work, substantially the same work or work of equal value in regulation 7 of the Employment Equity Regulations and its absence in South African case law is strengthened by the United Kingdom equal pay law which states that the obligation by law to pay the prescribed wage is not enough on its own to constitute a material factor defence unrelated to sex as a finding as to whether or not it can constitute a valid defence can only be decided after a factual enquiry into same.[153]

---

[151] See paras 6.1.9 and 9.6 of Chapter 4 of this thesis.
[152] See paras 6.1.9 and 9.6 of Chapter 4 of this thesis.
[153] See paras 6.1.10 and 9.6 of Chapter 4 of this thesis.

(dd) It is submitted that whilst a genuine mistake is not listed under regulation 7 of the Employment Equity Regulations as a ground of justification it should not be listed under regulation 7 but it should rather have the potential to constitute such ground of justification by falling under regulation 7(1)(g) of the Employment Equity Regulations which relates to any other relevant factor that is not unfairly discriminatory in terms of section 6(1) of the EEA. It is further submitted that the reliance on a genuine mistake as a ground of justification under regulation 7(1)(g) of the Employment Equity Regulations will be subject to regulation 7(2) which is in accordance with *Tyldesley* and which will not require further justification where it is relied on provided that it does not give rise to indirect unfair pay discrimination as set out in regulation 7(2) of the Employment Equity Regulations. It is further submitted that the suggestion that a genuine mistake should not specifically be listed under regulation 7(1) as a ground of justification to an equal pay claim is because this does not seem to be a common ground of justification and an employer faced with an equal pay claim will not see this ground of justification being foreshadowed in regulation 7 which may lend credence to the genuineness of the raising of such ground of justification.[154]

(ee) Regulation 7(1)-(2) of the Employment Equity Regulations does not list the factors for assessing whether work is the same/substantially the same or of equal value as a ground of justification to an equal pay claim. It is submitted that this is an omission in regulation 7 because it will be legally incoherent if an employer is not allowed to rely on the fact that the claimant employee's work has been given a lesser value in terms of one of more factors for assessing her work and that is the reason why she is paid less than her comparator, in circumstances where regulation 6 of the Employment Equity Regulations specifically states that an assessment of the relevant factors for assessing whether work is the same/substantially the same or of equal value should be made. It is recommended that the factors for assessing whether work is the same/substantially the same or of equal value as set out in regulation 6 of the Employment Equity Regulations should specifically be listed as a ground of justification under regulation 7 of the Employment Equity Regulations. It is further recommended that the following principles

[154] See paras 6.1.11 and 9.6 of Chapter 4 of this thesis.

extracted from *Davies v McCartneys* should be mentioned under this ground of justification in regulation 7 of the Employment Equity Regulations: (i) the factors for assessing work can be used as a genuine material factor defence provided that it is genuine and the pay difference is due to such material factor which is not related to unfair discrimination; and (ii) an employer is not allowed to simply say that it values one demand factor so highly that it pays more because of it as it has to, in addition, show that it is genuine and the pay difference is due to such material factor which is not related to unfair discrimination.[155]

(ff) An employer may place greater emphasis on one factor for assessing the value of the work in question as opposed to other factors and then remunerate a comparator with the greater factor more than the equal pay claimant and this will amount to a material factor defence. It is submitted that this falls under regulation 7(1)(g) of the Employment Equity Regulations as any other relevant factor that is not unfairly discriminatory in terms of section 6(1) of the EEA and it is recommended that it should specifically be listed as a ground of justification under regulation 7.[156]

(gg) *Benveniste* makes it clear that an employer is allowed to rely on financial constraints as a material factor defence to an equal pay claim by an employee in circumstances where the maximum salary that it can pay the employee is below the salary that would have been offered to her if the financial constraints were absent and where the employee is aware of this. It also makes it clear that where the financial constraints ceases to exist then it no longer amounts to a ground of justification to an equal pay claim which is able to justify the lower salary paid to the claimant employee. Based on this, it is submitted that whilst financial constraints is not listed under regulation 7 of the Employment Equity Regulations as a ground of justification it should not be listed under regulation 7 but it should rather have the potential to constitute such ground of justification by falling under regulation 7(1)(g) of the Employment Equity Regulations which relates to any other relevant factor that is not unfairly discriminatory in terms of section 6(1) of the EEA. It is

---

155 See paras 6.1.12 and 9.6 of Chapter 4 of this thesis.
156 See paras 6.1.12 and 9.6 of Chapter 4 of this thesis.

further submitted that the reliance on financial constraints will only constitute a ground of justification to an equal pay claim for the period in which the financial constraints persist and ceases operating as such once the financial constraints come to an end. It is further submitted that the suggestion that financial constraints should not specifically be listed under regulation 7(1) as a ground of justification to an equal pay claim is because an employer faced with an equal pay claim will not see this ground of justification being foreshadowed in regulation 7 which may lend credence to the genuineness of the raising of such ground of justification.[157]

(hh) It is submitted that the non-listing of budgetary considerations, increased costs and the curtailing of public expenditure in regulation 7 of the Employment Equity Regulations and its absence in South African case law is strengthened by its rejection as a ground of justification to equal pay claims in international labour law coupled with the fact that increased costs to correct unfair pay discrimination is not clearly regarded as a ground of justification according to the United Kingdom equal pay principles set out in (i)-(ii) as follows:[158] (i) an employer cannot succeed in a genuine material factor defence by solely relying on a financial burden but it can argue the issue of financial burden together with other factors in order to successfully prove the genuine material factor defence;[159] and (ii) an employer is not allowed to automatically justify its failure to fully address pay discrimination by setting aside a certain amount of money to address it and then stating that the money is depleted.[160]

[157] See paras 6.1.13 and 9.6 of Chapter 4 of this thesis.
[158] See paras 6.1.14 and 9.6 of Chapter 4 of this thesis.
[159] See paras 6.1.14 and 9.6 of Chapter 4 of this thesis.
[160] See paras 6.1.14 and 9.6 of Chapter 4 of this thesis.

7. NON-STANDARD (ATYPICAL) EMPLOYEES

7.1 Temporary service employees

Section 198A(5) of the LRA provides specific protection for those temporary service employees who are deemed to be employees of the client employed on an indefinite basis subject to section 198B of the LRA and states that such employees *must be treated on the whole not less favourably* than employees of the client who perform the *same or similar work*. The LRA does not define or explain what is meant by the phrase "must be treated on the whole not less favourably". There is furthermore no guidance provided regarding what would constitute the *same* or *similar work* as referred to in section 198A(5). The issues raised here concerning the equal pay provision in section 198A(5) of the LRA are as follows: (a) What does the phrase *must be treated on the whole not less favourably* as referred to in section 198A(5) of the LRA mean?; (b) What will constitute work that is the *same* or *similar* for the purpose of section 198A(5) of the LRA? and (c) Any further lessons that can be learnt from international labour law and the United Kingdom equal pay law for the South African equal pay law relating to temporary service employees under section 198A of the LRA.[161]

7.1.1 South African law

The following submissions are made relating to the issue stated in (a) under paragraph 7.1 above:

There are two possible views based on South African law which could be argued based on the meaning to be accorded to the phrase *must be treated on the whole not less favourably* under section 198A(5) of the LRA. The *first argument* is that on the whole not less favourably under section 198A(5) of the LRA read with the Constitutional Court's remarks in *Assign Services* and the example of what would constitute treatment that is

[161] See para 6 of Chapter 1 and para 13.10.1 of Chapter 2 of this thesis.

on the whole not less favourably in clause 38 of the Memo is that the phrase means that the deemed employee must be given the *same terms and conditions* as the deemed employer's employees who are engaged in the same or similar work.[162]

The *second argument* based on taking the words "on the whole" under the phrase "on the whole not less favourably" in section 198A(5) of the LRA into account read with the dictionary meaning of the words "on the whole" and the limited guidance deduced from the use of the phrase *on the whole not less favourable* under section 197(3)(a) of the LRA is that the phrase *must be treated on the whole not less favourably* under section 198A(5) of the LRA does not oblige the deemed employer to provide the deemed employee with the same terms and conditions as its employees who are engaged in the same or similar work but allows the deemed employer to provide the deemed employee with, for example, a package, on condition, that the package does not result in treatment that is on the whole not less favourable as compared to the terms and conditions of employment enjoyed by those employees of the deemed employer who are engaged in the same or similar work.[163]

It is difficult to choose, by only having reference to South African law, which of the arguments are correct as they both can be substantiated and argued from a proper basis.[164]

The following submissions are made relating to the issue stated in (b) under paragraph 7.1 above:

Regulations 4(1)-(2) of the Employment Equity Regulations which defines what is meant by work that is the same and work that is substantially the same as referred to under the causes of action in section 6(4) of the EEA, equal pay for the same work and equal pay for substantially the same work read with the submissions made under paragraph 5.4 of

[162] See paras 11.1 and 13.10.1 of Chapter 2 of this thesis.
[163] See paras 11.1 and 13.10.1 of Chapter 2 of this thesis.
[164] See paras 11.1 and 13.10.1 of Chapter 2 of this thesis.

Chapter 2 of this thesis relating to the meaning to be accorded to the phrase "interchangeable" under the definition of the same work and the meaning to be accorded to the phrase "sufficiently similar" under the definition of work that is substantially the same under paragraph 5.5 of Chapter 2 of this thesis, should be followed when interpreting the same or similar work under section 198A(5) of the LRA.[165]

7.1.2 International labour law

The first issue on which guidance is sought is the interpretation of the phrase must be treated on the whole not less favourably as referred to in section 198A(5) of the LRA.

The deviation from the principle of equal/same treatment for temporary agency workers subject to them receiving overall protection/adequate protection under international labour law cannot assist the argument that the phrase "must be treated on the whole not less favourably" in section 198A(5) of the LRA can be interpreted to mean that an employer is allowed to provide the deemed employee with a package on condition that it does not result in treatment that is on the whole not less favourable because the deemed employee no longer works temporarily for the client, as is the case under international labour law, but is deemed to be the employee of the client on an indefinite basis and the temporary nature of the work is thus lost. The converse of this is that it supports the other argument put forth that the phrase "must be treated on the whole not less favourably" in section 198A(5) of the LRA can be interpreted to mean the *same terms and conditions of employment.*[166]

The following is stated with regard to the second matter relating to what will constitute work that is the same or similar for the purpose of section 198A(5) of the LRA. Whilst the EU Agency Directive is restricted to the same work or broadly similar work and this is the same position under section 198A(5) of the LRA, it is submitted that the guidance regarding how the same work or similar work issue should be approached under section

[165] See paras 11.1 and 13.10.1 of Chapter 2 of this thesis.
[166] See paras 7.1 and 9.7.1 of Chapter 3 of this thesis.

198A(5) of the LRA can be found in paragraphs 5.4-5.5 of Chapter 2 of this thesis as read with paragraph 4.4.1 of Chapter 3 of this thesis.[167]

No guidance could be extracted from international labour law for the research question stated in (c) under paragraph 7.1 above.[168]

7.1.3 United Kingdom equal pay law

The first issue on which guidance was provided by international labour law above, can also gain guidance from the United Kingdom, namely how should the phrase must be treated on the whole not less favourably as referred to in section 198A(5) of the LRA be interpreted.

It is submitted that the principle that the Agency Workers Regulations requires a term by term approach and not a package-based approach even though it applies to an agency worker who works temporarily as opposed to section 198A of the LRA which applies to an agency employee who is deemed to be employed on indefinite employment can still provide the following guidance. It supports the argument put forth that the phrase "must be treated on the whole not less favourably" in section 198A(5) of the LRA can be interpreted to mean the *same terms and conditions of employment* and supports a rejection of the other argument made that the phrase "must be treated on the whole not less favourably" in section 198A(5) of the LRA can be interpreted to mean that an employer is allowed to provide the deemed employee with a package on condition that it does not result in treatment that is on the whole not less favourable.[169]

On the second issue listed above, namely what will constitute work that is the same or similar for the purpose of section 198A(5) of the LRA, the following is important. Whilst the Agency Workers Regulations is restricted to the same work or broadly similar work as

[167] See paras 7.1 and 9.7.1 of Chapter 3 of this thesis.
[168] See paras 7.1 and 9.7.1 of Chapter 3 of this thesis.
[169] See paras 7.1 and 9.7.1 of Chapter 4 of this thesis.

is evident from regulation 5(4)(a)(i)-(ii) of the Agency Workers Regulations and this is the same position under section 198A(5) of the LRA, it is submitted that the guidance regarding how the same work or similar work issue should be approached under section 198A(5) of the LRA can be found in paragraphs 5.4-5.5 of Chapter 2 of this thesis as read with paragraph 4.4.1 of Chapter 4 of this thesis.[170]

No guidance could be extracted from the United Kingdom equal pay law for the research question relating to temporary service employees as stated in (c) under paragraph 7.1 above.[171]

7.2 Fixed-term contract employees

Section 198B(8)(a) of the LRA provides specific protection for employees employed in terms of a fixed-term contract for longer than three months and states that such employees "must not be treated less favourably" as compared to a permanent employee of the employer performing the same or similar work. The LRA does not define or explain what is meant by the phrase "must not be treated less favourably" neither does it provide guidance regarding what constitutes the *same* or *similar work* as referred to in section 198B(8)(a). The issues raised are as follows: (a) What does the phrase *must not be treated less favourably* as referred to in section 198B(8)(a) of the LRA mean?; (b) What will constitute work that is the *same* or *similar* for the purpose of section 198B(8)(a) of the LRA? The following question has arisen during the course of the discussion relating to fixed-term workers under section 198B of the LRA in paragraph 11.2 of Chapter 2 of this thesis and it relates to the issue raised in (a) above. Whether a fixed-term employee whose contract is deemed to be of an indefinite duration as contemplated in section 198B(5) of the LRA and a fixed-term employee whose contract is for a fixed-term which complies with section 198B must be provided with the same treatment as compared to a comparable permanent employee as contemplated in section 198B(8)(a) of the LRA; and

[170] See paras 7.1 and 9.7.1 of Chapter 4 of this thesis.
[171] See paras 7.1 and 9.7.1 of Chapter 4 of this thesis.

(c) Any further lessons that can be learnt from international labour law and the United Kingdom equal pay law for the South African equal pay law relating to fixed-term contract employees under section 198B of the LRA.[172]

7.2.1 South African law

With regard to the question on what does the phrase must not be treated less favourably as referred to in section 198B(8)(a) of the LRA mean, there is uncertainty whether the phrase must be interpreted to mean *treatment that is the same* or *treatment that is on the whole not less favourably*. There is further uncertainty regarding whether a fixed-term employee whose contract is deemed to be of an indefinite duration as contemplated in section 198B(5) of the LRA and a fixed-term employee whose contract is for a fixed-term which complies with section 198B must be provided with the same treatment as compared to a comparable permanent employee as contemplated in section 198B(8)(a) of the LRA. This could not be answered using South African law.[173]

The next question is, what will constitute work that is the same or similar for the purpose of section 198B(8)(a) of the LRA? Regulations 4(1)-(2) of the Employment Equity Regulations which defines what is meant by work that is the same and work that is substantially the same as referred to under the causes of action in section 6(4) of the EEA, equal pay for the same work and equal pay for substantially the same work read with the submissions made above under paragraph 5.4 of Chapter 2 of this thesis relating to the meaning to be accorded to the phrase “interchangeable” under the definition of the same work and the meaning to be accorded to the phrase “sufficiently similar” under the definition of work that is substantially the same under paragraph 5.5 of Chapter 2 of this thesis, should be followed when interpreting the same or similar work under section 198B(8)(a) of the LRA.[174]

[172] See para 6 of Chapter 1 and para 13.10.1 of Chapter 2 of this thesis.
[173] See paras 11.2 and 13.10.2 of Chapter 2 of this thesis.
[174] See paras 11.2 and 13.10.2 of Chapter 2 of this thesis.

7.2.2 International labour law

If guidance is sought from international labour law on how the phrase must not be treated less favourably should be interpreted, the following should be noted:

(a) The Framework Agreement will not be able to provide a direct answer to the part of the research questions as stated in (a) dealing with the treatment to be accorded to a fixed-term employee whose contract is deemed to be of an indefinite duration as contemplated in section 198B(5) of the LRA read with section 198B(8)(a) of the LRA because it only deals with the treatment to be accorded to fixed-term workers who are employed for a fixed-term and does not deal with a fixed-term worker who is deemed to be employed on an indefinite basis. This question could not be answered using international labour law;[175] and

(b) It is submitted that the phrase "must not be treated less favourably" in section 198B(8)(a) of the LRA should be interpreted to refer to treatment that is the same and treatment that is the same subject to the *pro rata temporis* principle insofar as fixed-term employees who are employed for a fixed term are concerned. It is further submitted that treatment that is the same will apply in the case of indivisible benefits where it cannot be granted *pro rata temporis* whereas treatment that is the same subject to the *pro rata temporis* principle will apply to divisible benefits which can be granted *pro rata temporis*. It is recommended that this should, however, be mentioned and explained in the Equal Pay Code with reference to the Code in this regard being specifically made under section 198B of the LRA.[176]

Whilst the Framework Agreement is restricted to the same/similar work and this is the same position under section 198B(8)(a) of the LRA, it is submitted that the guidance regarding how the same work or similar work issue should be approached under section 198B(8)(a) of the LRA, as called for in (b) under paragraph 7.2 above, can be found in

[175] See paras 7.2 and 9.7.2 of Chapter 3 of this thesis.
[176] See paras 7.2 and 9.7.2 of Chapter 3 of this thesis.

paragraphs 5.4-5.5 of Chapter 2 of this thesis as read with paragraph 4.4.1 of Chapter 3 of this thesis.[177]

The following further lesson can be learnt from international labour law. It should be mentioned, under section 198D of the LRA, that the temporary nature of the employment (fixed-term work) is not capable of constituting an objective ground (for different treatment) because to allow this will render the objectives of section 198B(8)(a) redundant.[178]

7.2.3 United Kingdom equal pay law

From the United Kingdom equal pay law, the following guidance has been extracted regarding the interpretation of the phrase *must not be treated less favourably*:

(a) The Fixed-term Employees Regulations only deals with the treatment to be accorded to fixed-term employees who are employed for a fixed-term and does not deal with a fixed-term employee who is deemed to be employed on an indefinite basis and it thus does not provide a direct answer to the part of the research questions as stated in (a) dealing with the treatment to be accorded to a fixed-term employee whose contract is deemed to be of an indefinite duration as contemplated in section 198B(5) of the LRA read with section 198B(8)(a) of the LRA. This question could not be answered using the United Kingdom equal pay law;[179] and

(b) It is submitted that the phrase “must not be treated less favourably” in section 198B(8)(a) of the LRA should be interpreted to refer to treatment that is the same and treatment that is the same subject to the *pro rata temporis* principle. It is further submitted that treatment that is the same will apply in the case of indivisible benefits as it cannot be granted *pro rata temporis* whereas treatment that is the same subject to the *pro rata*

[177] See paras 7.2 and 9.7.2 of Chapter 3 of this thesis.
[178] See paras 7.2 and 9.7.2 of Chapter 3 of this thesis.
[179] See paras 7.2 and 9.7.2 of Chapter 4 of this thesis.

temporis principle will apply to divisible benefits which can be granted *pro rata temporis*. It is recommended that this should, however, be mentioned and explained in the Equal Pay Code with reference to the Code in this regard being specifically made under section 198B of the LRA.[180]

To determine what will constitute work that is the *same* or *similar* for the purpose of section 198B(8)(a) of the LRA, the following is stated. Whilst the Fixed-term Employees Regulations is restricted to the same/similar work and this is the same position under section 198B(8)(a) of the LRA, it is submitted that the guidance regarding how the same work or similar work issue should be approached under section 198B(8)(a) of the LRA, as called for in (b) can be found in paragraphs 5.4-5.5 of Chapter 2 of this thesis as read with paragraph 4.4.1 of Chapter 4 of this thesis.[181]

Further lessons that could be gathered from the United Kingdom equal pay law are the following:

(a) It is submitted that the following instances of when less favourable treatment can occur as set out in the Fixed-term Guide provides invaluable guidance on this score for section 198B(8)(a) of the LRA and should be mentioned and explained in the Equal Pay Code with reference to the Code in this regard being specifically made under section 198B of the LRA: (a) when a fixed-term employee is not provided with a benefit be it contractual or non-contractual that a comparable permanent employee receives; (b) the fixed-term employee is offered a benefit on less favourable terms; (c) if the employer fails to do something for a fixed-term employee that is done for a permanent employee; (d) where the fixed-term employee is given less paid holidays than a comparable permanent employee; (e) where the contracts of the fixed-term employee and the comparable permanent employee are the same but the permanent employee is provided with extra benefits which are not provided to the fixed-term employee (for example a non-contractual

[180] See paras 7.2 and 9.7.2 of Chapter 4 of this thesis.
[181] See paras 7.2 and 9.7.2 of Chapter 4 of this thesis.

bonus); and (f) where training is accessible to permanent employees but not to fixed-term employees.[182]

(b) An employer may justify the less favourable treatment of the fixed-term employee regarding a term/s by showing that the package given to the fixed-term employee is on the whole at least as favourable as the terms enjoyed by the comparable permanent employee;[183]

(c) The package approach allows an employer to balance a less favourable term against a more favourable one on condition that it ensures that the fixed-term employee's overall employment package is not less favourable as compared to that of the comparable permanent employee;[184] and

(d) The allowance of an employer to rely on a package approach instead of a term by term approach is suitable in cases where the employer pays the fixed-term employee more, for instance a higher hourly rate, in order to reflect the fact that the fixed-term employee does not qualify for longer term benefits. The package approach means that the employer is not prohibited from paying higher up-front rewards to the fixed-term employee in return for reduced benefits elsewhere provided that the fixed-term employee's overall package is not less favourable. The value of the benefits should be assessed having regard to their objective monetary value and not the value which the employer or employee perceives them to have.[185]

It is submitted that the allowance of an employer to justify the less favourable treatment of the fixed-term employee regarding a term/s by relying on treatment that is on the whole not less favourable (the package approach) as compared to the terms enjoyed by the comparable permanent employee in the United Kingdom equal pay law should be used as a ground of justification to differential treatment of a fixed-term employee under section

[182] See paras 7.2 and 9.7.2 of Chapter 4 of this thesis.
[183] See paras 7.2 and 9.7.2 of Chapter 4 of this thesis.
[184] See paras 7.2 and 9.7.2 of Chapter 4 of this thesis.
[185] See paras 7.2 and 9.7.2 of Chapter 4 of this thesis.

198D of the LRA. It is submitted that the appropriateness of using this ground of justification is set out in the principles listed in (b)-(d) above. It is recommended that the principles listed in (b)-(d) above should be mentioned in the Equal Pay Code with reference thereto being made in section 198D of the LRA which deals with justifiable reasons (grounds of justification) that can be relied on for differential treatment.[186]

(e) Less favourable treatment will be objectively justified provided that the following is shown by the employer: (i) it is to achieve a legitimate objective; (ii) it is necessary to achieve that objective; and (iii) it is an appropriate means to achieve that objective;[187]

(f) An employer has to, on a case-by-case basis, consider whether the less favourable treatment in question is objectively justified;[188]

(g) If the cost to an employer of affording a benefit to a fixed-term employee is disproportionate to the benefit that the fixed-term employee would receive then different treatment may be objectively justified;[189] and

(h) An employer is allowed to try and objectively justify the less favourable treatment by relying on the differences between the job roles of the fixed-term employee and the comparable permanent employee even where the work performed is broadly similar and such differences may be able to justify the less favourable treatment.[190]

It is submitted that the principles listed in (e)-(f) provides general guidance for section 198D of the LRA. It is further submitted that the principles listed in (g)-(h) provides specific guidance for section 198D of the LRA and it is recommended that it should be mentioned in the Equal Pay Code with reference thereto being made in section 198D of the LRA.[191]

---

[186] See paras 7.2 and 9.7.2 of Chapter 4 of this thesis.
[187] See paras 7.2 and 9.7.2 of Chapter 4 of this thesis.
[188] See paras 7.2 and 9.7.2 of Chapter 4 of this thesis.
[189] See paras 7.2 and 9.7.2 of Chapter 4 of this thesis.
[190] See paras 7.2 and 9.7.2 of Chapter 4 of this thesis.
[191] See paras 7.2 and 9.7.2 of Chapter 4 of this thesis.

(i) It is submitted that the following three-stepped approach together with the guidance that progression from one step to the next step can only be made if the prior step has been met, provides valuable guidance for section 198B read with section 198D of the LRA: (i) the first step looks at whether the fixed-term employee and the comparable permanent employee are engaged in the same or broadly similar work; (ii) the second step looks at whether the less favourable treatment is on the ground that the fixed-term employee claimant is a fixed-term employee; and (iii) the third step looks at whether the less favourable treatment can be justified on objective grounds. It is recommended that this should be mentioned in the Equal Pay Code with reference thereto being made in section 198B of the LRA.[192]

7.2.4 Treatment of a fixed term employee whose contract is deemed to be of an indefinite duration versus a fixed-term employee whose contract is for a fixed-term

The following question, relating to whether a fixed-term employee whose contract is deemed to be of an indefinite duration as contemplated in section 198B(5) of the LRA and a fixed-term employee whose contract is for a fixed-term which complies with section 198B must be provided with the same treatment as compared to a comparable permanent employee as contemplated in section 198B(8)(a) of the LRA, as stated in (a) under paragraph 7.2 above could not be answered squarely from South African law, international labour law or the United Kingdom law and submissions relating to answering this question will thus be made here.

As a result of international labour law and the United Kingdom equal pay law relating to fixed-term workers only applying to fixed-term workers who are employed for a fixed-term term and not applying to fixed-term workers whose contracts are deemed to be of an indefinite duration,[193] the following is submitted. The closest guidance which can be gained for how a fixed-term employee whose contract is deemed to be of an indefinite duration should be treated, can be found in the arguments made under section 198A of

[192] See paras 7.2 and 9.7.2 of Chapter 4 of this thesis.
[193] See (a) under para 7.2.2 above and (a) under para 7.2.3 above.

the LRA as stated under paragraphs 7.1.2 and 7.1.3 above based on international labour law and the United Kingdom equal pay law relating to the treatment to be accorded to temporary service employees who are deemed to be employees of the client employed on an indefinite basis to the following effect. A temporary service employee who is deemed to be employed by the client on an indefinite basis must be given the same terms and conditions of employment as the deemed employer's employees who are engaged in the same or similar work. Based on this, it is submitted that a fixed-term employee whose contract is deemed to be of an indefinite duration as contemplated in section 198B(5) of the LRA must be provided with the same terms and conditions of employment under section 198B(8)(a) of the LRA as the employers' employees who are engaged in the same or similar work. It is further submitted that it is then self-evident that the application of the *pro rata temporis* principle and the package approach does not arise in the case of such employee. It is recommended that this should be explained in the Equal Pay Code with reference thereto being made in section 198B of the LRA.

7.3 Part-time employees

Section 198C(3)(a) of the LRA applies to part-time employees, subject to certain exceptions, and states that an employer "must treat a part-time employee on the whole not less favourably" as compared with a comparable full-time employee performing the same or similar work by taking the working hours of a part-time employee into account. The LRA does not define or explain what is meant by the phrase "must treat a part-time employee on the whole not less favourably" and neither does it explain how the working hours of the part-time employee should be taken into account when providing her with treatment that is *on the whole not less favourably*. The LRA, furthermore, does not explain what constitutes the *same* or *similar work* as referred to in section 198C(3)(a).[194] The issues raised concerning the equal pay provision in section 198C(3)(a) of the LRA are as follows: (a) What does the phrase *must treat a part-time employee on the whole not less favourably* as referred to in section 198C(3)(a) of the LRA mean?; (b) How should the

---

[194] See para 6 of Chapter 1 of this thesis.

working hours of the part-time employee be taken into account when providing her with treatment that is on the whole not less favourable; (c) What will constitute work that is the *same* or *similar* for the purpose of section 198C(3)(a) of the LRA? and (d) Any further lessons that can be learnt from international labour law and the United Kingdom equal pay law for the South African equal pay law relating to part-time employees under section 198C(3)(a) of the LRA.[195]

7.3.1 South African law

(a) With regard to the issue stated in (a) under paragraph 7.3 above no answer could be proffered, using South African law, as to what is meant by the phrase *must treat a part-time employee on the whole not less favourably*.[196]

(b) With regard to the issue in (b) under paragraph 7.3 above no explanation could be sourced from South African law regarding how the working hours of the part-time employee should be taken into account when providing her with treatment that is on the whole not less favourably.[197]

(c) With regard to the issue in (c) under paragraph 7.3 above, regulations 4(1)-(2) of the Employment Equity Regulations which defines what is meant by work that is the same and work that is substantially the same as referred to under the causes of action in section 6(4) of the EEA, equal pay for the same work and equal pay for substantially the same work read with the submissions made under paragraph 5.4 of Chapter 2 of this thesis relating to the meaning to be accorded to the phrase "interchangeable" under the definition of the same work and the meaning to be accorded to the phrase "sufficiently similar" under the definition of work that is substantially the same under paragraph 5.5 of Chapter 2 above, should be followed when interpreting the same or similar work under section 198C(3)(a) of the LRA.[198]

---

195 See paras 11.3 and 13.10.3 of Chapter 2 of this thesis.
196 See paras 11.3 and 13.10.3 of Chapter 2 of this thesis.
197 See paras 11.3 and 13.10.3 of Chapter 2 of this thesis.
198 See paras 11.3 and 13.10.3 of Chapter 2 of this thesis.

7.3.2 International labour law

When guidance is sought from international labour law on how to interpret the phrase must treat a part-time employee on the whole not less favourably as referred to in section 198C(3)(a) of the LRA and on how the working hours of the part-time employee should be taken into account when providing her with treatment that is on the whole not less favourable, the following is evident:

(a) A part-time employee is entitled to all forms of payment that a comparable permanent full-time employee is entitled to but the payment should be granted to the part-time employee in accordance with the *pro rata temporis* principle which requires the calculation of benefits proportionate to working time. It is submitted that the phrase "must treat a part-time employee on the whole not less favourably" in section 198C(3)(a) of the LRA read with the requirement under section 198C(3)(a) of the LRA to take the working hours of the part-time employee into account when providing her with such treatment should be interpreted to mean that a part-time employee is entitled to all forms of payment *pro rata temporis* to which a comparable permanent full-time employee is entitled to. It is recommended that section 198C(3)(a) of the LRA should be amended to reflect this clearly and an explanation should be provided in the Equal Pay Code;[199]

(b) It must be made clear in section 198C(3)(a) of the LRA that the *pro rata temporis* principle only applies to divisible benefits (benefits that are capable of being divided) and does not apply to indivisible benefits (benefits that are not capable of being divided). This means that an employer complies with the equal treatment of a part-time employee where it provides her with divisible benefits on a *pro rata* basis according to the *pro rata temporis* principle and in the case of indivisible benefits provides her with (access to) such benefits.[200] A part-time employee is thus entitled to access the facilities of the establishment (workplace), and this constitutes treatment that is on the whole not less

[199] See paras 7.3.1 and 9.7.3 of Chapter 3 of this thesis.
[200] See paras 7.3.2 and 9.7.3 of Chapter 3 of this thesis.

favourable as is required by section 198C(3)(a) of the LRA.[201] It is recommended that section 198C(3)(a) of the LRA should be amended to reflect this clearly and an explanation should be provided in the Equal Pay Code; and

(c) Part-time employees are entitled to have the same scheme (for example relating to pay/benefits) that applies to comparable full-time employees apply to them proportional to their working time (*pro rata temporis*). Such reduction is objectively justified, inherently, because the reduced pay/benefit is consideration given for less work. There is nothing in the EU law which prohibits pay/benefits from being proportionately calculated (*pro rata temporis*) in the case of part-time employment. It is recommended that this should specifically be mentioned in the Equal Pay Code in relation to section 198C(3)(a) of the LRA.[202]

The following is mentioned in relation to work that is the *same* or *similar*. Whilst the Part-time Convention is restricted to the same or similar work and this is the same position under section 198C(3)(a) of the LRA, it is submitted that the guidance regarding how the same work or similar work issue should be approached under section 198C(3)(a) of the LRA can be found in paragraphs 5.4-5.5 of Chapter 2 of this thesis as read with paragraph 4.4.1 of Chapter 3 of this thesis.[203]

The following further lessons from international labour law are also important:

(a) International labour law entitles a part-time employee to be provided with the same terms and conditions of employment *in proportion* to their working hours, where this is applicable, and to this extent the reference to treatment that is on the whole not less favourable in section 198C(3)(a) does not reflect the purpose of the section which is to provide a part-time employee with the same terms and conditions of employment as a comparable permanent full-time employee taking the part-time worker's hours of work

[201] See paras 7.3.1 and 9.7.3 of Chapter 3 of this thesis.
[202] See paras 7.3.2 and 9.7.3 of Chapter 3 of this thesis.
[203] See paras 7.3.1 and 9.7.3 of Chapter 3 of this thesis.

into account (*pro rata temporis*) where this is applicable. It is submitted that section 198C(3)(a) of the LRA should be amended to reflect this and reference to treatment that is on the whole not less favourable should accordingly be removed;[204]

(b) The exclusion of part-time employees from pay/benefits that are received by full-time employees infringes the equal pay principle unless it can be justified on objective grounds unrelated to discrimination. Based on this, it is submitted that it should be mentioned in the Equal Pay Code in relation to section 198C(3)(a) of the LRA that an employer is not allowed to exclude a part-time employee from any form of pay/benefits received by a comparable full-time employee engaged in the same/similar work unless there is a justifiable reason for doing so in accordance with section 198D(2) of the LRA;[205] and

(c) A collective agreement which excludes part-time employees from pay/benefits provided to comparable full-time employees infringes the equal pay principle unless the difference in treatment can be justified by objective factors which are not related to discrimination. It is recommended that this should specifically be mentioned in the Equal Pay Code in relation to section 198C(3)(a) of the LRA.[206]

7.3.3 United Kingdom equal pay law

The United Kingdom equal pay law principles give guidance on the interpretation of the phrase *must treat a part-time employee on the whole not less favourably* and on how the working hours of the part-time employee should be taken into account when providing her with treatment that is on the whole not less favourable.

A part-time worker is entitled to all forms of payment and benefits that a comparable permanent employee is entitled to but the payment should be granted to the part-time employee in accordance with the *pro rata* principle which is essentially the *pro rata*

[204] See paras 7.3.1 and 9.7.3 of Chapter 3 of this thesis.
[205] See paras 7.3.2 and 9.7.3 of Chapter 3 of this thesis.
[206] See paras 7.3.2 and 9.7.3 of Chapter 3 of this thesis.

temporis principle and which requires the calculation of benefits proportionate to working time. It is submitted that the phrase "must treat a part-time employee on the whole not less favourably" in section 198C(3)(a) of the LRA read with the requirement under section 198C(3)(a) of the LRA to take the working hours of the part-time employee into account when providing her with such treatment should be interpreted to mean that a part-time employee is entitled to all forms of payment *pro rata temporis* to which a comparable permanent full-time employee is entitled to. It is recommended that section 198C(3)(a) of the LRA should be amended to reflect this clearly and an explanation should be provided in the Equal Pay Code.[207]

The following is mentioned regarding the *same* or *similar* work. Whilst the Part-time Workers Regulations is restricted to the same or similar work and this is the same position under section 198C(3)(a) of the LRA, it is submitted that the guidance regarding how the same work or similar work issue should be approached under section 198C(3)(a) of the LRA, can be found in paragraphs 5.4-5.5 of Chapter 2 of this thesis as read with paragraph 4.4.1 of Chapter 4 of this thesis.[208]

The following further lessons can be gathered from the United Kingdom equal pay:

(a) The *pro rata* principle entitles a part-time employee to be provided with the same terms and conditions of employment *in proportion* to their working hours, where this is applicable, and to this extent the reference to treatment that is on the whole not less favourable in section 198C(3)(a) of the LRA does not reflect the purpose of the section which is to provide a part-time employee with the same terms and conditions of employment as a comparable permanent employee taking the part-time workers hours of work into account (*pro rata temporis*) where this is applicable. It is recommended that section 198C(3)(a) of the LRA should be amended to reflect this and reference to treatment that is on the whole not less favourable should accordingly be removed;[209]

[207] See paras 7.3 and 9.7.3 of Chapter 4 of this thesis.
[208] See paras 7.3 and 9.7.3 of Chapter 4 of this thesis.
[209] See paras 7.3 and 9.7.3 of Chapter 4 of this thesis.

(b) The guidance under the United Kingdom equal pay law relating to a part-time worker not being required to prove that her part-time status is the sole reason for the less favourable treatment and only being required to show that her part-time status is one of the reasons for the less favourable treatment in the sense that it is the predominant and effective cause of such treatment is a principle that is not unknown in South African discrimination law but should be stated in the Equal Pay Code with reference thereto being made in section 198C of the LRA for the sake of completeness;[210]

(c) Less favourable treatment is capable of being justified on objective grounds if the following can be shown: (i) the less favourable treatment seeks to achieve a legitimate objective such as a genuine business objective; (ii) the less favourable treatment is necessary in order to achieve that objective; and (iii) the less favourable treatment is an appropriate manner in order to achieve the objective.[211] It is submitted that this principle provides general guidance for section 198D of the LRA; and

(d) An employer will not be allowed to justify less favourable treatment on the sole basis that the elimination thereof will involve increased costs as the saving or avoidance of costs, on its own without more, will not amount to the achieving of a legitimate aim.[212]

It is submitted that the principle listed in (d) provides specific guidance for section 198D of the LRA and it is recommended that it should be mentioned in the Equal Pay Code with reference thereto being made in section 198D of the LRA.

(e) It is submitted that the principle relating to an employer not being able to rely on a package approach to justify less favourable treatment of a part-time worker under the Part-time Workers Regulations should not be incorporated into section 198D of the LRA for the following reasons. There might be instances where an employer may be justified in using the package approach with regard to the less favourable treatment of a part-time

[210] See paras 7.3 and 9.7.3 of Chapter 4 of this thesis.
[211] See paras 7.3 and 9.7.3 of Chapter 4 of this thesis.
[212] See paras 7.3 and 9.7.3 of Chapter 4 of this thesis.

employee such as its use in relation to fixed-term workers as discussed under paragraph 7.2 of Chapter 4 of this thesis where for example an employer pays a fixed-term employee a higher hourly rate, in order to reflect the fact that the fixed-term employee does not qualify for longer term benefits. The inclusion of the package approach (together with its rules) as a ground of justification in relation to less favourable treatment of fixed-term employees under section 198D of the LRA has been argued for under paragraph 7.2 of Chapter 4 of this thesis and there is thus no reason why it should not be used in relation to part-time employees. It is further submitted that the allowance of an employer to justify the less favourable treatment of the fixed-term employee regarding a term/s by relying on treatment that is on the whole not less favourable (the package approach) as compared to the terms enjoyed by the comparable permanent employee in the United Kingdom equal pay law should be used as a ground of justification to differential treatment of a part-time employee under section 198D of the LRA. It is further submitted that the appropriateness of using this ground of justification as set out in the principles listed in (a)-(c) under paragraph 7.2 of Chapter 4 of this thesis applies *mutatis mutandis* in relation to part-time employees under section 198D of the LRA.[213] It is recommended that this should specifically be mentioned in the Equal Pay Code;

(f) In determining whether the less favourable treatment of the part-time employee is solely because she is a part-time worker, the intention of the employer must be examined. In examining the intention of the employer, it is legitimate to consider hypothetical scenarios with the aim of testing the true intention of the employer. It is submitted that this provides valuable guidance for the Labour Court (including the CCMA) when they deal with this issue under section 198D of the LRA and it is recommended that this guidance should be mentioned in the Equal Pay Code with reference thereto being made under section 198D of the LRA.[214]

(g) Whilst the following approach relating to what a part-time employee needs to show and what an employer needs to show under the Part-time Workers Regulations seems

213 See paras 7.3 and 9.7.3 of Chapter 4 of this thesis.
214 See paras 7.3 and 9.7.3 of Chapter 4 of this thesis.

obvious, it is submitted that the approach provides valuable guidance for section 198C read with section 198D of the LRA: (i) it is for the claimant part-time worker to choose a comparable full-time worker, show less favourable treatment and satisfy the Tribunal that the less favourable treatment is on the ground that the claimant is a part-time worker; and (ii) once this has been shown, the onus shifts to the employer to show that there is an objectively justifiable reason for the less favourable treatment. It is recommended that this should be mentioned in the Equal Pay Code with reference thereto being made in section 198C of the LRA;[215] and

(h) The statement by Lockton relating to the Part-time Workers Regulations providing a quick and speedy remedy available to part-time workers who suffer less favourable treatment provides guidance for equal pay relating to certain part-time employees under section 198C of the LRA and it is recommended that it should accordingly be mentioned in the Equal Pay Code with reference thereto being made in section 198C of the LRA.[216]

8. SECTION 27 OF THE EEA

The following questions raised concerning section 27 of the EEA are as follows:

(a) What other measures can be taken in terms of section 27(3) of the EEA, in order to progressively reduce disproportionate income differentials or unfair discrimination in terms of section 6(4) of the EEA, besides those measures specifically listed in section 27(3) of the EEA?;

(b) Where can a designated employer find guidance relating to measures that must be taken to progressively reduce disproportionate income differentials or unfair discrimination in terms of section 6(4) of the EEA?;

[215] See paras 7.3 and 9.7.3 of Chapter 4 of this thesis.
[216] See paras 7.3 and 9.7.3 of Chapter 4 of this thesis.

(c) Whether an employer is allowed to progressively reduce pay differentials as contemplated in section 27(2) of the EEA by reducing the pay of the higher paid employees in question in order to bring it in line with that of the lower paid employees (downward equalisation) or whether it is confined to only do so by increasing the pay of the lower paid employers to the rate enjoyed by the higher paid employees (upward equalisation); and

(d) Can a court order an employer to correct unfair pay discrimination over a certain period of time which will amount to the progressive realisation of the right to equal pay where it finds that an employer has committed unfair pay discrimination in terms of section 6(4) of the EEA but is unable to immediately correct the unfair pay discrimination?[217]

8.1 South African law

With regard to the issue stated in (a) under paragraph 8 above about progressively reducing disproportionate income differentials or unfair discrimination, the submissions relating thereto are as follows: (i) an equal terms and conditions audit taken together with an equal pay audit as provided for in the Integration of Employment Equity Code falls within the ambit of section 27(3) of the EEA as a measure which may be taken by an employer to progressively reduce unfair pay discrimination or disproportionate income differentials and it is recommended that this should specifically be listed under section 27(3) of the EEA as such a measure; and (ii) an objective job evaluation system as mentioned in the Integration of Employment Equity Code and which is free from unfair discrimination in section 6(4) of the EEA and disproportionate income differentials will assist in complying with the aims of section 27 of the EEA and constitutes a measure which can be taken to progressively reduce unfair pay discrimination and disproportionate income differentials and it is recommended that it should specifically be listed as such under section 27(3) of the EEA.[218]

---

[217] See para 7 of Chapter 1 and paras 12 and 13 of Chapter 2 of this thesis.
[218] See paras 12 and 13.11 of Chapter 2 of this thesis.

With regard to the issue stated in (b) under paragraph 8 above namely where a designated employer can find guidance relating to measures that must be taken to progressively reduce disproportionate income differentials or unfair discrimination, the submissions relating thereto are as follows: (i) it should specifically be stated in section 27 of the EEA that guidance for employers to reduce disproportionate income differentials or unfair discrimination in terms of section 6(4) of the EEA is provided for in the Integration of Employment Equity Code in the form of conducting equal terms and conditions audits and equal pay audits and how to go about doing this; and (ii) it should also specifically be stated in section 27 of the EEA that guidance relating to how an employer should go about conducting an objective job evaluation is provided for in the Equal Pay Code. No guidance is provided from domestic law regarding how an employer should go about reducing disproportionate income differentials and/or unfair pay discrimination by means of collective bargaining.[219]

With regard to the issue stated in (c) under paragraph 8 above namely whether an employer may close the pay gap by progressively reducing the pay of higher paid employees or whether it is confined to only increasing the pay of the lower paid employees, the submissions relating thereto are as follows: (i) it should specifically be stated in section 27 of the EEA that an employer is not allowed to address pay differentials contemplated in section 27(2) of the EEA by reducing the pay of employees (downward equalisation); and (ii) the converse of this is that such employer is confined to address the pay differentials as contemplated in section 27(2) of the EEA by increasing the pay of employees (upward equalisation).[220]

Further lessons which can be taken from the discussion are, that a Court can order an employer to correct unfair pay discrimination over a certain period of time where it finds that it will not be practicable for the employer to do so immediately and this will amount to a court ordered form of the progressive realisation of the right to equal pay. The CCMA will also be able to make such an order where it has the power to entertain an unfair pay

[219] See paras 12 and 13.11 of Chapter 2 of this thesis.
[220] See paras 12 and 13.11 of Chapter 2 of this thesis.

discrimination claim in terms of section 6(4) of the EEA. It is recommended that the power to make such an order should specifically be stated in section 48 of the EEA which sets out the powers of a commissioner in arbitration proceedings and section 50(2) of the EEA which sets out the powers of the Labour Court, with reference to this being made in section 27 of the EEA.[221]

8.2 International labour law

As far as the progressive reduction of disproportionate income differentials or unfair discrimination are concerned, it is evident from international labour law that the mentioning of an objective job evaluation system as a proactive measure to equal pay strengthens the argument made in paragraphs 12 and 13.11 of Chapter 2 of this thesis to the effect that an objective job evaluation system should specifically be listed under section 27(3) of the EEA as a measure which can be taken to progressively reduce disproportionate income differentials and/or unfair discrimination in terms of section 6(4) of the EEA.[222]

International labour law can provide the following guidance for designated employers on measures that must be taken to progressively reduce disproportionate income differentials or unfair discrimination:

(a) It is submitted that a pay equity programme with all its steps as well as the establishment of a Pay Equity Committee is a comprehensive manner of ensuring equal pay in a proactive manner and to this end, it is recommended that it should be used in South African equal pay law and accordingly be mentioned in the Equal Pay Code where it deals with objective job evaluation systems as is discussed under paragraphs 12 and 13.11 of Chapter 2 of this thesis;[223] and

[221] See paras 12 and 13.11 of Chapter 2 of this thesis.
[222] See paras 8.1 and 9.8 of Chapter 3 of this thesis.
[223] See paras 8.1 and 9.8 of Chapter 3 of this thesis.

(b) The following guidance can be extracted from international labour law insofar as guidance is sought for collective bargaining as a measure to address unequal pay: (i) the principle of equal pay must be addressed/discussed in the collective bargaining process; (ii) employers and trade unions must respect the principle of equal treatment (equal pay) during collective negotiations; (iii) both employers and unions are responsible (have a shared responsibility) for the application of the equal pay principle; (iv) significant progress in implementing the principle of equal pay cannot be achieved without the active participation of both employers and employees (trade unions); (v) employers should provide training on equal pay issues including job evaluation methods (to those involved in the collective bargaining process); (vi) collective agreements can directly address pay inequalities through the adjustment of pay levels and this provides better monitoring and enforcement of the equal pay principle; and (vii) employers and trade unions must ensure that collective agreements do not contain provisions which are discriminatory in respect of terms and conditions of employment. It is submitted that this list provides valuable guidance on how to use collective bargaining to progressively reduce disproportionate income differentials and/or unfair discrimination as contemplated in section 27(3)(a) of the EEA. It is recommended that it is better placed for this list to be included in the Code of Good Practice: Collective Bargaining, Industrial Action and Picketing[224] under Part B thereof which deals with collective bargaining and for section 27(3) of the EEA to refer to this Code of Good Practice in relation to the list in order to provide guidance to employers on how to go about progressively reducing disproportionate income differentials and/or unfair discrimination by using collective bargaining as a measure to do so. It is further recommended that the last factor prohibiting collective agreements from containing provisions which are unfairly discriminatory in respect of terms and conditions of employment must specifically be mentioned in section 23 of the LRA which deals with the legal effect of collective agreements. In order to give this provision teeth in section 23 of the LRA, it should be stated that any provision in a collective agreement which is unfairly

[224] The Code of Good Practice: Collective Bargaining, Industrial Action and Picketing *GG* No 42121 of 19 December 2018.

discriminatory in respect of terms and conditions of employment shall be null and void (of no force and effect).[225]

May an employer, under international labour law, close the pay gap by progressively reducing the pay of higher paid employees or is it confined to only increasing the pay of the lower paid employees? An employer is not allowed under international labour law to address pay differentials by reducing the pay of employees (downward equalisation). Based on this, it is submitted that an employer is not allowed under section 27 of the EEA to progressively reduce pay differentials by reducing the pay of employees (downward equalisation) and is confined to reduce same by progressively increasing the pay of the underpaid employees to a point where equal pay is reached (upward equalisation). It is recommended that this should specifically be mentioned in section 27 of the EEA.[226]

As a further lesson taken from international labour law, it is submitted that the recognition under international labour law that there might be instances where an employer will not be able to correct unequal pay immediately and should then be allowed to correct same over a period of time strengthens the submission made in paragraphs 12 and 13.11 of Chapter 2 of this thesis that the progressive realisation of the right to equal pay is capable of featuring in a court order.[227]

8.3 United Kingdom equal pay law

The following guidance has been extracted in relation to the question as to how to progressively reduce disproportionate income differentials or unfair discrimination:

(a) It is submitted that the use of an equal pay audit as a proactive measure under the United Kingdom equal pay law strengthens the argument made in paragraph 12 read with paragraph 13.11 of Chapter 2 of this thesis to the effect that an equal terms and conditions

---

225 See paras 8.2 and 9.8 of Chapter 3 of this thesis.
226 See paras 8.1.8.1 and 9.8 of Chapter 3 of this thesis.
227 See paras 8.1.8 and 9.8 of Chapter 3 of this thesis.

audit taken together with an equal pay audit as provided for in the Integration of Employment Equity Code constitutes a measure which falls within section 27(3) of the EEA which may be taken by an employer to progressively reduce unfair pay discrimination or disproportionate income differentials and which should be listed as such;[228] and

(b) It is submitted that although a job evaluation study/scheme is not specifically mentioned as a proactive measure to achieving equal pay under the United Kingdom equal pay law it does amount to a proactive measure to equal pay and this is supported by it featuring under the second equal pay cause of action which is equal pay for work rated as equivalent and where it can be relied on as a material factor defence to an equal pay claim under section 69 of the Equality Act. It is further submitted that this strengthens the argument made in paragraph 12 read with paragraph 13.11 of Chapter 2 of this thesis to the effect that an objective job evaluation system as mentioned in the Integration of Employment Equity Code which is free from unfair discrimination in section 6(4) of the EEA and disproportionate income differentials constitutes a measure which falls within section 27(3) of the EEA which may be taken by an employer to progressively reduce unfair pay discrimination or disproportionate income differentials and which should be listed as such.[229]

The following guidance has been extracted in relation to the question as to where a designated employer can find guidance relating to measures that must be taken to progressively reduce disproportionate income differentials or unfair discrimination:

(a) While the Integration of Employment Equity Code provides guidance to employers on how to go about conducting an equal terms and conditions audit and an equal pay audit as argued for in paragraph 12 read with paragraph 13.11 of Chapter 2 of this thesis, it is submitted that the more detailed guidance relating to equal pay audits under the United Kingdom equal pay law can augment the guidance already contained in the Integration

[228] See paras 8.1 and 9.8 of Chapter 4 of this thesis.
[229] See paras 8 and 9.8 of Chapter 4 of this thesis.

of Employment Equity Code and to this end it is recommended that it should be mentioned in the Equal Pay Code in relation thereto;[230]

(b) The consideration of involving an outside expert in the equal pay audit process under the Equal Pay Statutory Code of Practice provides valuable guidance for the equal pay audit process as a proactive measure under South African equal pay law as discussed under paragraph 12 of Chapter 2 of this thesis and to this end it is recommended that it should be mentioned in the Equal Pay Code in relation thereto;[231] and

(c) The statement contained in the Equal Pay Statutory Code of Practice relating to a job evaluation system which has not properly been implemented or kept up to date being a common pay practice which poses a risk of potential non-compliance with an employer's equal pay obligations strengthens the argument made under paragraph 12 of Chapter 2 of this thesis to the effect that an objective job evaluation which is free from unfair discrimination in section 6(4) and disproportionate income differentials constitutes a measure which can be taken to progressively reduce unfair discrimination and disproportionate income differentials and should be listed as such under section 27(3) of the EEA.[232]

No guidance could be extracted from the United Kingdom equal pay law for the research question relating to whether an employer is allowed to address pay differentials by reducing the pay of employees (downward equalisation) as called for in paragraph 13.11 of Chapter 2 of this thesis as stated in (c).

The following further lessons and guidance can be extracted.

It is submitted that the Equal Pay Audit Regulations which empowers an Employment Tribunal to order an employer to carry out an equal pay audit amounts to the tribunal

[230] See paras 8.1 and 9.8 of Chapter 4 of this thesis.
[231] See paras 8.1 and 9.8 of Chapter 4 of this thesis.
[232] See paras 8.1 and 9.8 of Chapter 4 of this thesis.

ordering the employer to carry out a proactive measure and this power given to the tribunal indirectly strengthens the argument made under paragraph 12 of Chapter 2 of this thesis to the effect that the Labour Court (including the CCMA) should be empowered to order the progressive realisation of the right to equal pay where the employer is able to prove that it cannot immediately correct the unfair pay discrimination;[233] and

The principle listed in (c) under paragraph 6.1.14 of Chapter 4 of this thesis to the effect that if an employer seeks to rely on unaffordability as a ground of justification, then it has to adduce evidence explaining the costs involved as well as the financial context in order to place the Employment Tribunal in a position where it can make an informed decision, provides the following further guidance to the Labour Court (including the CCMA) considering ordering the progressive realisation of the right to equal pay. It is submitted that the principle should be adapted to read that if an employer seeks an indulgence to correct the unfair pay discrimination in question then it has to adduce evidence explaining the costs involved as well as the financial context in order to place the Labour Court (including the CCMA) in a position where it can make an informed decision as to how much time to afford the employer.[234]

The Equal Pay Audit Regulations which require an Employment Tribunal to order an employer to carry out an equal pay audit where it finds that an equal pay breach has been committed unless there are circumstances which do not warrant an equal pay audit to be ordered amounts to the Employment Tribunal being empowered to order an employer to embark on a proactive measure in order to ensure equal pay. This provides valuable guidance to the South African proactive equal pay measures featuring in a court order because this is not known in South African equal pay law. It is submitted that the Labour Court (including the CCMA) being empowered to order an employer to embark on a proactive measure in order to ensure equal pay in its organisation where it finds that an equal pay claimant has proved a case of unfair pay discrimination against such employer makes equal pay law effective as it forces an employer to correct other potential instances

[233] See paras 8.2 and 9.8 of Chapter 4 of this thesis.
[234] See paras 8.2 and 9.8 of Chapter 4 of this thesis.

of unfair pay discrimination. It is submitted that this type of court order will only be able to be made where the Labour Court finds that pay discrimination has been committed with the attendant relief being ordered in favour of the equal pay claimant and is thus an additional order which can be made and should not be made as a single order. It is further submitted that the power to make such an order should specifically be stated in section 48 of the EEA which sets out the powers of a commissioner in arbitration proceedings, where the CCMA has the power to entertain an unfair pay discrimination claim in terms of section 6(4) of the EEA, and in section 50(2) of the EEA which sets out the powers of the Labour Court with reference to this being mentioned in section 27 of the EEA with the condition as stated that it cannot be a single order but can only be a second order accompanying an order (finding) of unfair pay discrimination in favour of an equal pay claimant. It is lastly submitted that the Labour Court (including the CCMA) should decide which proactive measure should be ordered and should hear evidence and argument to this end. The Labour Court (including the CCMA) should furthermore play a supervisory role as to whether its order regarding the carrying out of the proactive measure has been complied with and where it has not then it should be given the additional power in terms of sections 48 and 50(2) of the EEA respectively, to order penalties against the employer.[235]

9. CONCLUSION

> "Unequal remuneration is a subtle chronic problem, which is difficult to overcome without a clear understanding of the concepts and the implications for the workplace and society in general, as well as the introduction of proactive measures."[236]

This quotation was used at the beginning of the thesis and is repeated here as a reminder of the subtle and chronic nature of unequal pay. It is hoped that this thesis has contributed towards providing a clearer (better) understanding of the equal pay law in South Africa including the proactive measures relating thereto.

---

[235] See paras 8.2 and 9.8 of Chapter 4 of this thesis.

[236] Preface to 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).

BIBLIOGRAPHY

Books

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).

Basson AC *et al The New Essential Labour Law Handbook* 6th edition (Labour Law Publications 2017).

Botha C *Statutory Interpretation: An Introduction for Students* 4th ed (Juta 2012).

Bowers J *A Practical Approach to Employment Law* 7ed (Oxford University Press 2005).

Bronstein A *International and Comparative Labour Law: Current challenges* (International Labour Organisation 2009).

Burrows N & Mair J *European Social Law* (John Wiley & Sons Ltd 1996).

Chen CW *Compliance and Compromise: The Jurisprudence of Gender Pay Equity* (Martinus Nijhoff Publishers Leiden, Boston 2011).

Claassen RD *Claassen's Dictionary of Legal Words and Phrases.*

Connolly M *Discrimination Law* 1ed (Sweet & Maxwell Ltd 2006).

Connolly M *Discrimination Law* 2ed (Sweet & Maxwell 2011).

Currie I and de Waal J *The Bill of Rights Handbook* 5th ed (Juta 2010).

Currie I & De Waal J *The Bill of Rights Handbook* 6th ed (Juta Cape Town 2013).

Davies ACL *EU Labour Law* (Edward Elgar Publishing 2012).

Duggan M *Equal Pay Law and Practice* (Jordan Publishing Limited 2009).

Du Toit D *et al Labour Relations Law: A Comprehensive Guide* 5th ed (LexisNexis Durban 2006).

Du Toit D *et al Labour Relations Law: A Comprehensive Guide* 6th ed (LexisNexis 2015).

Grogan *Workplace Law* 10th ed (Juta Cape Town 2009).

Hardy S *Labour Law and Industrial Relations in Great Britain* 3rd revised edition (Kluwer Law International 2007).

Hepple B *Equality: The Legal Framework* 2ed (Hart Publishing 2014).

Honeyball S *Honeyball & Bowers' Textbook on Employment Law* 11ed (Oxford University Press 2010).

Jacobs A & Zeijen H *European Labour Law and Social Policy* (Tilburg University Press 1993).

Kelly D, Hammer R, Hendy J & Denoncourt J *Business Law* 3ed (Routledge 2018).

Landau EC & Beigbeder Y *From ILO Standards to EU Law: The Case of Equality between Men and Women at Work* (Martinus Nijhoff Publishers 2008).

Lewis D, Sargeant M & Schwab B *Employment Law: The Essentials* 11ed (Chartered Institute of Personnel and Development 2011).

Lockton DJ *Employment Law* 9ed (Palgrave Macmillan 2014).

McCrudden C *Equality in Law between Men and Women in the European Community: United Kingdom* (European Commission, Martinus Nijhoff Publishers 1994).

Pitt G *Employment Law* 6ed (Sweet & Maxwell Limited 2007).

Riesenhuber K *European Union Law: A Systematic Exposition* (Intersentia Cambridge 2012).

Robinson RM *Access to Information* (LexisNexis 2016).

Romney D *Equal Pay: Law and Practice* (Oxford University Press 2018).

Schmidt CWH & Rademeyer H *Law of Evidence* (loose-leaf).

Smith I & Baker A *Smith & Wood's Employment Law* 10ed (Oxford University Press 2010).

Taylor S & Emir A *Employment Law: An Introduction* 3ed (Oxford University Press 2012).

Thusing G *European Labour Law* (Verlag C.H. Beck oHG 2013).

Valticos N and von Potobsky G *International Labour Law* 2nd ed (Kluwer Law and Taxation Publishers Deventer-Boston 1995).

van Niekerk A *et al Law@work* 5th ed (LexisNexis 2019).

Chapters in Books

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).

Benson E "European Union: Impact on UK Law" in *Tolley's Employment Law Service* (loose-leaf).

Benson E "Part-time Employment" in *Tolley's Employment Law Service* (loose-leaf).

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* 1st ed (Juta Cape Town 2009).

Dupper O & Garbers C "Employment Discrimination" in Thompson C & Benjamin P *South African Labour Law* (Juta Claremont loose-leaf 2002) Vol 2.

Hage J "Comparative Law as Method and the Method of Comparative Law" 37 at 47 in Adams M & Heirbaut D (eds) *The Method and Culture of Comparative Law: Essays in Honour of Mark Van Hoeke* (Hart Publishing 2014).

Landman A "Equal Pay for Equal Work or Work of Equal Value" in Dupper O *et al Essential Employment Discrimination Law* (Juta Claremont 2010).

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).

Leach D "Temporary Workers" in *Tolley's Employment Law Service* (loose-leaf).

Nag S "Equality of Terms" in *Tolley's Employment Law Service* (loose-leaf).

Napier BW "Division K – Equal Pay" in Smith I (gen editor) *Harvey on Industrial Relations and Employment Law* (loose-leaf).

Pollitt PL, Rocco G, Burnip V, Donaldson L & Beck S "Disclosing and Accessing Information" in *Tolley's Employment Law Service* (loose-leaf).

Smith I "Division AI – Agency Workers" in Smith I (gen editor) *Harvey on Industrial Relations and Employment Law* (loose-leaf).

Smith I "Division AI – Fixed-term Employees" in Smith I (gen editor) *Harvey on Industrial Relations and Employment Law* (loose-leaf).

Smith I "Division AI – Part-time Workers" in Smith I (gen editor) *Harvey on Industrial Relations and Employment Law* (loose-leaf).

Articles

Benjamin P "Decent Work and Non-standard Employees: Options for Legislative Reform in South Africa: A Discussion Document" (2010) 31 *ILJ* 845.

Burrows N & Robinson M "An Assessment of the Recast of Community Equality Laws" *European Law Journal* 2007 13(2) 186.

Campanella J "Some Light on Equal Pay" (1991) 12 *ILJ* 26.

Cohen T "Justifiable Discrimination – Time to Set the Parameters" (2000) 12 *SA Merc LJ* 255.

Corazza L "Hard Times for Hard Bans: Fixed-Term Work and So-Called Non-Regression Clauses in the Era of Flexicurity" *European Law Journal* 2011 17(3) 385.

Countouris N & Horton R "The Temporary Agency Work Directive: Another Broken Promise?" 2009 38(3) *ILJ* 329.

Ebrahim S "A Critical Analysis of the New Equal Pay Provisions Relating to Atypical Employees in Sections 198A-198D of the LRA: Important Lessons from the United Kingdom" *PER* 2017(20) 1.

Ebrahim S "Can the outcome of collective bargaining (collective agreements) justify an equal pay claim in terms of the EEA?" *THRHR* 2020(83) 514.

Ebrahim S "Equal pay in terms of the Employment Equity Act: Is geographical location a ground of discrimination or a ground justifying pay differentiation? *Duma v Minister of Correctional Services* [2016] ZALCCT 6" *THRHR* 2018(81) 134.

Ebrahim S "Equal Pay for Work of Equal Value in Terms of the Employment Equity Act 55 of 1998: Lessons from the International Labour Organisation and the United Kingdom" *PER* 2016(19).

Ebrahim S "Equal Pay in Terms of the Employment Equity Act: The Role of Seniority, Collective Agreements and Good Industrial Relations: *Pioneer Foods (Pty) Ltd v Workers against Regression* 2016 ZALCCT 14" *PER* 2017(20).

Ebrahim S "Reviewing the Suitability of Affirmative Action and the Inherent Requirements of the Job as Grounds of Justification to Equal Pay Claims in Terms Of the *Employment Equity Act* 55 of 1998" *PER* 2018(21).

Fredman S "Equal Pay and Justification" 1994 23(1) *ILJ* 37.

Fredman S "Reforming Equal Pay Laws" 2008 37(3) *ILJ* 193.

Hlongwane N “Commentary on South Africa’s Position regarding Equal Pay for Work of Equal Value” (2007) 11(1) *LDD* 69.

Jeffrey M “Not Really Going to Work? Of the Directive on Part-Time Work, 'Atypical Work' and Attempts to Regulate It” 1998 27(3) *ILJ* 193.

Jones EL “Temporary Agency Labour: Back to Square One?” 2002 31(2) *ILJ* 183.

Kok A “The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000: Proposals for Legislative Reform” (2008) 24 *SAJHR* 445.

Kahn-Freund O “On Uses and Misuses of Comparative Law” *The Modern Law Review* 1974 37(1) 1.

Kombos C and Hadjisolomou M “The Mechanisms Used by the ILO and the EU in Combating Employment Discrimination in Pay: Converging Divergence?” *Electronic Journal of Comparative Law* 11(2) 2007.

Landman A “The Anatomy of Disputes about Equal Pay for Equal Work” (2002) 14 *SA Merc LJ* 341.

McGregor M “Equal Remuneration for the Same Work or Work of Equal Value” (2011) 23(3) *SA Merc LJ* 488.

Meintjes-Van Der Walt L “Levelling the ‘Paying’ Fields” (1998) 19 *ILJ* 22.

Murray J “Normalising Temporary Work: The Proposed Directive on Fixed-Term Work” 1999 28(3) *ILJ* 269.

Pieterse M “Towards Comparable Worth? *Louw v Golden Arrow Bus Services*” (2001) 118(11) *SALJ* 9.

Plender R "Equal Pay for Men and Women: Two Recent Decisions of the European Court" *The American Journal of Comparative Law* 1982 30(4) 627.

Rautenbach C "The South African Constitutional Court's use of Foreign Precedent in matters of Religion: Without Fear or Favour?" *PER* 2015(18) 1546.

Traversa E "Protection of Part-time Workers in the Case Law of the Court of Justice of the European Communities" *International Journal of Comparative Labour Law* 2003 19(2) 219.

Zappala L "The Temporary Agency Workers' Directive: An Impossible Political Agreement?" (2003) 32 *ILJ* 310.

Case Law

South Africa

Assign Services (Pty) Limited v NUMSA & Others [2018] ZACC 22.

Bernstein v Bester NO (CCT23/95) [1996] ZACC 2.

Cape Metropolitan Council v Metro Inspection Services (Western Cape) CC 2001 (3) SA 1013 (SCA).

Company Secretary, ArcelorMittal South Africa Ltd v Vaal Environmental Justice Alliance 2015 (1) SA 515 (SCA).

Co-operative Worker Association & Another v Petroleum Oil and Gas Co-operative of SA [2007] 1 BLLR 55 (LC).

De Beers Industrial Diamond Division (Pty) Ltd v Ishizuka 1980 (2) SA 191 (T).

DM Sethole & 18 Others v Dr Kenneth Kaunda District Municipality [2017] ZALCJHB 484.

Duma v Minister of Correctional Services & Others [2016] ZALCCT 6.

Ex Parte Minister of Justice: re R v Jacobson & Levy 1931 AD 466.

Famous Brands Management Company v CCMA & Others [2016] ZALCJHB 290.

Fredericks and Others v MEC for Education and Training, Eastern Cape and Others 2002 (2) BCLR 113 (CC).

General Industries Workers Union of South Africa obo Mgedezi and others / Swissport SA (Pty) Ltd and Another [2019] 9 BALR 954 (CCMA).

Harksen v Lane NO & Others 1997 (11) BCLR 1489 (CC).

Heynsen v Armstrong Hydraulics (Pty) Ltd [2000] 12 BLLR 1444 (LC).

Hoffman v SA Airways 2001 (1) SA 1 (CC).

Jansen van Vuuren v South African Airways (Pty) Ltd & Another [2013] 10 BLLR 1004 (LC).

Jooste v Score Supermarket Trading (Pty) Ltd 1999 (2) SA 1 (CC).

Kroukam v SA Airlink [2005] 12 BLLR 1172 (LAC).

Larbi Odam & Others v Member of the Executive Council for Education (North-West Province) & Another 1997 (12) BCLR 1655 (CC).

Leonard Dingler Employee Representative Council v Leonard Dingler (Pty) Ltd (1998) *ILJ* 285 (LC).

Louw v Golden Arrows Bus Services (Pty) Ltd (2000) 21 *ILJ* 188 (LC).

Mangena v Fila (JS 343/05) [2009] ZALC 81.

Mdunjeni-Ncula v MEC, Department of Health & Another (PA10/2019) [2021] ZALAC 29.

MEC for Transport: KwaZulu-Natal and Others v Jele [2004] 12 BLLR 1238 (LAC).

M & G Media Ltd & Others v 2010 FIFA World Cup Organising Committee South Africa Ltd & Another 2011 (5) SA 163 (GSJ).

Minister of Correctional Services & Others v Duma [2017] ZALAC 78.

Minister of Health & Another v New Clicks South Africa (Pty) Ltd & Others 2006 (1) BCLR 1 (CC).

Mthembu v Claude Neon Lights (1992) 13 *ILJ* 422 (IC).

Mutale v Lorcom Twenty Two CC [2009] 3 BLLR 217 (LC).

NAPTOSA & Others v Minister of Education, Western Cape & Others 2001 (4) BCLR 388 (CPD).

National Union of Mineworkers of SA v Driveline Technologies 2002 (4) SA 645 (LAC).

National Union of Mineworkers v Henry Gould (Pty) Ltd (1988) 9 *ILJ* 1149 (IC).

Ndudula v Metrorail PRASA (C1012/2015) [2017] ZALCCT 12.

NEHAWU v UCT 2003 (2) BLLR 156 (CC).

New Way Motor & Diesel Engineering (Pty) Ltd v Marsland [2009] 12 BLLR 1181 (LAC).

Ntai & Others v SA Breweries Ltd (2001) 22 *ILJ* 214 (LC).

NUMSA & Others v Baderbop (Pty) Ltd & Another 2003 (3) SA 513 (CC).

Pioneer Foods (Pty) Ltd v Workers Against Regression 2016 ZALCCT 14.

President of the Republic of South Africa v Hugo 1997 (4) SA 1 (CC).

Prinsloo v Van der Linde & Another 1997 (3) SA 1012 (CC).

S v Makhubela 1981 (4) SA 210 (B).

S v Makwanyane 1995 (3) SA 391 (CC).

SA Chemical Workers Union & Others v Sentrachem (1988) 9 *ILJ* 410 (IC).

Sanderson v Attorney-General, Eastern Cape (CCT10/97) [1997] ZACC 18.

SANDU v Minister of Defence 1999 (6) BCLR 615 (CC).

SANDU v Minister of Defence & Others (CCT 65/06) [2007] ZACC 10.

Sentrachem Ltd v John NO & Others (1989) 10 *ILJ* 249 (WLD).

Shoprite Checkers (Pty) Ltd v Ramdaw 2001 (3) SA 68 (LC).

TGWU & Another v Bayete Security Holdings [1999] 4 BLLR 401 (LC).

Transvaal Consolidated Land and Exploration Co Ltd v Johannesburg City Council 1972 (1) SA 88 (W).

European Union

Abdoulaye v Regie nationale des usines Renault SA Case C-218/98, [1999] ECR I-5742 (ECJ).

Allonby v Accrington & Rossendale College Case C-256/01, [2004] IRLR 224 (ECJ).

Angestelltenbetriebsrat der Wiener Gebietskrankenkasse v Wiener Gebietskrankenkasse [1999] IRLR 804 (ECJ).

Arbeiterwohlfahrt der Stadt Berlin e. V. v Bötel Case C-360/90, [1992] ECR I-3589 (ECJ).

Barber v Guardian Royal Exchange Assurance Group Case C-262/88, [1990] ECR I-1944 (ECJ).

Bauer v Hamburg Case C-187/00, [2003] ECR I-2771 (ECJ).

Bestuur van het Algemeen Burgerlijk Pensioenfonds v Beune Case C-7/93, [1994] ECR I-4502 (ECJ).

Bilka-Kaufhaus GmbH v Weber von Hartz Case 170/84, [1986] ECR 1620 (ECJ), [1986] IRLR 317 (ECJ).

Birds Eye Walls Ltd v Roberts Case C-132/92, [1993] ECR I-5599 (ECJ).

Brunnhofer v Bank der osterreichischen Postsparkasse Case C-381/99, [2001] IRLR 571 (ECJ).

Cadman v Health & Safety Executive [2006] IRLR 969 (ECJ).

Chollet, née Bauduin v Commission of the European Communities Case 32/71, [1972] ECR 363 (ECJ).

Coloroll Pension Trustees Limited v Russell & Others Case C-200/91, [1994] IRLR 586 (ECJ).

Commission of the European Communities v Kingdom of Belgium Case C-173/91, [1993] ECR I-693 (ECJ).

Commission of the European Communities v United Kingdom Case 61/81, [1982] ECR 2602 (ECJ).

Defrenne v Sabena Case 43/75, [1976] ECR 456 (ECJ).

Del Cerro Alonso v Osakidetza-Servicio Vasco de Salud Case C-307/05, [2007] ECR I-7122 (ECJ).

Deutsche Telekom AG v Schröder Case C-50/96, [2000] ECR I-774 (ECJ).

Elsner-Lakeburg v Land Nordrhein-Westfalen Case C-285/02, [2005] IRLR 209 (ECJ).

Enderby v Frenchay Health Authority and Secretary of State for Health Case C-127/92, [1993] IRLR 591 (ECJ).

Garland v British Rail Engineering Ltd Case 12/81, [1982] ECR 360 (ECJ).

Gavieiro Gavieiro & Toress v Conselleria de Educacion e Ordenacion Universitaria de la Xunta de Galicia Joined Cases C-444/09 & C-456/09, [2010] ECR I-14035 (ECJ).

Gerster v Bayern Case C-1/95, [1997] ECR I-5274 (ECJ).

Gillespie v Northern Health and Social Services Boards Case C-342/93, [1996] ECR I-492 (ECJ).

Grant v South West Trains Case C-249/96, [1998] ECR I-636 (ECJ).

Griesmar v Ministre de L'Economie, des Finances et de L'Industrie Case C-366/99, [2001] ECR I-9413 (ECJ).

Gruber v Silhouette International Schmied GmbH & Co KG Case C-249/97, [1999] ECR I-5315 (ECJ).

Handels- og Kontorfunktionaerernes Forbund i Danmark v Dansk Arbejdsgiverforening acting on behalf of Danfoss A/S Case 109/88, [1989] ECR 3220 (ECJ).

Hill and Stapleton v Revenue Commissioners Case C-243/95, [1998] ECR I-3759 (ECJ).

Hlozek v Roche Austria Gesellschaft mbH Case C-19/02, [2004] ECR I-11523 (ECJ).

Impact v Minister for Agriculture and Food C-268/06, [2008] ECR I-2533 (ECJ).

Jämställdhetsombudsmannen v Örebro läns landsting [2000] IRLR 421 (ECJ).

Jorgenson v Foreningen af Speciallaeger, Sygesikringens Forhandlingsudvalg Case C-226/98, [2000] ECR I-2467 (ECJ).

Kruger v Kreiskrankenhaus Ebersberg Case C-281/97, [1999] ECR I-5141 (ECJ).

Kowalska v Freie und Hansestadt Hamburg Case C-33/89, [1990] ECR I-2607 (ECJ).

Kuratorium für Dialyse und Nierentransplantation e.V. v Lewark Case C-457/93, [1996] ECR I-260 (ECJ).

Kenny v Minister for Justice, Equality and Law Reform [2013] IRLR 463 (ECJ).

Lawrence and Others v Regent Office Care Ltd Case C-320/00, [2002] IRLR 822 (ECJ).

Lewen v Denda Case C-333/97, [1999] ECR I-7266 (ECJ).

Lommers v Minister van Landbouw, Natuurbeheer en Visserij Case C-476/99, [2002] ECR I-2921 (ECJ).

Lorenzo Martínez v Junta de Castilla y León Unpublished decisions, Case C-556/11.

Macarthys Ltd v Smith Case 129/79, [1980] ECR 1276 (ECJ).

Murphy v Bord Telecom Eireann [1988] IRLR 267 (ECJ).

Nikoloudi v Organismos Tilepikoinonion Ellados AE Case C-196/02, [2005] ECR I-1812 (ECJ).

Nimz v Freie und Hansestadt Hamburg [1991] IRLR 222 (ECJ), Case C-184/89, [1991] ECR I-297 (ECJ).

North Western Health Board v Mckenna Case C-191/03, [2005] IRLR 895 (ECJ).

Podesta v CRICA Case C-50/99, [2000] ECR I-4055 (ECJ).

Regina v Secretary of State for Employment, ex parte Seymour-Smith & Another Case C-167/97, [1999] ECR I-666 (ECJ).

Rinner-Kuhn v FWW Spezial-Gebaudereinigung GmbH Case 171/88, [1989] ECR (ECJ).

Roca Álvarez v Sesa Start España ETT SA Case C-104/09, [2010] ECR I-8677 (ECJ).

Rummler v Dato-Druck GmbH Case 237/85, [1986] ECR 2110 (ECJ).

Ruzius-Wilbrink v Bedrijfsvereniging Voor Overheidsdiensten Case C-102/88, [1989] ECR 4311 (ECJ).

Sabbatini-Bertoni v European Parliament Case 20/71, [1972] ECR 345 (ECJ).

Schonheit v Stadt Frankfurt am Main Joined Cases C-4/02 and C-5/02, [2003] ECR I-12607, [2004] IRLR 983 (ECJ).

Smith v Avdel Systems Ltd [1994] IRLR 616 (ECJ).

Specialarbejderforbundet i Danmark v Dansk Industri, acting for Royal Copenhagen [1995] IRLR 648 (ECJ).

Steinicke v Bundesanstalt fur Arbeit Case C-77/02, [2003] ECR I-9044 (ECJ).

Ten Oever v Stichting Bedrijfspensioenfonds voor het Glazenwassers-en Schoonmaakbedrijf Case C-109/91, [1993] ECR I-4939 (ECJ).

Worringham and Humphreys v Lloyds Bank Limited Case 69/80, [1981] ECR 768 (ECJ).

Zentralbetriebsrat der Landeskrankenhäuser Tirol v Land Tirol Case C-486/08, [2010] ECR I-3527 (ECJ).

United Kingdom

Advocate General For Scotland v Barton [2016] IRLR 210 (CS).

Ahmed v BBC Case No: 2206858/2018 (ET).

Ainsworth v Glass Tubes & Components Ltd [1977] IRLR 74 (EAT).

Albion Shipping Agency v Arnold [1981] IRLR 525 (EAT).

Allen v National Australia Group Europe Ltd [2004] IRLR 847 (EAT).

Arnold v Beecham Group Ltd [1982] IRLR 307 (EAT).

Asda Stores Ltd v Brierley [2019] IRLR 335 (CA).

Avon County Council v Foxall & Webb [1989] IRLR 435 (EAT).

Benveniste v University of Southampton [1989] IRLR 122 (CA).

British Airways Plc v Grundy (No.2) [2008] IRLR 815 (CA).

British Coal Corporation v Smith; North Yorkshire County Council v Rattcliffe [1994] IRLR 342 (CA).

British Coal Corporation v Smith & Others [1996] IRLR 404 (HL).

British Road Services Ltd v Loughran & Others [1997] IRLR 92 (NICA).

Bromley v H & J Quick Ltd [1988] IRLR 249 (CA).

Brooknight Guarding Limited v Matei UKEAT/0309/17/LA.

Bury Metropolitan Council v Hamilton [2011] IRLR 358 (EAT).

Council of the City of Sunderland v Brennan [2012] IRLR 507 (EWCA).

Coventry City Council v Nicholls [2009] IRLR 345 (EAT).

Cumbria County Council v Dow (No. 1) [2008] IRLR 91 (EAT).

City of Edinburgh Council v Wilkinson & Others [2012] IRLR 202 (Ct Sess).

Capper Pass Ltd v Lawton [1976] IRLR 366 (EAT).

Capper Pass Ltd v Allan [1980] IRLR 236 (EAT).

Calmac Ferries Ltd v Wallace [2014] EqLR 115 (EAT).

Cross v British Airways plc [2005] IRLR 423 (EAT).

Carl v University of Sheffield [2009] IRLR 616 (EAT).

Davies v McCartneys [1989] IRLR 43 (EAT).

De Brito v Standard Chartered Bank Ltd [1978] ICR 650 (EAT).

Degnan v Redcar & Cleveland Borough Council [2005] IRLR 615 (EWCA).

Department for Work and Pensions v Webley [2005] IRLR 288 (EWCA).

Dibro Ltd v Hore [1989] IRLR 129 (EAT).

Diocese of Hallam Trustee v Connaughton 1996 ICR 860 (EAT).

Dorothy Perkins Ltd v J Dance & Others [1977] IRLR 226 (EAT).

Dugdale v Kraft Foods Ltd [1976] IRLR 368 (EAT).

Eaton Ltd v J Nuttall [1977] IRLR 71 (EAT).

EC Greene & Others v Broxtowe District Council [1977] IRLR 34 (EAT).

E Coomes (Holdings) Ltd v Shields [1978] IRLR 263 (CA).

Electrolux Ltd v AM Hutchinson & Others [1976] IRLR 410 (EAT).

Engels v Ministry of Justice [2017] ICR (EAT).

England v Bromley London Borough Council 1977 ICR 1 (EAT).

Evesham v North Hertfordshire Health Authority and Secretary of State for Health [2000] IRLR 257 (CA).

Fearnon & Others v Smurfit Corrugated Cases (Lurgan) Ltd [2009] IRLR 132 (NICA).

Fletcher v Clay Cross (Quarry Services) Ltd [1978] IRLR 361 (CA).

Ford v R Weston (Chemists) Ltd 1977 12 ITR 369 (EAT).

Glasgow City Council v Marshall [2000] IRLR 272 (HL).

Glasgow City Council v Unison [2014] IRLR 532 (CS).

Hartlepool Borough Council v Llewellyn [2009] IRLR 796 (EAT).

Hasley v Fair Employment Agency [1989] IRLR 106 (NICA).

Hayward v Cammell Laird Shipbuilders Ltd [1988] IRLR 257 (HL).

Home Office v Bailey & Others [2005] IRLR 757 (EAT).

Hovell v Ashford & St Peter's Hospital NHS Trust [2009] IRLR 734 (CA).

Kocur v Angard Staffing Solutions Ltd & Another [2018] IRLR 388 (EAT).

Kocur & Another v Angard Staffing Solutions Ltd & Another [2021] IRLR 212 (EAT).

Kocur & Others v Angard Staffing Solutions Ltd & Another [2020] IRLR 732 (EAT).

Lawson v Britfish Ltd [1988] IRLR 53 (EAT).

Leverton v Clwyd County Council [1989] IRLR 28 (HL).

Lloyds Banking Group Pensions Trustees Ltd v Lloyds Banking Plc & Others [2018] EWHC 2839 (Ch).

London Underground Ltd v Amissah & Others [2019] IRLR 545 (CA).

Maidment & Hardacre v Cooper & Co (Birmingham) Ltd [1978] IRLR 462 (EAT).

Manchester College v Cocliff UKEAT/0035/10.

Matthews v Kent & Medway Towns Fire Authority [2006] IRLR 367 (HL).

McGregor & Others v General Municipal Boilermakers & Allied Trades Union [1987] ICR 505 (EAT).

McMenemy v Capita Business Services Ltd [2007] IRLR 400 (CS).

McNeil & Others v Revenue and Customs Commissioners [2018] IRLR 398 (EAT).

Methven & Musiolik v Cow Industrial Polymers Ltd [1980] IRLR 289 (CA).

Middlesbrough Borough Council v Surtees & Others [2007] IRLR 981 (EAT).

Moran & Others v Ideal Cleaning Services Ltd & Another [2014] IRLR 172 (EAT).

Morgan v Middlesborough Council [2005] EWCA Civ 1432 (CA).

National Coal Board v Sherwin [1978] IRLR 122 (EAT).

National Vulcan Engineering Insurance Group Ltd v Wade [1978] ICR 800 (CA).

Nelson v Carillion Services Ltd [2003] IRLR 428 (CA).

North v Dumfries & Galloway Council [2013] IRLR 737 (SC).

North Cumbria Acute Hospitals NHS Trust v Potter and Others [2009] IRLR 176 (EAT).

O'Brien & Others v Sim-Chem Ltd [1980] IRLR 373 (HL).

Outlook Supplies Ltd v Parry [1978] IRLR 12 (EAT).

Paterson & Others v London Borough of Islington & Others UKEAT/0347/03/DA (EAT).

Pickstone & Others (respondents) v Freemans PLC (appellants) [1988] IRLR 357 (HL).

Potter v North Cumbria Acute Hospitals NHS Trust [2009] IRLR 22 (EAT).

Pulham & Others v London Borough of Barking & Dagenham [2010] IRLR 184 (EAT).

R v Secretary of State for Social Services and Others Ex Parte Clarke and Others [1988] IRLR 22 (HC).

Rainey v Greater Glasgow Health Board [1987] IRLR 26 (HL).

Ratcliffe v North Yorkshire County Council [1995] IRLR 439 (HL).

Redcar & Cleveland Borough Council v Bainbridge & Others [2007] IRLR 91 (EAT).

Redcar & Cleveland Borough Council v Bainbridge [2007] IRLR 984 (CA).

Redcar & Cleveland Borough Council v Bainbridge (No. 2) [2008] IRLR 776 (EWCA).

Redland Roof Tiles v Harper [1977] ICR 349 (EAT).

Secretary of State for Justice v Bowling [2012] IRLR 382 (EAT).

Sharma v Manchester City Council [2008] IRLR 336 (EAT).

Skills Development Scotland v Buchanan [2011] EqLR 955 (EAT).

Snoxell v Vauxhall Motors Ltd [1977] IRLR 123 (EAT).

South Tyneside Metropolitan Borough Council v Anderson [2007] EWCA Civ 654.

Springboard Sunderland Trust v Robson [1992] IRLR 261 (EAT).

St Helens & Knowsley Hospitals NHS Trust v Brownbill and Others [2011] IRLR 815 (EWCA).

Tennants Textile Colours Limited v Todd [1988] NI 1 (CA).

Thomas v National Coal Board [1987] IRLR 451 (EAT).

Tyldesley v TML Plastics Ltd [1996] IRLR 395 (EAT).

United Biscuits Ltd v Young [1978] IRLR 15 (EAT).

Waddington v Leicester Council for Voluntary Services [1997] IRLR 32 (EAT).

Walker v Co-operative Group Limited & Another [2020] EWCA Civ 1075.

Walton Centre for Neurology and Neurosurgery NHS Trust v Bewley [2008] IRLR 588 (EAT).

Wilson v Health & Safety Executive [2010] IRLR 59 (EWCA).

Wood & Others v William Ball Ltd [1999] IRLR 773 (EAT).

Woodcock v Cumbria Primary Care Trust [2012] IRLR 491 (CA).

Legislation

South Africa

Basic Conditions of Employment Act 75 of 1997.

Constitution of the Republic of South Africa, 1996.

Employment Equity Act 55 of 1998.

Employment Equity Amendment Act 47 of 2013.

Interim Constitution 200 of 1993.

Labour Relations Act 66 of 1995.

Labour Relations Act 28 of 1956.

Labour Relations Amendment Act 6 of 2014.

Promotion of Access to Information Act 2 of 2000.

Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

Protection of Personal Information Act 4 of 2013.

United Kingdom

Equal Pay Act of 1970.

Equality Act of 2010.

European Union (Withdrawal) Act 2018.

European Union (Withdrawal Agreement) Act 2020.

Sex Discrimination Act of 1975.

ILO Conventions and Recommendations

Discrimination (Employment and Occupation) Convention No. 111 of 1958.

Discrimination (Employment and Occupation) Recommendation No. 111 of 1958.

Equal Remuneration Convention No. 100 of 1951.

Equal Remuneration Recommendation No. 90 of 1951.

Part-time Work Convention No. 175 of 1994.

Part-Time Work Recommendation No. 182 of 1994.

ILO and EU Materials

Achieving Equal Employment Opportunities for People with Disabilities through Legislation: Guidelines (ILO 2007).

Chicha M-T, Promoting Equity: Gender – Neutral Job Evaluation for Equal Pay: A Step by Step Guide (Geneva, International Labour Office 2008).

Equality at work: Tackling the challenges: Global Report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work, Report of the Director-General, International Labour Conference, 96th Session (ILO Geneva 2007).

European Commission, European network of legal experts in gender equality and non-discrimination, *National cases and good practices on equal pay* (Luxembourg: Publications Office of the European Union, 2019).

EU Memorandum on Equal Pay for Work of Equal Value (COM (94) 6 final Brussels, 23 June 1994).

EU Recommendation on Pay Transparency to strengthen the principle of equal pay between men and women through transparency of 7 March 2014 (2014/124/EU).

Foubert P *The Gender Pay Gap in Europe from a Legal Perspective* (European Commission 2010).

Fredman S *Making Equality Effective: The role of proactive measures* (European Commission Directorate-General for Employment, Social Affairs and Equal Opportunities, 2009).

Human Rights Social Charter Monograph – No.6 on the Conditions of Employment in the European Social Charter (Council of Europe Publishing 1999).

ILO Equal Remuneration General Survey by the Committee of Experts on the Application of Conventions and Recommendations (International Labour Conference, 72nd Session 1986; International Labour Office, Geneva).

Report from the Commission to the European Parliament, the Council and the European Economic and Social Committee: Report on the Implementation of Commission

Recommendation on Strengthening the Principle of Equal Pay between Men and Women through Transparency (Brussels 2017).

Report on the application of Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (European Commission 2013).

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).

Equal Pay: Overview of Landmark Case-Law of the Court of Justice of the European Union (Luxembourg: Publications Office of the European Union, 2019).

Time for Equality at Work: Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work (International Labour Conference 2003).

International and Regional Instruments

African Charter on Human and Peoples' Rights of 1986.

Consolidated versions of the Treaty on European Union and of the Treaty Establishing the European Community of 24 December 2002.

Consolidated version of the Treaty on the functioning of the European Union of 26 December 2012.

Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions.

Directive 97/80/EC of 15 December 1997 on the burden of proof in cases of discrimination based on sex.

Directive 2006/54/EC on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) of 5 July 2006.

Directive 2008/104/EC of the European Parliament and of the Council on temporary agency work.

European Council Directive Concerning the Framework Agreement on Part-time Work Council Directive 97/81/EC.

EU Fixed-term Work Council Directive 1999/70/EC.

SADC Protocol on Gender and Development of 2008 Directive 75/117/EEC of 10 February 1975 relating to the application of the principle of equal pay for men and women.

Treaty of Rome of 25 March 1957.

Bills, Memorandums, Regulations and Guides

Agency Workers Regulations Statutory Instrument No 93 of 2010.

BIS Guidance on the Agency Workers Regulations 2011.

Employment Equity Regulations, *GG* No 37873 of 1 August 2014.

Equality Act 2010: Explanatory Notes 8 April 2010.

Equality Act 2010 (Equal Pay Audits) Regulations 2014.

Equality Act 2010 (Gender Pay Gap Information) Regulations 2017.

European Union (Withdrawal) Act 2018 (Relevant Court) (Retained EU Case Law) Regulations 2020 (SI 2020/1525).

Fixed-term Employees (Prevention of Less Favourable Treatment) Regulations Statutory Instrument No 2034 of 2002.

Guidance Notes to the Part-time Workers Regulations.

Memorandum on Objects of Employment Equity Amendment Bill, *GG* No 35799 of 19 October 2012.

Part-time Workers (Prevention of Less Favourable Treatment) Regulations Statutory Instrument No 1551 of 2000.

Part-time Workers, the Law and Best Practice – A Detailed Guide for Employers and Part-timers.

The Fixed-term work – Guidance Note.

Codes of Practice and Reports

ACAS Asking and Responding to Questions of Discrimination in the Workplace - Guidance for Job Applicants, Employees, Employers and Others Asking Questions about Discrimination related to the Equality Act 2010.

Code of Good Practice: Collective Bargaining, Industrial Action and Picketing *GG* No 42121 of 19 December 2018.

Code of Good Practice on Equal Pay/Remuneration for Work of Equal Value, *GG* No 38837 of 1 June 2015.

Code of Good Practice on the Integration of Employment Equity into Human Resources Policies, Practices and Procedures *GG* No 27866 of 4 August 2005.

10th Commission for Employment Equity Annual Report 2009–2010.

Equal Pay Statutory Code of Practice to the Equality Act of 2010.

IDS Employment Law Guide: The Equality Act 2010 (Income Data Services Limited 2010).

The Guide on how to use the Promotion of Access to Information Act 2 of 2000.

Internet websites

https://www.gov.za/speeches/address-president-cyril-ramaphosa-108th-session-international-labour-conference-palais-des

https://dictionary.cambridge.org/dictionary/english/identical

https://dictionary.cambridge.org/dictionary/english/interchangeable

https://www.oxfordlearnersdictionaries.com/definition/english/sufficiently

https://dictionary.cambridge.org/dictionary/english/similar
https://www.justice.gov.za/about/sa-courts.html#:~:text=Labour%20Courts%20and%20Labour%20Appeal,such%20as%20unfair%20labour%20practices

https://www.collinsdictionary.com/dictionary/english/on-the-whole

https://training.itcilo.org/actrav_cdrom1/english/global/law/lablaw.htm

https://www.achpr.org/legalinstruments/detail?id=49

https://www.sadc.int/sites/default/files/2021-08/Protocol_on_Gender_and_Development_2008.pdf

https://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:102888

https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62011CO0556&from=EN

https://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:102651

https://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:102888

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/32121/11-949-agency-workers-regulations-guidance.pdf

https://webarchive.nationalarchives.gov.uk/ukgwa/20070603203105/http://www.dti.gov.uk/employment/employment-legislation/employment-guidance/page18475.html

https://webarchive.nationalarchives.gov.uk/ukgwa/+/berr.gov.uk/whatwedo/employment/employment-legislation/employment-guidance/page19479.html

https://www.legislation.gov.uk/uksi/2000/1551/note/made

https://www.gov.za/sites/default/files/gcis_document/201409/b31b-201217oct2013.pdf