

***A CRITICAL ANALYSIS OF SECTION 6(4) OF THE EMPLOYMENT
EQUITY ACT: IS IT LIKELY TO ACHIEVE ITS STATED
OBJECTIVES?***

by

**PRANISHA MAHARAJ
(MHRPRA014)**

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Supervisor: Professor Alan Rycroft

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Name: Pranisha Maharaj

Student number: MHRPRA014

Date: 10 February 2019

Signature:

Signed by candidate

ABSTRACT

This dissertation presents a critical analysis of section 6(4) of the Employment Equity Act 55 of 1998 (“EEA”) and seeks to address the question of whether it is likely to achieve its stated objective of giving effect to the constitutional right to equality. In conducting my analysis, I consider the concept of managerial prerogative and discuss what underlies the drive for substantive equality in order to determine why the issue of protection from discriminatory income disparities has been removed from the realm of an employer’s traditional prerogative. Next, I highlight the requirements for establishing a claim of discrimination in terms section 6(4) and the remedies available to a successful complainant. I then turn to highlight the limitations introduced by the statutorily prescribed comparator in section 6(4) before demonstrating that the regulated methodology for assessing the value of work and the factors for justifying a differentiation in terms and conditions of employment give significant deference to employer prerogative. My analysis proceeds to consider whether, following the introduction of section 6(4), an administrative body whose primary function is the conduct of formal investigation into discriminatory pay practices and the resolution of equal pay disputes ought to have been created. I ultimately conclude that section 6(4) of the EEA provides only a partial solution to the issue of discriminatory pay disparities in South Africa and is likely to have a limited effect in contributing to the achievement of the State’s objective of achieving substantive equality. In analysing section 6(4), I draw on the experience of the United Kingdom, the United States of America and Canada. While the socio-economic and political landscapes of these jurisdictions may not be apposite to the South African experience, these jurisdictions have a long legislative history in pay equality issues which assist in establishing a benchmark for South Africa.

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1. THEORETICAL BACKGROUND

1.1. Introduction

Unequal pay is said to be a ‘stubborn and universal problem’.¹

In the international law context, the right to equal remuneration has been acknowledged by the International Labour Organisation (“ILO”) since as early as 1919.² The introductory provisions of the ILO Constitution expressly recognise equal pay for equal work as a ‘key element of social justice’.³ This recognition precipitated the creation of the Equal Remuneration Convention (“Convention”),⁴ which largely centers on requiring equal pay for women and men performing work of equal value. Notably, the provisions of the Convention focused on the achievement of pay equity between men and women given that, at the time of its inception at the end of World War II, ‘differences in pay [between men and women was] one of the most obvious and measurable forms of discrimination’.

Notwithstanding the restrictive scope of this Convention, the Convention ‘was forward-looking at the time and is [considered] still particularly relevant’ given that it ‘allows for the means of application to evolve.’⁵

¹ Martin Oelz, Shauna Olney, Manuela Tomei *Equal pay: an introductory guide* (2013) International Labour Organisation, available at http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/--publ/documents/publication/wcms_216695.pdf (accessed on 22 June 2015).

² Article 427 of the Treaty of Versailles: ILO, Geneva, Official Bulletin, Vol. 1, April 1919 to August 1920.

³ Oelz, Olney & Tomei *op cit* (n1) at 3.

⁴ Equal Remuneration Convention, 1951 (No. 100).

⁵ Oelz, Olney & Tomei *op cit* (n1) at 3.

The provisions of this Convention come into force for any ratifying member twelve months after the date upon which its ratification has been registered with the Director-General of the International Labour Office.⁶ Pursuant to Article 2 of the Convention, each member is required to ‘promote and, insofar as is consistent with such methods, ensure the application to all workers of the principle of equal remuneration for men and women workers for work of equal value’. Member states are provided a sense of autonomy in determining the manner in which this principle may be applied and can elect between enacting national laws or regulations, establishing legal or recognised machinery for wage determination or a combination of these measures.⁷

In the South African context, ‘as a result of apartheid and other discriminatory laws and practices, there are disparities in employment, occupation and income’.⁸ By way of example, black people,⁹ women and people with disabilities historically held a smaller range of job roles which has resulted in ‘downward pressure on average wages in those occupations’ which is perpetuated by a ‘vicious cycle...justifying the continuation of lower pay’ for members of these groups.¹⁰ It is therefore unsurprising that since the advent of its constitutional democracy, South Africa ratified both the Convention¹¹ as well as Convention concerning Discrimination in respect of Employment and Occupation No 111 of

⁶ Article 6(3) of the Equal Remuneration Convention, 1951 (No.100).

⁷ Article 2 of Equal Remuneration Convention, 1951 (No.100).

⁸ Preamble to the Employment Equity Act 55 of 1998. Due cognisance of this context should be had when undertaking the comparative study proposed in chapter 3 of this dissertation.

⁹ As the term is understood in the context of section 1 of the Employment Equity Act 55 of 1998.

¹⁰ Oelz, Olney & Tomei op cit (n1) at 3.

¹¹ Ratified in 2000.

1958¹² which prohibits distinctions, exclusions or preferences made on various grounds, including sex, that have the effect of impairing equality of opportunity or treatment in employment or occupation.¹³

Although the Employment Equity Act¹⁴ (“EEA”) expressly acknowledges that the disparities referred to above must be addressed in order to *inter alia* ‘promote the constitutional right of equality’,¹⁵ until the enactment of the recent amendments¹⁶ to the EEA, South Africa did not have specific legislation addressing pay discrimination, although remedies to address discrepancies in pay ‘have been in place from at least 1981 when the concept of “unfair labour practice” came into being’.¹⁷ The 1981 unfair labour practice jurisdiction fell away upon the promulgation of the Labour Relations Act (“LRA”).¹⁸ Until the enactment of the EEA, the concept of a residual unfair labour practice under the LRA enabled the Labour Court to adjudicate pay discrimination claims.¹⁹

Thereafter, the promulgation of the EEA brought with it an express obligation on every employer to take steps to promote equal opportunity and eliminate unfair discrimination in any ‘employment policy or practice’, which is defined broadly to include ‘remuneration, employment benefits and terms and

¹² Ratified in 1997.

¹³ Nomagugu Hlongwane ‘Commentary on South Africa’s position regarding equal pay for work of equal value’ (2001) Volume 11(1) *Law, Democracy & Development Journal of the Faculty of Law, University of the Western Cape* 69 at 71.

¹⁴ Employment Equity Act 55 of 1998.

¹⁵ Preamble to the EEA. See also section 9 of the Constitution of the Republic of South Africa, 1996.

¹⁶ Employment Equity Amendment Act 47 of 2013.

¹⁷ Adolph A. Landman ‘The anatomy of disputes about equal pay for equal work’ (2002) 14 *SA Merc LJ* 341.

¹⁸ Labour Relations Act 66 of 1995.

¹⁹ Landman op cit (n17) at 342.

conditions of employment'.²⁰ While these provisions of the EEA made it possible for claimants to allege discrimination on the grounds of a disparity in pay for work of equal value, the premise that equal work should receive equal pay was 'not enshrined as principles of law in the EEA'.²¹

The lack of legislative provisions dealing expressly with pay discrimination was criticised by the ILO notwithstanding our Labour Courts ruling that pay discrimination is prohibited.²² Accordingly, section 6(4) of the EEA – which came into effect on 1 August 2014 – seeks to establish an explicit basis for equal pay claims and give effect to the constitutional protection of equality while achieving compliance with core international labour standards binding on South Africa.²³ In addition, section 27 of the EEA requires every designated employer²⁴ to take measures to progressively reduce income differentials or unfair discrimination by virtue of a difference in terms and conditions of employment as contemplated in section 6(4) if identified in any occupational level of its workforce.

This dissertation will limit its analysis to whether section 6(4) of the EEA – which is applicable to every employer in South Africa – and the regulations issued pursuant to section 6(5) of the EEA achieve the aforesaid objectives. Before doing so, however, it is apposite to examine the theories, processes and dynamics

²⁰ Section 5 of the EEA, as read with section 1.

²¹ Landman op cit (n17) at 342.

²² See Memorandum on objects of Employment Equity Amendment Bill, 2012 *Government Gazette* No. 35799 of 19 October 2012.

²³ Ibid.

²⁴ In the private sector, a "designated employer" is either (i) an employer who employs 50 or more employees; (ii) an employer who employs fewer than 50 employees, but has a total annual turnover that is equal to or above the applicable annual turnover of a small business in terms of Schedule 4 to the EEA; or (iii) an employer bound by a collective agreement in terms of section 23 or 31 of the LRA, which appoints it as a designated employer.

underpinning this legislative mechanism to regulate private employment relationships in an endeavour to reduce (and ultimately eradicate) discriminatory disparities in terms and conditions of employment.

Accordingly, the primary enquiry this chapter seeks to resolve is why the legislature deemed it necessary to intervene in private employment relationships by way of provisions of the EEA commonly known as the “equal pay” or “pay discrimination” provisions and, in so doing, has effectively removed the task of addressing income disparities within the workplace from an employer’s prerogative.²⁵ By considering the factors relied upon by employers to yield control over their workforce (which often fall short of a legal basis for the exercise of this authority) and the superior economic power wielded by employers to assert an entitlement to determine employees’ terms and conditions of employment, I will demonstrate that, if left to itself, there is unlikely to be an incentive for businesses to undermine their economic efficiency by acting fairly, altruistically or against the *status quo*.

This chapter will first consider the concept of managerial prerogative before turning to discuss what underlies the drive for substantive equality. Finally, this chapter will consider how and why the issue of protection from *inter alia* discriminatory income disparities has been removed from the realm of an employer’s traditional prerogative.

²⁵ The term “employer prerogative” and “managerial prerogative” are used interchangeably in this dissertation as they are both common parlance for the discretionary authority and control exercised by employers over their employees.

1.2. The meaning of and justification for managerial prerogative

The term “prerogative” is commonly understood to relate to the ‘discretionary authority’²⁶ held by a particular institution, group or persons and the concomitant rights and privileges flowing from this authority.²⁷ In the context of labour relations, managerial or employer prerogative relates to an employer’s right to make ‘decisions in furtherance of operational objectives and to determine how these objectives will be executed’.²⁸ This right or privilege is closely related to an employer’s ‘ability to control the activities of employees in the workplace’.²⁹

Although South African labour courts acknowledge that some form of prerogative must be exercised within the workplace in order to ‘co-ordinate the skills, effort and activities’ of an organisation’s so-called “human capital” to achieve its *inter alia* commercial objectives,³⁰ its departure point is often that there is a legitimate legal basis for the exercise of this right or privilege and its critique is limited to whether the exercise of this authority is proportional and rational to the objectives sought to be achieved. But what are the legal bases or justifications for the exercise of this control?

In his book *Managerial Prerogative and the Question of Control*,³¹ John Storey suggests that the justification for an employer’s ability to exercise a

²⁶ See *Sachs v Donges*, NO 1950 (2) SA 265 (A) at 275, albeit it in the context of discussing executive authority.

²⁷ EML Strydom ‘The origin, nature and ambit of employer prerogative (part 1)’ (1991) 11 *SA Merc LJ* 40 at 41.

²⁸ CR Shooter ‘Managerial prerogative: a cosseted preserve of our labour system or a fool’s safe haven?’ (2010) *SA Merc LJ* 22 at 532.

²⁹ Strydom op cit (n27) at 42.

³⁰ Strydom op cit (n27) at 43. *SATAWU v Old Mutual Life Assurance Company South Africa Ltd and Another* [2005] 4 BLLR 378 (LC) at para 85.

³¹ John Storey *Managerial prerogative and the question of control* (2015) e-book version.

discretionary right or privilege to control and manage rests on four pillars, namely (i) the ownership of property; (ii) the statutory law of ownership responsibility; (iii) the argument for economic efficiency; and lastly (iv) the argument that decision-making should be left to those identifiable as ‘leaders’. Each of these sources of the apparent right to manage and control will be discussed briefly below.

The first of the underlying justifications for an employer’s right to control is linked to its right of ownership over its property. Storey explains that this justification is derived from the premise that as owners of capital assets, employers should have control over such assets. Given that, traditionally, employees own no part of these assets, ‘the way in which they are utilised is solely a matter for the owners and their representatives’.³²

1.2.1. Reliance on the right of ownership

The reliance on common law rights of ownership to justify control over employees has been criticised on the basis that ‘property rights give the employer the right to make decisions regarding the economic or business component of the business [but] they do not *per se* afford the employer the right to manage its employees’.³³

Accordingly, where employers seek to legitimise their power of control with reference to their property rights of ownership, they are clearly exposing themselves to objections ranging from ‘how acquisition rights were secured’ to ‘denials that possession [of property] necessarily involves the granting of full ownership rights’.³⁴

Therefore, while a reliance on property rights may provide a possible justification for

³² Storey op cit (n31) at 149.

³³ Strydom op cit (n27) at 48.

³⁴ Storey op cit (31) at 170.

an exercise of power, it does not provide a legal basis for the exercise of such power, thereby rendering this power susceptible to external interference.

1.2.2. Statutory law of ownership responsibility

The second pillar upon which an employer's prerogative of control rests pertains to statutory law of ownership responsibility.³⁵ By way of example, Storey refers to British company law which 'puts responsibility firmly in the hands of shareholders' and suggests that this is a reason why authority must be concentrated in the hands of "management".³⁶

In the South African context, a company's business and affairs are required to be managed by or under the direction of its board of directors and not by its shareholders.³⁷ However, while the board of directors has the authority to exercise all of the powers and perform any of the functions of the company, this authority is limited by statute and a company's Memorandum of Incorporation.³⁸ Given that a profit company's (other than a state-owned company) Memorandum of Incorporation must provide for the election by its shareholders of at least 50% of the directors, and 50% of any alternate directors,³⁹ and shareholders are empowered to remove a director by ordinary resolution before the expiration of his or her period of office,⁴⁰ directors (as the delegated "managers" of an enterprise) 'will be constrained

³⁵ Storey op cit (n31) at 149.

³⁶ Ibid.

³⁷ Section 66 of the Companies Act 71 of 2008.

³⁸ Ibid.

³⁹ Section 66(4)(b).

⁴⁰ This power is conferred on shareholders notwithstanding anything to the contrary in the Memorandum of Incorporation or rules of the company, or any agreement between the director and the company, see section 71(1) of the Companies Act 71 of 2008.

by their need for capital support from the owners (that is, the shareholders) which may be [withdrawn] if it appears that their objectives are different from those of the owners'.⁴¹ Therefore, a semblance of ownership responsibility and authority remains with the shareholders of a company.

Further, Storey opines that in light of statutes (such as the Companies Act) dictating the composition of the board of directors, that is the “controlling mind” of an organisation, industrial democracy is only possible where there is a reform of these statutory provisions.⁴²

1.2.3. The economic efficiency argument

The third pillar of justification for the exercise of employer prerogative is the “economic efficiency” argument. This argument is based on the assumption that ‘managers have the necessary skill and expertise to manage present-day undertakings’ and consequently, it is in the interests of consumers, shareholders, the nation and the workers that managers be left alone to manage as they see fit.⁴³ However, although this argument provides a reason why managers should in practice yield control over their workforce, it falls short of establishing a legal basis for the exercise of this authority.⁴⁴ Despite this shortcoming in the argument, the ‘primacy of economic efficiency has nourished the doctrine of managerial prerogative [thus

⁴¹ Strydom op cit (n27) at 48.

⁴² Storey op cit (n31) at 150.

⁴³ Strydom op cit (n27) at 48.

⁴⁴ Ibid.

creating a spurious] duty to let management manage with the least possible constraints'.⁴⁵

1.2.4. Decision-making should be left to the 'leaders'

Storey's last pillar draws on an aspect of the social Darwinism theory and centres on the notion that there are persons naturally identifiable as leaders and those that perform best when led.⁴⁶ This too falls short of providing a legitimate legal basis for the exercise of discretionary authority as it confers no legal duty on employees to obey such authority.⁴⁷

Essentially, it is submitted that the abovementioned set of justifications merely highlight the socio-economic considerations and realities that come to light when analysing the concept of managerial or employer prerogative, but they in fact fail to establish a legal basis for the exercise of this right or authority.

1.2.5. The contractual relationship

In his analysis of the origin, nature and ambit of employer prerogative, Strydom suggests that the legal foundation for the employer prerogative is 'vested in the contractual relationship between an employer and employee'.⁴⁸ Although there has been a degree of interference in the private employment relationships as set out in section 1.3 below, the basic common law premise that the employment relationship

⁴⁵ A Rycroft 'Obstacles to employment equity: the role of judges and arbitrators in the interpretation and implementation of affirmative action policies' (1999) 20 *ILJ* 1411 at 1418.

⁴⁶ Storey op cit (n31) at 151.

⁴⁷ Strydom op cit (n27) at 49.

⁴⁸ Shooter op cit (n28) at 532.

is a contractual one has not been challenged by South African labour legislation.⁴⁹ Essentially, the element of subordination created by the contract of employment introduces the ‘lawful right to manage the employee, imposing upon the latter the concomitant duty to obey the employer’s instructions’.⁵⁰

While it is patently clear that the contract of employment may be a legitimate source for the authority asserted by employers, one cannot disregard the fact that this right or privilege is further bolstered by the employers’ superior economic power,⁵¹ which power is essentially drawn from the set of justifications proposed by Storey.

Thus, as submitted in further detail below, although legislative developments have attempted to steer society away from the common law conception of the employment relationship being one between a master and servant, the socio-economic reality is that the employment relationship continues to be ‘characteristically one between a “bearer of power”, on the one hand, and one with little or no bargaining power on the other’,⁵² thereby resulting in an ‘opportunity for the employer to extend its discretionary power within the workplace through the negotiation of a favourable contract’.⁵³

⁴⁹ EML Strydom ‘The origin, nature and ambit of employer prerogative (part 2)’ (1999) 11 *SA Merc LJ* 311 at 313.

⁵⁰ Shooter op cit (n28) at 532.

⁵¹ Shooter op cit (n28) at 533.

⁵² Strydom op cit (n27) at 49.

⁵³ Shooter op cit (n28) at 533.

1.3. “There is effectively no such thing as managerial prerogative”?⁵⁴

It is uncontroversial that the South African labour legislative framework has taken cognisance of the unequal bargaining power and consequent effect thereof on the nature of the rights and obligations vis-à-vis the employer and its employees.⁵⁵

Thus, although ‘South African labour legislation has not challenged the basic common law premis[e] that the employment relationship is a contractual one’,⁵⁶ it has directly interfered in an employer’s prerogative regarding terms and conditions of employment.⁵⁷ By way of example, the Basic Conditions of Employment Act⁵⁸ (“BCEA”) prescribes minimum terms and conditions of employment which apply to, subject to limited exceptions, all employees and employers;⁵⁹ the LRA entrenches the right of every employee not to be subjected to unfair labour practices which includes *inter alia* unfair conduct by the employer relating to the provision of benefits;⁶⁰ and the EEA obliges every employer to take steps to promote equal opportunity and eliminate unfair discrimination in any ‘employment policy or practice’.⁶¹

The statutory interference referred to above is said to be an ‘inevitable consequence of industrialisation’ as ‘specific and binding legal regulations...limit

⁵⁴ Clive Thompson ‘Bargaining, business restructuring and the operational requirements dismissal’ (1999) 20 *ILJ* 755 at 758.

⁵⁵ Strydom op cit (n49) at 313.

⁵⁶ *Ibid.*

⁵⁷ *Ibid.*

⁵⁸ Basic Conditions of Employment Act 75 of 1997.

⁵⁹ Section 2, read with section 3 of the BCEA.

⁶⁰ Section 185 and 185(2)(a) of the LRA.

⁶¹ Section 5 of the EEA, as read with section 1.

the freedom of the contracting parties and “steer” them into certain directions laid down ...’ by the legislature in order to conform with the state’s broad political and social objectives.⁶² This process is broadly referred to as “juridification”, a term first defined by Otto Kircheimer in the 1920s as ‘a means of neutralising political conflicts with the help of formal legal regulation’.⁶³ Essentially, “juridification” is a ‘process (or processes) by which the state intervenes in areas of social life...in ways which limit the autonomy of individuals or groups to determine their own affairs’.⁶⁴

Juridification is said to be irrevocably tied to state intervention and an ‘inescapable consequence of industrialisation in all democratic societies’⁶⁵ with an ‘irreversible trend’ being the ever-increasing extent of the legal regulation of industrial relations. In his review of the juridification of industrial relations, Jon Clark recognises that while the beginnings of juridification processes are similar in all countries, for example, limits on child labour and the introduction of health and safety laws, there may be a necessary divergence in the forms of juridification given the unique historical or socio-economic characteristics of individual societies. Despite processes of juridification unfolding in different ways and at different paces, the effect thereof is the same, namely, the ‘employer and employee are bound into conditions of action laid down in a statutory framework’.⁶⁶

The recognition of the fact that employers enjoy greater social and economic power than individual workers and the need to level the playing fields, so to say, to

⁶² Jon Clark ‘The juridification of industrial relations: a review article’ (1985) 14 *Indus L J* 69 at 70.

⁶³ Clark op cit (n62) at 71.

⁶⁴ Clark op cit (n62) at 86.

⁶⁵ Clark op cit (n62) at 71.

⁶⁶ Ibid.

ensure that workers are able to act in concert to exert sufficient power to bargain effectively with employers appears to underpin the constitutional entrenchment of the right to strike and engage in collective bargaining.⁶⁷ As a consequence of the juridification of labour relations in South Africa, Thompson proclaimed that ‘there is effectively no such thing as the managerial prerogative’.⁶⁸ In substantiation of this view, Thompson argues that *inter alia* the South African collective bargaining landscape effectively erodes the concept of managerial prerogative in our labour law.⁶⁹

Notwithstanding the above, Thompson argues that the ‘absence of managerial prerogative does not mean that management cannot have its way’.⁷⁰ This contention draws on the socio-economic realities referred to above, that is, employers are able to wield a ‘range of weapons’ including dismissal and the implementation or discontinuation of benefit schemes⁷¹ given their great economic power thereby giving rise to bargaining power which can be used to give effect to an employer’s wishes.

The power of the employer to negotiate favourable contractual terms with its employees remains strong, despite the legislative interventions referred to above. The sample surveyed in the Quarterly Labour Force Survey: Quarter 2, 2018 revealed that, in the period April to June 2018, 54.62 per cent of employees had their

⁶⁷ *Chairperson of the Constitutional Assembly, ex parte: In re Certification of the Constitution of the Republic of SA*, 1996 (4) SA 744 (CC) at para 66.

⁶⁸ Thompson op cit (n54) at 758.

⁶⁹ Thompson op cit (n54) at 759.

⁷⁰ Ibid.

⁷¹ *Chairperson of the Constitutional Assembly, ex parte: In re Certification of the Constitution of the Republic of SA* supra (n67) para 66.

salary increments determined by their employers only, while 22.66 per cent of salary increments were negotiated through union led collective bargaining, collaborating the view that union power is not evidently resulting in excessive wage premise for its members.⁷²

The statistic that only 8.07 per cent of salary increments have been negotiated at the level of bargaining councils suggests that wage fixing remains largely organisation specific rather than collectivist in nature, with single employer bargaining preferred over multi-employer structures.⁷³

This decentralisation of wage bargaining appears to have reduced dependency on collective bargaining as a medium of change.⁷⁴ In substantiation of this submission, in the period 2016/2017 only 17.6 per cent of the economically active South Africans chose to join trade unions. This constitutes a decrease of 37.1 per cent over the period 1995/1996 to 2017/2017.⁷⁵ It is submitted that this is indicative of the increasingly marginal role of unions in workplace relations.⁷⁶ Through the development of performance-related pay practices, the scope of bargaining and the role of trade unions has been reduced.⁷⁷ By way of example,

⁷² Statistics South Africa *Quarter labour force survey: quarter 2, 2018*, page 70, available at <http://www.statssa.gov.za/publications/P0211/P02112ndQuarter2018.pdf> (Accessed 12 December 2018). See also Haroon Borat, Karmen Naidoo & Derek Yu 'Trade unions in an emerging economy, the case of South Africa' *DPRU Working Paper 201402* (July 2014) Development Policy and Research Unit at page 12.

⁷³ See the introductory comments on the move to firm-specific labour markets in John Purcell 'The rediscovery of the management prerogative: the management of labour relations in the 1980s' (Spring 1991) 7(1) *Oxford Review of Economic Policy* 33 at 34.

⁷⁴ Purcell op cit (n73) at 37.

⁷⁵ Information on trade unions and membership, 1995/96 to 2016/17 received from analyst Gerbrandt van Heerden from the Centre of Risk Analysis on 9 January 2018 based on information sourced from the Department of Labour on 19 June 2017.

⁷⁶ Purcell op cit (n73) at 34.

⁷⁷ Purcell op cit (n73) at 40.

registered trade union membership has declined by approximately 26 per cent between 1994 and 2014 and the number of registered trade unions operating in South Africa has declined by approximately 14 per cent in the same period.⁷⁸ The obvious impact of the decrease in reliance on collectivism is that there is a consequent decrease in the scope for employees to challenge the discretionary authority of employers in negotiating terms and conditions of employment.

It is therefore submitted that the above explains why addressing issues of income disparities could not be left to the contracting parties to the employment relationship alone. Before turning to discuss this submission and the legislature's ancillary rationale for introducing the express prohibition against discriminatory pay practices in section 6(4) of the EEA, it is appropriate to consider the concept of equality.

1.4. Equality, the Leviathan and the Tantalus⁷⁹

In her address at a conference in 2001,⁸⁰ Beverley McLachlin PC characterised equality as the Leviathan of rights⁸¹ given that '[c]ourts and policy makers around the world have struggled with the meaning of equality and...its limits [which are] shaped by the political and social histories of the countries involved'.⁸²

⁷⁸ Press release of the Institute for Race Relations "Trade unions lose control of the workshop floor" dated 9 February 2015. Available at <https://irr.org.za/media/media-releases/trade-unions-lose-control-of-the-workshop-floor> (Last accessed 8 January 2019).

⁷⁹ The Right Honourable Beverley McLachlin, P.C, 'Equality: the most difficult right' (2001) 14 *SCLR* (2d) at 17.

⁸⁰ The '2000 Constitutional Cases: Fourth Annual Analysis of the Constitutional Decisions of the S.C.C' on 6 April 2001.

⁸¹ McLachin op cit (n79) at 19.

⁸² Ibid.

This is primarily because ‘the choice between different conceptions of equality is not one of logic but of values or policy’, that is,

‘[e]quality could aim to achieve the redistributive goal of alleviating disadvantage, the liberal goal of treating all with equal concern and respect, the neo-liberal goal of market or contractual equality, and the political goal of access to decision-making processes’.⁸³

Hence, before turning to consider whether the provisions of section 6(4) of the EEA will prove effective in addressing discriminatory income disparities in the workplace and ultimately give effect to the constitutionally guaranteed right to equality, it is necessary to consider the different conceptions of equality.

Invariably, an analysis of the concept of equality begins with a reference to the basic Aristotelian principle that likes should be treated alike.⁸⁴ This formulation of equality prohibits direct discrimination or disparate impact.⁸⁵ In considering what value the principle that likes should be treated alike might seek to achieve, Professor Sandra Fredman recognises the principle of consistency as being a central consideration. In other words, where two individuals or situations are relevantly alike, they should be treated alike for consistency sake.⁸⁶ Fredman identifies, however, the ‘consistency alone is a minimal value’ for a variety of reasons.⁸⁷

⁸³ Sandra Fredman *Discrimination law, 2nd edition* (2001) at 1.

⁸⁴ Anne Smith ‘Equality constitutional adjudication in South Africa (Chapter 14 Vol 2) [2014] *AHRLJ* 30.

⁸⁵ Sandra Fredman ‘Substantive equality revisited’ Paper No. 70/2014 *University of Oxford Legal Research Paper Series*, October 2014 at 6.

⁸⁶ Fredman *op cit* (n83) at 9.

⁸⁷ Fredman *op cit* (n83) at 7.

Firstly, not every distinction between similarly placed individuals or situations is discriminatory.⁸⁸ Secondly, there is no ‘substantive underpinning’ for this principle of equality in that the requirement of equal treatment does not allow for an acknowledgement of structural inequalities arising from South Africa’s socio-political and economic past. In this context, ‘insisting upon equal treatment in established inequality may well result in the entrenchment of that inequality’.⁸⁹

The third so-called drawback of equality in the form of consistency in treatment is the requirement that a complainant in a disparate treatment claim find a similarly situated comparator, that is, a similarly situated person who does not share the characteristic in question (for example, race or sex) has been treated more favourably in order to assert his or her right to consistent treatment.⁹⁰ The underlying assumption is that once the personal characteristics of similarly situated individuals in an unequal treatment claim are disregarded, they can be treated the same on their merit, that is, there can be a “universal individual”.⁹¹ Fredman criticises the premise of the universal individual as being ‘deeply deceptive’ given that it ignores that there are other shifting levels and forms of social differentiation and systematic under-privilege which still persist.⁹² Accordingly, instead of creating a truly “universal individual”, there is ‘powerful conformist pressures’.⁹³

⁸⁸ See the minority judgment of Ngcobo J in *Minister of Finance & another v Van Heerden* 2004 (6) SA 121 (CC) at para 118. *President of the Republic of South Africa v Hugo* 1997 (4) SALR 1 (CC) 41 at para 41. In the context of pay discrimination disputes, see *Middleton & others v Industrial Chemical Carriers (Pty) Ltd* (2001) 22 ILJ 472 (LC) at para 9.

⁸⁹ See the concurring judgment of O’Regan J in *President of the Republic of South Africa v Hugo* 1997 (4) SALR 1 (CC) at para 112.

⁹⁰ Fredman op cit (n83) at 10.

⁹¹ Ibid.

⁹² *Minister of Finance & another v Van Heerden* supra (n88) para 27. See also *National Coalition for Gay & Lesbian Equality & another v Minister of Justice & others* 1999 (1) SA 6 (CC) at para 126.

⁹³ *Minister of Finance & another v Van Heerden* supra (n88) para 27.

The fourth problematic aspect of equality in the form of consistent treatment is that there is ‘no requirement that people be treated appropriately according to their difference’.⁹⁴ To draw on Fredman’s example, while it may be appropriate for a woman to be paid less than a comparable man if she performs work of less value, equality as consistency does not require that she be paid proportionately to the difference in value of her work.⁹⁵

The final criticism of equality as consistency worthy of reference is that equality in this form is intensely individualist.⁹⁶ By way of explanation, a major characteristic of equality rights has been the insistence that individuals be treated according to their own qualities and merits and not on the basis of the stereotypes attributed to their personal characteristics such as race or gender.⁹⁷ As a result, the principle of equality as consistency has assumed that all aspects of group membership should be disregarded’.⁹⁸ Fredman appropriately highlights that personal characteristics such as ethnicity, gender and cultural or religious affiliations are important aspects of an individual’s identity and diversity is often ‘enriching and desired’.⁹⁹ Equality of consistency does not appear to acknowledge this and seeks the elimination of difference rather than the detriment attached to such difference.¹⁰⁰ In addition, this emphasis on individualism requires individual fault in order to

⁹⁴ Fredman op cit (n83) at 12.

⁹⁵ Ibid.

⁹⁶ Ibid.

⁹⁷ See Kriegler J’s critique in *President of the Republic of South Africa v Hugo* supra (n89) para 80 and 83.

⁹⁸ Ibid.

⁹⁹ Ibid.

¹⁰⁰ Ibid.

impose liability and does not take cognisance of the fact that prejudices are embedded in societal structures and cannot be clearly attributed to any one person.¹⁰¹

Accordingly, although formal equality such as equality in the form of consistency may contribute towards eradicating personal prejudice, the deficiencies in this articulation of this right encourages a more substantive approach to equality that includes measures to redress existing inequality.¹⁰²

Substantive equality extends beyond the objective of equality of treatment and instead prescribes that there should be an equality of results.¹⁰³ Substantive equality is said to recognise the ‘fallacy of formal equality’¹⁰⁴ which seemingly reinforces inequality by not appreciating that identical treatment may reinforce inequality because of past or ongoing discrimination.¹⁰⁵ To draw on Fredman’s example,

‘if there has been race discrimination in the provision of education for black children, a requirement of literacy as a precondition for voting rights will, although applied equally to all, in effect exclude a significant portion of black people’.¹⁰⁶

Substantive equality introduces further difficulties in understanding the concept of equality in that its scope is unclear, thereby rendering McLachlin’s image of equality being the Leviathan of rights apposite. Firstly, substantive equality may manifest itself in the form of promoting equality of results thereby addressing one of

¹⁰¹ Fredman op cit (n83) at 14.

¹⁰² *Minister of Finance & another v Van Heerden* supra (n88) para 31.

¹⁰³ Ibid.

¹⁰⁴ McLachlin op cit (n79) at 20.

¹⁰⁵ Fredman op cit (n83) at 14.

¹⁰⁶ Ibid.

the shortcomings of formal equality, namely equal treatment may entrench antecedent inequalities.¹⁰⁷ Understanding the objective of equality in the form of equality of results has not only been ‘seminal to the development of concepts of indirect discrimination’ but it has also made it possible for affirmative action measures to be seen as a tool to advance the quest for equality in our society.¹⁰⁸ In terms of this approach, the objective is to achieve the fair distribution of benefits.¹⁰⁹ However, this notion of equality is said to be equivocal in that it can be used in three different ways.¹¹⁰

The first manner of utilising a results or impact-based approach to equality is by focusing on whether the equal treatment has had an impact on the individual and providing a remedy, rather than equality of results, to the individual.¹¹¹ The second manner in which equality of results may be used is to focus on the results of a group rather than an individual. However, this approach does not concern itself with prescribing an outcome to achieve equality but rather emphasises the need to identify obstacles to entry.¹¹² The third manner of achieving equality of results is by prescribing an equal outcome. In this manifestation of the principle, there need not be a discriminatory factor requiring redress and a mere under-representation of a particular group would require action to achieve an equal outcome. The primary shortcoming of this approach is that there is no examination of the structures that

¹⁰⁷ Fredman op cit (n85) at 12.

¹⁰⁸ Fredman op cit (85) at 1.

¹⁰⁹ Fredman op cit (n83) at 14.

¹¹⁰ Ibid.

¹¹¹ Ibid.

¹¹² Ibid.

perpetuate discrimination. Accordingly, equality of results can be seen as providing, at best, ‘a partial framework for situating the right to equality’.¹¹³

As such, equality of opportunity is said to be a ‘popular alternative to both equal treatment and equality of results’.¹¹⁴ This model aims to equalise the starting point rather than the result. In practice however, equality of opportunity is ‘rarely used...when framing equality laws’.¹¹⁵ Instead, ‘legislatures, courts and theorists have searched for a more substantive notion of equality’, with the ‘foremost candidate [being] the notion of dignity’.¹¹⁶ The notion of dignity and the impairment thereof by differential treatment has been expressly recognised by the Constitutional Court in South Africa when developing our equality jurisprudence.¹¹⁷

While the notion of dignity ‘creates a substantive underpinning to equality’, its use in the application of the right to equality is problematic to the extent that it is regarded as a separate inquiry in discrimination disputes, despite it being an abstract and subjective notion.¹¹⁸

As evident from the above, there are various conceptions to the meaning of equality and the move from formal equality to substantive equality ‘recognises that

¹¹³ Fredman op cit (n85) at 15.

¹¹⁴ Ibid.

¹¹⁵ Fredman op cit (n85) at 16.

¹¹⁶ Fredman op cit (n85) at 17.

¹¹⁷ See, for example, *Prinsloo v Van der Linde* 1997 (3) SA 1012 (CC) quoted in Fredman op cit (n85) where Ackermann J stated that unfair discrimination ‘principally means treating persons differently in a way which impairs their fundamental dignity as human beings’.

¹¹⁸ Fredman op cit (n85) at 19.

elaborating the right to equality requires a value laden choice as to its aims and purposes'.¹¹⁹ It is broadly recognised that

‘in a country such as South Africa, persons belonging to certain categories have suffered considerable unfair discrimination in the past [and it] is insufficient [to] merely to ensure, through [a constitutional right to equality], that statutory provisions [or conduct] which have caused such unfair discrimination in the past are eliminated’.¹²⁰

Thus, section 9 of the Constitution contemplates both substantive and remedial equality in that it not only unequivocally asserts that equality includes ‘the full and equal enjoyment of all rights and freedoms’ but it also obliges the State ‘to promote the achievement of such equality’ by ‘legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination’.¹²¹

1.5. The interventionist State

In pursuance of its constitutional mandate, the State has moved with alacrity from the so-called “reactive phase” of intervening in private employment relationships to address specific abuses arising in the employment context, to integrating regulations which serve to suffuse long-term state policy in private contractual relationships.

This therefore marks a significant change in strategy from addressing specific abuses which cause social conflict to prevent such conflict.¹²²

¹¹⁹ Fredman op cit (n85) at 20.

¹²⁰ *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 at para 50.

¹²¹ *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* supra (n120) para 62.

¹²² Clark op cit (n62) at 73.

An instance where this was patently clear was in former President Jacob Zuma's inaugural State of the Nation address in June 2009 in which he highlighted the key provisions of government's macroeconomic strategy and programme for action which has since become known as the New Growth Path ("NGP"). Central to the NGP, we are told, is the recognition that 'government has a critically important role to play in accelerating social and economic development including through effective regulation of markets'.¹²³ It is therefore the stated 'priority of government to deal with the inequalities left behind by the apartheid legacy [in order] to bring about socio-economic freedom'.¹²⁴

For the reasons set out in section 1.3, it is apparent that the achievement of equal pay in the workplace cannot be left to the parties to an employment relationship. Given that 'employer prerogative is at its strongest when the economy is at its weakest',¹²⁵ it has become necessary for the State to intervene through a policy of 'calculated autonomy', that is, where the 'state affirms self-determination and self-regulation on the one hand, and on the other ties it into the system of rules governing the labour market which it (the state) has determined'.¹²⁶

The codification of the prohibition against discriminatory income disparities can thus be seen as an attempt by the State to reduce managerial prerogative in

¹²³ Economic Development Department "The New Growth Path: framework" (November 2011) available at <http://www.economic.gov.za/communications/publications/new-growth-path-series> (accessed 11 May 2015) at 12.

¹²⁴ Speech by the Minister of Labour, Honourable Mildred Oliphant, MP on the occasion of the Employment Equity and Transformation Indaba, Birchwood, Johannesburg on 18 April 2013. Available at <http://www.labour.gov.za/DOL/media-desk/speeches/2013/speech-by-the-minister-of-labour-hon-mildred-n-oliphant-mp-on-the-occasion-of-the-employment-equity-and-transformation-indaba-birchwood-johannesburg> (accessed on 19 May 2015).

¹²⁵ Strydom op cit (n27) at 52.

¹²⁶ Clark op cit (n62) at 74.

shaping relations at work and steer the employment relationship towards achieving broader socio-economic objects which conform to its own broad political and social objectives.¹²⁷

1.6. Structure of dissertation

In my assessment of whether section 6(4) is likely to achieve its stated objective of ‘[giving] effect to the constitutional protection of equality and [achieving] compliance with core international labour standards binding on South Africa’¹²⁸, I first provide a brief overview of the history of enforcing claims for equal pay for equal work in South Africa before turning to consider the anatomy of section 6(4) of the EEA in chapter 2, the requirements for establishing a claim of discrimination in terms thereof and the remedies available to a successful complainant.

In chapter 3, I introduce the comparative jurisdictions referenced in my analysis of section 6(4), namely the United Kingdom, the United States of America and Canada, setting out briefly an explanation of their equivalent “equal pay” or “pay discrimination” laws.

In chapter 4, I seek to highlight the limitations introduced by the statutorily prescribed comparator in section 6(4), that is, an employee of the same employer performing the same, substantially the same or work of equal value. In doing so, I argue that (i) the requirement to produce the correct comparator at the outset of litigation poses a significant burden on a complainant, particularly given the restrictions on obtaining sufficient data in support of a claim at the inception thereof;

¹²⁷ Clark op cit (n62) at 70.

¹²⁸ Paragraph 3.3.3 of the “Memorandum on objects of Employment Equity Amendment Bill, 2012” *Government Gazette* No. 35799 of 19 October 2012.

(ii) the limitation of the comparator to an individual within the same employer as the complainant leaves room for an unscrupulous employer to immunise itself from the operation of section 6(4) by transferring portions of its workforce to other entities; (iii) the need for a contemporaneous comparator has the potential to perpetuate disproportionate pay differentials along the lines of *inter alia* sex or race; and (iv) the requirement of identifying an actual comparator operates to effectively leave uniquely situated employees without redress.

In chapter 5, I discuss the limitations of a regulated methodology for assessing the value of work and the apparent election of the legislature to limit the extent to which the State impinges on the prerogative of employers to demonstrate what factors are relevant to assessing the value of work by not requiring a more collective or consensus driven approach to job evaluation.

In chapter 6, I demonstrate that the prescribed factors for justifying a differentiation in terms and conditions of employment give significant deference to employer prerogative and argue that there ought to have been a requirement, or at the very least, an encouragement for all employers (not just designated employers) to produce a plan for the reduction of differential payments.

Chapter 7 of this paper considers whether, following the introduction of section 6(4) of the EEA, an administrative body whose primary function is the conduct of formal investigation into discriminatory pay practices and the resolution of equal pay disputes ought to have been created. In this regard, this chapter considers the functions, scope and powers of the United States' Equal Opportunity Commission, the United Kingdom's Equality and Human Rights Commission and the Canadian Human Rights Commission. It will conclude that in light of (i) the

already overburdened employment dispute resolution bodies in South Africa; and (ii) the unique and complex issues which may arise in pay discrimination claims, a specialised administrative body with the skills and expertise to *inter alia* carry out inquiries into the extent and causes of pay disparities in particular sectors or areas and to conduct investigations into employers alleged to have unlawfully discriminated against employees as contemplated in section 6(4) of the EEA ought to be have been established.

Having considered the above, I ultimately conclude that section 6(4) of the EEA provides only a partial solution to the issue of discriminatory pay disparities in South Africa. In this regard, it is likely to have a limited effect in contributing to the achievement of the State's objective of achieving substantive equality given that (i) the complexity associated with the effectual articulation and prosecution of a claim under section 6(4) poses a significant challenge to redressing disadvantage;¹²⁹ (ii) a complaints-based approach to addressing pay discrimination impedes the ability to effectively counter prejudice based on a protected characteristics and accommodate structural change and diversity;¹³⁰ and (iii) the structure of section 6(4) and its accompanying Employment Equity Regulations, 2014 are likely to be largely ineffectual in preventing employers from evading or changing their pay practices to suit their own economic or professional interests.¹³¹ It will therefore conclude that equality in the form of equal pay for equal work is likely to remain a Tantalus.

¹²⁹ Fredman op cit (n85) at 21 and 24.

¹³⁰ Ibid. See also Fredman op cit (n85) at 25.

¹³¹ In this regard, reference will be made to the principles on which equity legislation ought to be structured proposed by Professor Bob Hepple QC in 'Equality laws and economic efficiency' (1997) 18 *ILJ* 598 at 606.

2. ANATOMY OF SECTION 6(4) OF THE EEA

2.1. Brief legislative history

As set out in the preceding chapter, despite South Africa's ratification of the Convention, until the assent of the Employment Equity Amendment Act 47 of 2013 on 14 January 2014, no legislative provisions expressly addressing the issue of pay discrimination existed in our law. Following the promulgation of this amendment Act, a new sub-section (4) was introduced to the prohibition against unfair discrimination in section 6 of the EEA 'in order to deal explicitly with unfair discrimination by an employer in respect of terms and conditions of employment of employees doing the same or similar work or work of equal value' where such differentiation is based on a proscribed ground set out in section 6(1) of the EEA.¹³² Although this provision of the EEA has garnered significant attention following its promulgation, it does not represent a change in our law.

Even prior to the introduction of the constitutional right to equality and the current section 6(4) of the EEA, an employer's prerogative to determine the remuneration and benefits payable to employees was limited by the recognition that disparities in pay for similarly-situated employees, where the differences were based on reasons other than the employees' skills and experience, may constitute an unfair labour practice in the form of discrimination.¹³³ In this regard, the Labour Relations Act 28 of 1956 ("LRA 1956") defined an unfair labour practice to include any act or omission which has or may have unfairly affected any employee or class of

¹³² Memorandum on objects of Employment Equity Bill, 2012 at para 3.3.2 on 13.

¹³³ T Laubscher "Equal pay for work of equal value – a South African perspective" (2016) 37 ILJ 804. *SA Chemical Workers Union & others v Sentrachem Ltd* (1988) 9 ILJ 410 (IC) at 429E-F.

employees. Claimants relied on this wide definition to argue that a failure to pay employees performing equal work in the absence of a good cause for the differentiation constitutes an unfair labour practice which was prohibited under the LRA 1956.¹³⁴

When the current LRA came into force on 11 November 1996, the definition of an unfair labour practice further facilitated the adjudication of claims for unequal pay for work of equal value as an unfair labour practice dispute given that the LRA initially broadened the definition of an unfair labour practice to include unfair discrimination.¹³⁵ Therefore, although the premise of “equal work should receive equal pay” and “work of equal value should receive equal pay” were not enshrined as principles of law in the definition of an “unfair labour practice” in Item 2(1)(a) of Schedule 7 of the LRA, the Labour Court considered them to be ‘principles of justice, equity and logic which may be taken into account in considering whether an unfair labour practice has been committed...’.¹³⁶

Item 2(1)(a) of Schedule 7 of the LRA was subsequently repealed and replaced by section 6(1) of the EEA on 9 August 1999. However, despite ratifying the Convention in 2000, the South African legislature did not incorporate a provision expressly prohibiting payment of unequal remuneration for work of equal value. Rather, this practice was only prohibited insofar as it amounted to direct or indirect unfair discrimination in terms of section 6(1) of the EEA in respect of employment policies or practices.

¹³⁴ *National Union of Mineworkers v Henry Gould (Pty) Ltd & another* (1988) 9 ILJ 1149 (IC) at 1158.

¹³⁵ *Ntai & others v SA Breweries Ltd* (2001) 22 ILJ 214 (LC) (“*Ntai*”).

¹³⁶ In *Louw v Golden Arrow Bus Services (Pty) Ltd* (2000) 21 ILJ 188 (LC) (“*Louw*”) at 196D-F.

In order to establish a claim of pay discrimination prior to the enactment of section 6(4) of the EEA, an employee was firstly required to prove that he or she was a victim of discrimination. Given that the ‘law anticipates that individuals and groups may be regulated differently without it being unfair’,¹³⁷ the mere existence of disparate treatment between employees was considered insufficient to establish that a prohibited act of discrimination had taken place. It therefore fell upon the claimant to demonstrate that the differentiation was either (i) indirectly discriminatory, that is, it impaired his or her fundamental dignity; or (ii) a differentiation based on a listed ground.¹³⁸ Only once the above was established did the burden shift to the employer to demonstrate that there was a legitimate ground for the differentiation.¹³⁹

Despite our law recognising that unfair wage discrimination is prohibited, the memorandum to the Employment Equity Bill, 2012 explained that ‘the lack of a provision dealing expressly with wage discrimination on the basis of race and gender has been criticised by the International Labour Organisation’. Therefore, the legislature envisaged that the new section 6(4) would not only provide an ‘explicit basis’ for equal pay claims but also ‘[give] effect to the constitutional protection of equality and [achieve] compliance with core international labour standards binding on South Africa.’

¹³⁷ *Middleton supra* (n88) at 475. In *Mthembu v Claude Neon Lights* (1992) 13 ILJ 422 (IC) at 423E-F the court held ‘[i]t would be in the interest of neither employers nor employees nor society in general to rule that an employer may not differentiate between employees on the basis of their productivity.’

¹³⁸ *Transport & General Workers Union & another v Bayete Security Holdings* (1999) 20 ILJ 1117 (LC) (“*Bayete*”) at para 4.

¹³⁹ *Ibid.*

2.2. Anatomy of section 6(4) of the EEA

Turning to the anatomy of the new section 6(4) of the EEA, the section provides 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 grounds of unfair discrimination listed in subsection (1), is unfair discrimination.

Evident from the formulation of section 6(4), the EEA does not create a positive right to equal pay for equal work. Rather, there is only a limitation on the employer's ability to differentiate between employees performing "equal work" insofar as such differential treatment amounts to unfair discrimination.

2.2.1. The complainant

The applicant in a discrimination claim based on section 6(4) is required to be an 'employee' as defined in section 1 of the EEA.¹⁴⁰

2.2.2. A 'difference' in 'terms and conditions of employment'

In order to bring a claim in terms of this sub-section, an applicant is required to demonstrate that there is a difference in treatment between the applicant and another employee of his or her employer due to a proscribed ground. From the plain wording of the section, there is no threshold of materiality that must be reached by an applicant before the protections of this sub-section can be invoked.

¹⁴⁰ Section 9 of the EEA. This includes an applicant for employment – Landman op cit (n17) and Lauscher op cit (n133) at 812 and her reference to *Mias v Minister of Justice & others* (2002) 23 ILJ 884 (LAC) at para 28.

What would constitute a “term or condition of employment” to establish a claim under the section is not defined in the EEA or its accompanying regulations. It is however clear that section 6(4) goes further than simply requiring equal pay or remuneration for the same work, substantially the same work or work of equal value.¹⁴¹ The general approach has been to interpret what constitutes a “term and condition of employment” narrowly as terms included in an individual contract of employment or collective agreements. This may include, amongst other things, an employee’s salary, leave entitlement, working hours and access to training. Determining whether a particular aspect constitutes a term or condition of employment would therefore require an examination of the complainant’s contract of employment, any other document regulating the employment relationship such as a collective agreement, and any terms that may be implied from the parties’ conduct or from established custom in the workplace.¹⁴²

2.2.3. The comparator

The requirement that an applicant in a discrimination claim under section 6(4) of the EEA present a comparator is statutorily defined. In this regard, an applicant is required to demonstrate that the difference relates to another employee of the same employer, and that the other employee is in a situation analogous to him or her, that is, the other employee (or comparator) is performing the same work, substantially the same work or work of equal value.

¹⁴¹ This does not appear to be acknowledged in the Code of Good Practice on Equal Pay/Remuneration for Work of Equal Value GN448 in GG 38837 of 1 June 2015 (“Code of Good Practice”) which appears to limit the scope of section 6(4) to requiring parity in pay/remuneration.

¹⁴² *Pikitup Johannesburg (SOC) Ltd v SA Municipal Workers Union & others* (2014) 35 ILJ 188 (LC) at para 38 and 39.

On a plain reading of the sub-section, the applicant and the comparator must be employed by the same legal entity. Therefore, employees in a multinational or group of companies would not be able to institute a claim in terms of this provision if his or her comparator is employed by a related entity, irrespective of whether these entities are controlled by the same shareholder or management structure.¹⁴³

Landman suggests that the “rules” about the permissible selection of a comparator include that the comparator must be a person doing the same or similar work or work of equal value at the same time as the applicant, that is, the comparator must be contemporaneous.¹⁴⁴

In respect of the query of when work is considered to be the same, substantially the same or of equal value, section 6(5) of the EEA confers the power to prescribe criteria and methodology for assessing work of equal value on the Minister of Labour. Pursuant to this, the Minister published the Employment Equity Regulations, 2014¹⁴⁵ which provides that work is considered the same for purposes of invoking section 6(4) where the work undertaken by the complainant and his or her comparator is identical or interchangeable.¹⁴⁶ Work is considered substantially the same if the work undertaken by the complainant and his or her comparator are sufficiently similar that they can be reasonably considered to be performing the same job, even if the work is not identical or interchangeable.¹⁴⁷

¹⁴³ In terms of section 2 of the Companies Act 71 of 2008, a juristic person is ‘related’ to another juristic person if (i) either of them directly or indirectly controls the other, or the business of the other; (ii) either is a subsidiary of the other; or (iii) a person directly or indirectly controls each of them, or the business of each of them.

¹⁴⁴ Landman op cit (n17) at 346.

¹⁴⁵ Employment Equity Regulations, 2014 published in GN R595 in GG 37873 of 1 August 2014.

¹⁴⁶ Regulation 4(1) of the Employment Equity Regulations, 2014.

¹⁴⁷ Regulation 4(2) of the Employment Equity Regulations, 2014.

In broad terms, in considering whether work is of equal value, the Employment Equity Regulations, 2014 require the job of the complainant and the comparator to be objectively assessed taking into account, amongst other things, (i) the responsibility demanded of the work; (ii) the skills and qualifications (including prior learning and experience) required to perform the work;¹⁴⁸ (iii) the physical, mental and emotional effort required to perform the work; and (iv) to the extent relevant, an assessment of the conditions under which the work is performed. The work of the complainant and his or her comparator is of the same value where their respective operations are accorded the same value in accordance with regulations 5 to 7. Notably, neither the EEA nor the Employment Equity Regulations, 2014 oblige an employer to use a job evaluation system to determine whether work is of the same value.

2.2.4. Stages of the dispute

In essence, a claim under section 6(4) comprises of two stages. First, for a complainant's claim to qualify under the section, the complainant would need to establish that there is a difference in the terms and conditions of employment between him- or herself and the comparator despite the employees performing the same work, substantially the same work or work of equal value. In respect of a claim premised on gender discrimination, the Code of Good Practice recognises that the 'fact that there are no comparable male-dominated jobs to female-dominated jobs within the employer's organisation, does not necessarily imply that there is no discrimination on grounds of sex or gender (or other prescribed grounds)'.¹⁴⁹ Thus,

¹⁴⁸ *National Education, Health and Allied Workers' Union obo Nquma v Department of Justice and Constitutional Development* [2017] 1 BALR 76 (CCMA) at para 27.

¹⁴⁹ Code of Good Practice, para 6.4. While the existence of a hypothetical comparator in these instances may advance the legislative objective of section 6(4) of the EEA, it is arguable that the Code of Good

the Code of Good Practice permits a female employee to base a claim on the ground that they would have received higher rate of pay or remuneration if they were not female, that is, the employee may utilise a hypothetical comparator.¹⁵⁰

If a difference is established, the question then turns to whether the differentiation is prohibited for a reason set out in section 6(1) of the EEA, which includes an arbitrary ground.¹⁵¹ Consistent with the position adopted by the Labour Courts in pay discrimination disputes under the LRA 1956 and the now repealed Item 2(1)(a) of Schedule 7 of the LRA, a mere a differentiation is insufficient to succeed in a claim under section 6(4) of the EEA.¹⁵²

The Employment Equity Regulations, 2014 provide that a disparity in treatment between the applicant and his or her comparator may be justified if it is (1) fair and rational; and (2) based on:

- (i) seniority or length of service;
- (ii) qualifications, ability, competence, or potential above the minimum acceptable levels required for the performance of a job;

Practice is *ultra vires* its enabling legislation given that it departs from the factual circumstances which the legislature prescribed must exist before potential liability may arise under 6(4) of the EEA. See *Road Accident Fund v Makwetlane* 2005 (4) SA 51 (SCA) at 63H.

¹⁵⁰ Code of Good Practice, para 6.5.

¹⁵¹ Where a complainant premises a claim on an unlisted ground of discrimination, the ‘complainant must clearly identify the ground relied upon and illustrate that it shares the common trend of listed grounds, namely that ‘it is based on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings, or to affect them adversely in a comparable manner ...’ *National Union of Metalworkers of SA and Others v Gabriels (Pty) Ltd* (2002) 23 ILJ 2088 (LC) at para 19. See also *Sethole and Others v Dr Kenneth Kaunda District Municipality* 2018] 1 BLLR 74 (LC) and *Pioneer Foods (Pty) Ltd v Workers Against Regression & others* (2016) 37 ILJ 2872 (LC) at para 55.’ In *Ndudula & others v Metrorail — Prasa (Western Cape)* (2017) 38 ILJ 2565 (LC) at para 108 the court held that, where a complainant relies on an arbitrary ground, the complainant must define the ground and has the burden of proof.

¹⁵² *Louw* supra n135 at 196E-F.

- (iii) performance, quantity or quality of work, provided that employees are equally subject to the employer's performance evaluation system and that this system is consistently applied;
- (iv) 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 the same level until the remuneration of employees in the same job category reached this level;¹⁵³
- (v) where an individual is employed temporarily in a position for purposes of gaining experience or training and, as result, receives different remuneration or enjoys different terms and conditions of employment;
- (vi) the existence of a shortage of relevant skill, or the market value in a particular job classification; and/or
- (vii) any other fact that is not unfairly discriminatory in terms of section 6(1) of the EEA.¹⁵⁴

A differentiation is furthermore considered "fair and rational" where its application is not biased against an employee or group of employees based on race,

¹⁵³ This is known as 'red-circling' and, as pointed out by Laubscher op cit (n133) at 824, it is not an absolute defence. See Victoria Hooten 'This is a (Wo)Man's world: reforming UK Equal Pay' (2015) 3 *Legal Issues J* 65 at 77: 'If discrimination has previously been a reason behind the higher pay of males, then red-circling will not protect an employer from an equal pay claim, as per *Snoxell and Davies v Vauxhall Motors Ltd*' [1977] IRLR 123 EAT.

¹⁵⁴ Regulation 7(1)(a) of the Employment Equity Regulations, 2014. See *National Education Health & Allied Workers Union on behalf of Totyi and Airports Company SA (Pty) Ltd (SOE)* (2017) 38 ILJ 2637 (CCMA).

gender, disability or any other ground listed in section 6(1) of the EEA and it is applied in a proportionate manner.¹⁵⁵

Where reliance is placed on a factor referred to in Regulation 7(a) as described above, an employer is required to establish that such factor caused the differential treatment. Furthermore, Regulation 7(2)(a) requires that reliance on these factors should not operate to the detriment of an employee or group of employees on the basis of race, gender, disability or any other listed ground. Thus, the factor would need to be consistently and proportionately applied to all employees.

Regulation 7 of the Employment Equity Regulations, 2014 does not require an employer to demonstrate that the difference in the terms and conditions of employment between a complainant and the comparator must be proportionate to any difference it considers there to be in the value of their work.

2.2.5. Remedies

In circumstances where it is found that an applicant has been unfairly discriminated against as contemplated in section 6(4) of the EEA, the Labour Court is empowered to ‘make any appropriate order that is just and equitable in the circumstances’.¹⁵⁶ This includes ordering that the employer pay the applicant compensation and/or damages.¹⁵⁷ Further, the employer may be ordered to take steps to prevent the same

¹⁵⁵ Regulation 7(2)(b) of the Employment Equity Regulations, 2014.

¹⁵⁶ Section 50(2) of the EEA.

¹⁵⁷ Section 50(2)(a) and (b) of the EEA.

unfair discrimination or a similar practice occurring in the future in respect of other employees.¹⁵⁸

¹⁵⁸ Section 50(2)(c) of the EEA.

3. OVERVIEW OF COMPARATIVE JURISDICTIONS

3.1. Introduction

In my analysis of section 6(4) of the EEA, I draw on the experiences and “equal pay” dispute resolution models of the United Kingdom, United States of America and Canada to identify shortcomings in the South African model and the scope for improving the efficacy thereof. In doing so, I do not suggest that “functional equivalence” is required between South Africa and any of the three countries I have selected given that, admittedly, these countries have different socio-economic and political landscapes with long legislative history in equality issues which may not be apposite in the South African context.¹⁵⁹ However, they have been referenced because they provide insight into possible “best practice” as well as deficiencies in the formulation and adjudication of equal pay rights and claims enabling one to identify a benchmark for South Africa.

3.2. United Kingdom

Although the origins of Britain’s pay equality legislation can be traced backed to 1888, there was no legislative intervention to codify this for at least 75 years¹⁶⁰ given

¹⁵⁹ I am mindful that a functionalist approach to the methodology of a comparison of law focuses primarily on the identification of the social purpose of the law and, in doing so, suffers the deficiency of assuming that legal systems face similar problems and despite the implementation of differing measures and systems, a common solution can be achieved such that the “rules of the law” [can] travel across jurisdictions...unencumbered by historical, epistemological, or cultural baggage’ - Pierre Legrand ‘The impossibility of legal transplants’ (1997) 4 *Maastricht J Eur & Comp L* 111 at 114. See also O Kahn-Freund ‘On uses and misuses comparative law’ (1974) 37 *Mod L Rev* 1. The Constitutional Court cautioned in *Park-Ross v Director, Office of Serious Economic Offenses* 1995 (2) SALR 148 (CC) at 160 against legal transplantation because of the ‘different contexts within which other constitutions were drafted, the different social structures and milieu existing in those countries as compared to those in this country, and the different historical backgrounds against which the various constitutions came into being’.

¹⁶⁰ Ibid.

the preference of the British government to refrain from closely regulating industrial relations so that parties to an employment relationship regulate themselves through collective bargaining.¹⁶¹

However, it later became apparent that voluntary collective bargaining alone would not achieve the objective of equal pay for equal work and, following the Labour Government's ascent to power in 1964, there was a revision of the government's abstentionist policy on the issue. Pursuant to this, a Bill regulating equal pay for equal work was introduced and received Royal Assent in May 1970. In terms of this Bill, employers were given a period of five years to adjust their pay structures before the Equal Pay Act of 1970 ("EqPA") came into effect on 29 December 1975. This five-year period is said to be a 'remnant of the voluntarist approach to labour relations' and a final attempt to afford employers an opportunity to correct their pay practices before state intervention to limit an employer's prerogative.¹⁶² The EqPA did not establish a general right to equal pay for equal work or work of equal value. Rather, it required equality in contractual terms and conditions of employment for men and women in same employment in two scenarios, namely (i) where they conduct "like" work; or (ii) where their work is rated as equivalent under a job evaluation study. In respect of the latter, undertaking such a study was not obligatory.¹⁶³

¹⁶¹ Mildred Catherine Didio 'Towards economic equality for women: Britain's equal pay legislation as the model for lesson and reform' (1989-1990) 5 *Conn J Int'l L* 353 at 363.

¹⁶² Didio op cit (n161) at 364.

¹⁶³ Catherine Barnard 'New developments in employment discrimination law: the UK report' The UK Report Trinity College, Cambridge at page 32 available at https://www.jil.go.jp/english/events/documents/clls08_barnard.pdf (Last accessed 10 February 2019).

In addition to the EqPA, the United Kingdom acceded to Article 119 of the Treaty of Rome which obliged each member state to maintain the principle that men and women should receive equal pay for equal work. Article 1 of Directive 75/117/EEC (“Directive”) later clarified the ‘principle of equal pay’ to mean ‘for the same work, or for work to which equal value is attributed, the elimination of all discrimination...with regard to all aspect and conditions of remuneration’.¹⁶⁴ Further, the Directive provided that where a job classification system is used to determine the rate of pay, this system must be based on the same criteria for men and women.

In 1981, infringement proceedings were instituted by the Commission of the European Communities against the United Kingdom in terms of which it alleged that the United Kingdom had incorrectly applied the provisions of Article 1 of the Directive given that, in effect, a woman cannot enforce a right to equal pay in terms of the EqPA in respect of work of equal value to her male counterpart unless a job evaluation study is applied by their employer, which study the employer is not bound to introduce.¹⁶⁵ Ultimately, the Court of Justice found that the position adopted by the United Kingdom in the EqPA in respect of equal pay for work of equal value was ‘not consonant with the general scheme and provisions of Directive 75/117’ given that the provisions of the EqPA did not provide a means whereby an employee who considers her post to be of equal value to another to pursue a claim for equal pay if

¹⁶⁴ Council of the European Union Directive 75/117/EEC.

¹⁶⁵ Judgment of the Court of 6 July 1982, Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland, C-61/81, ECLI:EU:C:1982:258 (“Decision”) at 2604 and 2605. Available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61981CJ0061&qid=1547090950262&from=EN> (accessed 8 January 2018).

her employer refuses to introduce a job classification system'¹⁶⁶ nor did it 'endow an authority with the requisite jurisdiction to decide whether work has the same value as other work, after obtaining such information as may be required'.¹⁶⁷

Following this finding, the Equal Pay (Amendment) Regulations 1983 was introduced to give effect to the EU law and a new residual basis for establishing an entitlement to equal pay, that is, where the work undertaken by a woman is 'in terms of demands made on her (for instance under such headings as effort, skill and decision) of equal value to that of a man in the same employment'.¹⁶⁸ In order to advance a claim of this nature, a complainant had to meet the requirements of establishing a *prima facie* case under the EqPA and demonstrate that her claim did not qualify as a claim for like work or work rated as equivalent.¹⁶⁹

Although the EpA 'produced some modest and welcome improvements', it is said to have been generally 'ineffective and unworkable'.¹⁷⁰ This has been attributed to the legislation being complex 'beyond compare'.¹⁷¹ This much is evident from the fact that less than 1 percent of the equal pay claims in the employment tribunals in the year ending 31 March 2012 were successful at a hearing.¹⁷² The provisions of

¹⁶⁶ Decision, 2615 and 2616.

¹⁶⁷ Decision, 2617.

¹⁶⁸ B Hepple *Equality the legal framework* 2ed (2014) at 152.

¹⁶⁹ Didio op cit (n161) at 371.

¹⁷⁰ Hepple op cit (n168) at 153.

¹⁷¹ Lord Denning to the House of Lords quoted in Hepple op cit (n168) at 153.

¹⁷² Hepple op cit (n168) at 153.

the EqpA have since been consolidated with other anti-discrimination laws¹⁷³ into a single piece of legislation – the Equality Act 2010 (“EqA 2010”).

3.2.1. Statutory provision regulating equal pay or pay discrimination

In terms of the EqA 2010, a person that claims they are being paid less than a comparator because of a ground such as race, religion or belief, disability or sexual orientation may bring a claim for direct or indirect discrimination without the need to establish that his or her work is the same, substantially the same or of equal value.¹⁷⁴ The law on equality of terms for the same work, like work or work of equal value pertains only to equality of terms between the sexes and relating to pregnancy and maternity.¹⁷⁵

In terms of Chapter 3 of the EqA, there is an implied equality clause in contracts of employment where the employee is performing equal work, like work or work that is rated equivalent under a job evaluation study to that of a member of the opposite sex.¹⁷⁶ The sex equality rule set out in section 66 of the EqA has the following effects:

- (i) If a relevant term is less favourable to a complainant than it is to his or her comparator, the term is modified so as not to be less favourable.

¹⁷³ For example, the Sex Discrimination Act 1975, the Race Relations Act, 1976 and the Disability Discrimination Act, 1995.

¹⁷⁴ Hepple *op cit* (n168) at 156.

¹⁷⁵ Chapter 3 of the Equality Act, 2010.

¹⁷⁶ Section 65 of the Equality Act, 2010.

- (ii) If the complainant does not have a term which corresponds to that of his or her comparator which benefits the comparator, then the complainant's terms are modified to include such a term.

Similar provisions are implied into the terms of occupational pension schemes.¹⁷⁷ In the application of this rule, the House of Lords held that the enquiry is not into whether the complainant enjoys, on the whole, not less favourable terms and conditions of employment than her comparator. Rather, each term and condition of employment is individually considered.¹⁷⁸ As with the EEA, the enforcement of the prohibition under the EqA is reliant on individual complaints.¹⁷⁹

3.2.2. The complainant

A complainant in an "equal pay" claim is a person in the employment of another. This is broadly defined to include *inter alia* employment under a contract of employment, a contract of apprenticeship or a contract personally to do work.¹⁸⁰

3.2.3. Comparator

As with the EEA, the EqA identifies a statutorily defined comparator. In this regard, the sex equality rule applies in circumstances where a person ("A") is employed on work that is equal to the work that a comparator of the opposite sex ("B").¹⁸¹ B is a comparator for purposes of Chapter 3 of the EqA if:

¹⁷⁷ Section 67 of the Equality Act, 2010.

¹⁷⁸ Laubscher *supra* n133 at 810. See also *Hayward v Cammel Laird Shipbuilders Ltd (No.2)*, [1988] A.C. 894 at 904B-C and *St Helens NHS Trust v Brownhill and others* 2011 IRLR 815.

¹⁷⁹ Sandra Fredman 'Reforming equal pay laws' (2008) 37 *Industrial Law Journal* 193 at 210.

¹⁸⁰ Section 83(2) of the Equality Act, 2010.

¹⁸¹ Section 64(1)(a) of the Equality act, 2010.

- (i) He is employed by A's employer or by an associate¹⁸² of A's employer; and A and B work at the same establishment.
- (ii) B is employed by A's employer or an associate of A's employer; B works at an establishment other than the one at which A works; and common terms apply at the establishments (either generally or as between A and B).

Therefore, unlike the EEA, in terms of the EqA employees in a multinational or group of companies may be able to institute a claim in terms of this provision if his or her comparator is employed by a related entity. Furthermore, section 64(2) of the EqA clearly stipulates that the comparison between an applicant and the comparator need not be contemporaneous. Thus, it is possible for a complainant to identify a predecessor or successor as a comparator for a claim under the EqA.¹⁸³

3.2.4. The meaning of equal work

In terms of section 65(1) of the EqA, the work of A is "equal" to that of B if it is (i) like B's work; (ii) rated as equivalent to B's work; or (iii) of equal value to B's work.

Work is "like" if the work undertaken by A and B are the same or broadly similar, and the differences in their work is not of practical importance in relation to the terms of their work.¹⁸⁴ It is therefore necessary when conducting a comparison

¹⁸² In terms of section 79(9) of the EqA, employers are associated if one is a company which the other directly or indirectly has control; or both are companies of which a third person directly or indirectly has control.

¹⁸³ T Laubscher 'Equal pay for equal work – a South African perspective' (2016) 37 *ILJ* 804 at 813.

¹⁸⁴ Section 65(2) of the Equality Act, 2010.

of the work undertaken by A and B to have regard to the frequency with which differences between their work occur, as well as the nature and the extent of such differences.¹⁸⁵ A's work is rated as equivalent to that of B if a job evaluation study gives an equal value to A and B's jobs in terms of demands made on the employee or would give an equal value to their jobs in those terms were the evaluation not made on a system which values the demands on men different to those it sets for woman.¹⁸⁶ Finally, A's work is considered equal in value to B's work if it is neither like B's work nor rated as equivalent to B's work but is nevertheless equal to B's work if regard is had to the demands on A by reference to factors such as effort, skill and decision-making.¹⁸⁷

The job evaluation system adopted by an employer to determine the value of work as discussed above is required to withstand rigorous testing against factors such as the thoroughness in its analysis, objectivity, transparency, accuracy, internal soundness, consistency, sufficient detail and fairness.¹⁸⁸

3.2.5. Defences

In terms of section 69 of the EqA, the sex equality clause has no effect if the employer is able to show that the difference between A and B's terms of employment are because of reliance on a material factor, that is, a material difference between A and B's case, which does not involve treating A less favourably than B because of A's sex; and if the factor is a proportionate means of achieving a

¹⁸⁵ Section 65(3) of the Equality Act, 2010.

¹⁸⁶ Sections 65(4) and 65(5) of the Equality Act, 2010.

¹⁸⁷ Section 65(5) of the Equality Act, 2010.

¹⁸⁸ See *Armstrong and others v Glasgow City Council* [2017] IRLR 993 which identified these factors as relevant to an assessment of whether a job evaluation system complies with section 1(5) of the EqA.

legitimate aim.¹⁸⁹ The reduction of inequality between men and women's terms of work is always regarded as a legitimate aim.¹⁹⁰

3.2.6. Remedies

Remedies for a successful claim of contractual pay discrimination include an order that the applicant's pay be raised to that of his or her comparator; the beneficial term in the comparator's contract of employment which was not conferred on the applicant be inserted into his or her contract; compensation in the form of back-pay or damages.¹⁹¹

3.3. Canada

Canada ratified the United Nations International Covenant on Economic, Social and Cultural Rights¹⁹² in 1976. State parties to this treaty recognise the right of everyone to remuneration which provides, as a minimum, fair wages and equal remuneration for work of equal value without distinction of any kind.¹⁹³ Following this ratification, Canada was enjoined to take steps to progressively realise the rights recognised in the Covenant by *inter alia* the adoption of legislative measures.¹⁹⁴ In compliance with its obligations under this Covenant, by the mid-1980s Canada

¹⁸⁹ Section 69 of the Equality Act, 2010.

¹⁹⁰ Section 69(3) of the Equality Act, 2010.

¹⁹¹ Section 132 of the Equality Act, 2010.

¹⁹² UN General Assembly, *International Covenant on Economic, Social and Cultural Rights, International Covenant on Civil and Political Rights and Optional Protocol to the International Covenant on Civil and Political Rights*, 16 December 1966, A/RES/2200, available at: <https://www.refworld.org/docid/3b00f47924.html> [accessed 9 February 2019].

¹⁹³ Part III, Article 7(1)(a).

¹⁹⁴ Article 2(1).

recognised equal pay for equal work as a ‘fundamental right’ and equal pay legislation was passed by the federal government as well as most provinces.¹⁹⁵

Canadian “equal pay” legislation can be broadly categorised into the following categories (i) laws that guarantee equal pay for equal work; (ii) laws that require equal pay for work of equal value; and (iii) laws that prohibit, in general terms, unequal treatment in an employment context.¹⁹⁶ This dissertation will limit its assessment to the federal legislation and that of the province of Ontario that require equal pay for work of equal value.

3.3.1. Statutory provision that requires equal pay for work of equal value

Section 11 of the Canadian Human Rights Act (“CHRA”)¹⁹⁷ provides that it is a ‘discriminatory practice’ for an employer to establish or maintain differences in wages between male and female employees that are employed in the same establishment and who perform work of equal value. For purposes of this section, “wages” is a term broader than salary and includes commissions, vacation pay, dismissal wages, bonuses, the value of board, rent or housing, payments in kind, contributions to pension funds, long-term disability plans and health insurance plans, as well as ‘any other advantage received directly or indirectly from the individual’s employer’.¹⁹⁸

Section 11 of the CHRA recognises that it is not a discriminatory practice to pay male and female employees different wages if the difference is based on a factor

¹⁹⁵ Sydney Kruth ‘A case for Canadian pay equity reform’ [i] 2014 5 *W. J. Legal Stud.* at 6.

¹⁹⁶ Kruth op cit (n195) at 7.

¹⁹⁷ Canadian Human Rights Act R.S.C., 1985, c.H-6.

¹⁹⁸ Section 11(7) of the Canadian Human Rights Act.

recognised by the guidelines issued by the Canadian Human Rights Commission to be a reasonable factor justifying such differentiation.¹⁹⁹ The Equal Wage Guidelines (“Guidelines”) recognise factors similar to those set out in the Employment Equity Regulations, 2014 as justifiable reasons for differentiation such as *inter alia* a difference in performance ratings, seniority, demotion, downgrading of the role, reclassification of a role, and the existence of an internal labour shortage.²⁰⁰

Ontario’s Employment Standards Act (“ESA”)²⁰¹ seeks to ensure that men and women receive equal pay for performing substantially the same job. In this regard, it prohibits an employer from paying an employee of one sex at a rate of pay less than the rate of another of the other sex in circumstances where (i) the employees perform substantially the same kind of work in the same establishment; (ii) their performance requires substantially the same skill, effort and responsibility; and (iii) their work is performed under similar working conditions.²⁰² The exceptions to this general prohibition are set out in section 42(2) of the ESA which provides that the prohibition does not apply when the difference in the rate of pay is made on the basis of a seniority or merit system, a system that measures earnings by quantity or quality of production or any other factor other than sex. Section 42(3) prohibits an employer from reducing an employee’s rate of pay in order to comply with the provisions of section 42(1).

¹⁹⁹ Section 11(4) of the Canadian Human Rights Act.

²⁰⁰ Paragraph 16 of the Equal Wages Guidelines, 1986 SOR/86-1082.

²⁰¹ Employment Standards Act, 2000, SO 2000, c 41.

²⁰² Section 42(1) of the Employment Standards Act.

Ontario's Pay Equity Act ("PEA")²⁰³ seeks to ensure that men and women receive equal pay for work that is of equal value, albeit different. Unlike the provisions of the CHRA and ESA which are enforced through a complaint process, the PEA requires employers with more than ten employees to proactively address pay disparities by *inter alia* comparing jobs generally done by women to those generally done by men using consistent gender-neutral job comparison systems which factor in skill, effort, responsibility and working conditions. Thereafter, an employer is obliged to establish and maintain compensation practices that provide for pay equity in work of equal or comparable value.²⁰⁴

3.3.2. The complainant

Under the CHRA, it is possible for a complaint of pay discrimination to be lodged on behalf of an identifiable group provided that the group is predominantly of one sex and the comparator group is predominantly of the other sex, as defined in the Guidelines.²⁰⁵

Under the ESA, an employee alleging that the Act has been or is being contravened may file a complaint with the Ministry of Labour.²⁰⁶ An Employment Standards Officer will then be appointed to investigate the complaint.

²⁰³ Pay Equity Act R.S.O. 1990, c. P.7.

²⁰⁴ Ontario Pay Equity Commission *The Pay Equity Act* available on http://www.payequity.gov.on.ca/en/AboutUs/Pages/the_act.aspx (last accessed 15 January 2018). See also section 7(1) of the Pay Equity Act.

²⁰⁵ Paragraph 12 of the Equal Wages Guidelines.

²⁰⁶ Section 96(1) of the Employment Standards Act.

3.3.3. Comparator

For purposes of section 11 of the CHRA, employees of an establishment include those that are subject to a common personnel and wage policy, irrespective of any collective agreement applicable to them and whether or not this policy is centrally administered.²⁰⁷ Two or more locations are considered a single establishment if they are in the same municipality or there are common “bumping rights” for at least one employee across municipal borders.²⁰⁸ Where separate establishments are established or maintained by an employer solely or principally for the purpose of establishing or maintaining differences in wages between male and female employees, they are deemed to be the same establishment for purposes of founding a claim under section 11 of the CHRA.²⁰⁹

3.3.4. Assessment of work

In terms of section 11 of the CHRA, when assessing the value of work performed by employees in the same establishment, the criteria that will be adopted is composite of the skill, effort and responsibility required in the performance of the work and the conditions under which the work is performed.²¹⁰

For purposes of the ESA, work is considered “substantially the same” if it is similar enough to reasonably be considered to fall within the same job classification. It is not necessary for the work to be identical in every respect, nor does the work

²⁰⁷ Paragraph 10 of the Equal Wages Guidelines.

²⁰⁸ Ministry of Labour *Your guide to the Employment Standards Act* available at <https://www.ontario.ca/document/your-guide-employment-standards-act-0/equal-pay-equal-work> (Last accessed 15 January 2018).

²⁰⁹ Section 11(3) of the Canadian Human Rights Act.

²¹⁰ Section 11(2) of the Canadian Human Rights Act.

need to be interchangeable.²¹¹ When assessing whether work requires substantially the same skill, one is required to consider the ‘degree or amount of knowledge, physical or motor capability needed by the employee performing the job’.²¹² “Effort” is measured with reference to the physical or mental exertion needed to perform the job, whereas responsibility is measured by the number and the nature of an employee’s work obligations, degree of accountability, and the degree of authority exercised by the employee in the performance of the work. When comparing employees’ working conditions, one is required to consider factors such as exposure to the elements, health and safety hazards in the workplace, and hours of work.²¹³

3.3.5. Remedies

The remedies available under the CHRA²¹⁴ include *inter alia* orders to cease the discrimination and take measures to prevent recurrence; compensate the applicant for wages and expenses; and/or damages.

In terms of section 42(5) of the ESA, where an Employment Standards Officer finds that an employer has contravened subsection (1), the officer may determine the amount owing to an employee as a result of the contravention and that amount shall be deemed to be unpaid wages for that employee. The employer may then be ordered to pay the unpaid wages to the employee.²¹⁵

²¹¹ Ministry of Labour *Your guide to the Employment Standards Act* available at <https://www.ontario.ca/document/your-guide-employment-standards-act-0/equal-pay-equal-work> (Last accessed 15 January 2018).

²¹² *Ibid.*

²¹³ *Your guide to the Employment Standards Act* op cit (n211).

²¹⁴ Section 53(2) and (3) of the Canadian Human Rights Act.

²¹⁵ Section 103 of the Employment Standards Act.

3.4. United States of America

In the United States of America, the right of employees not to be discriminated against in relation to their compensation is regulated under various federal laws.²¹⁶

The assessment in this paper will however be limited to the Equal Pay Act 1963 (“Equal Pay Act”) and Title VII of the Civil Rights Act, 1964 (“Title VII”).

3.4.1. Statutory framework

The Equal Pay Act came into effect on 11 June 1964 and forms part of the Fair Labour Standards Act 1938 (as amended) incorporated in the compilation of general and permanent federal statutes known as the United States Code. The Equal Pay Act was intended as ‘broad charter of women’s rights in the economic field’ seeking to ‘overcome the age-old belief in women’s inferiority and to eliminate the depressing effects on living standards of reduced wages for female workers and the economic and social consequences which flow from it’.²¹⁷

Pursuant to the Equal Pay Act, the Fair Labour Standards Act provides that no employer may discriminate between employees on the basis of sex by paying wages to employees in an establishment at a rate less than at which it pays employees of the opposite sex for equal work on jobs that require equal skill, effort and responsibility and which are performed under similar working conditions.²¹⁸

The exceptions to this general position is where payment is made pursuant to a seniority system, a merit system, a system which measures earnings by quantity or

²¹⁶ This includes the Equal Pay Act 1963, Title VII of the Civil Rights Act, 1964, Age Discrimination in Employment Act, 1967 and Title I of the Americans with Disabilities Act, 1990.

²¹⁷ *Schultz v American Can Company -Dixie Products* 424 F.2d 356 at 360 (8th Cir. 1970).

²¹⁸ Section 206(d)(1) of the Fair Labour Standards Act.

quality of production, or a differential based on any other factor other than sex.²¹⁹

As with Ontario's ESA, an employer may not reduce an employee's rate of pay in order to comply with this section.

Title VII is broader in scope than the Equal Pay Act insofar as it makes it an "unlawful practice" for an employer to discriminate against any individual with respect to his or her compensation, terms, conditions or privileges of employment because of that individual's race, colour, religion, sex or national origin. It only applies to employers with fifteen or more employees. What is commonly referred to as the Bennett Amendment inserted an exception to the general principle of the pay equity in Title VII similar to that set out in the Equal Pay Act. In this regard, the Bennett Amendment provided that it is not an unlawful practice for an employer to apply different standards of compensation or differed terms, conditions or privileges of employment pursuant to a *bona fide* seniority or merit system, a system which measures earning by quantity or quality of production or to employees at different locations. This exception is subject to the condition that the differences are not a result of an intention to discriminate on one of the listed grounds. It is furthermore not an unlawful practice to give or act upon the results of a professionally developed ability test, provided that the test is not designed, intended to or used to discriminate on a listed ground.²²⁰

²¹⁹ Section 206(d)(1) of the Fair Labour Standards Act.

²²⁰ Section 2000(h) of Title VII.

3.4.2. Establishing a claim

In order to found a claim for a breach of Title VII, a plaintiff need not demonstrate that he or she performed equal work to his or her comparator.²²¹ Rather, a plaintiff need only establish that he or she occupied a job “similar” to that of the higher paid comparator.²²² Once a *prima facie* case has been established, the burden then shifts to the employer to prove that there is a legitimate, non-discriminatory reason for the pay disparity.²²³ If the employer is able to demonstrate this, the plaintiff will then need to establish that, regardless of the reasons advanced by the employer, the employer intentionally discriminated against him or her.

Unlike with claims under Title VII, in a claim under the Equal Pay Act an employee need not establish that the employer acted with discriminatory intent.²²⁴ In order to establish a *prima facie* case, the plaintiff is required to demonstrate that the work performed is substantially equal to that of the identified comparator if regard is had to (i) the skills, duties, supervision, effort and responsibilities of the job; (ii) the work conditions of the plaintiff and her comparator were the same; and (iii) the comparator was paid more in the circumstances.²²⁵ Once a *prima facie* case is established on the Equal Pay Act, the burden of proof shifts to the employer to show that the pay disparity was due to one of the four legitimate reasons referred to above.

²²¹ *County of Washington v Gunther* 452 U.S. 161, 161, 168-171, 180-181, 68 L. Ed. 2d 751, 1010 S. Ct. 2242 (1981).

²²² *Sprague v Thom Ams*, 129 F.3d 1355 (10th Cir. 1997) (“*Sprague*”) at 1363.

²²³ *Sprague* supra (n222).

²²⁴ *Sinclair v Automobile Club of Oklahoma, Inc.* 733 F.2d 726, 729 (10th Cir. 1984).

²²⁵ *Mickelson v New York Life Ins. Co.* 460 F.3d 1304, 1311 n.5 (10th Cir. 2006).

3.4.3. Remedies

If an employer is found to have violated the provisions of the Equal Pay Act, it may be liable to the employee for unpaid wages and an equal amount in liquidated damages, as well as costs.²²⁶ Furthermore, an employer may be required to increase the complainant's pay in order to match that of the comparator.

A successful plaintiff in a Title VII pay discrimination claim may be entitled to recover back-pay, compensatory damages, punitive damages, front pay (that is, anticipated future damages resulting from the discrimination) and costs.²²⁷

²²⁶ Title 29 United States Code at section 206.

²²⁷ Title 42 United States Code, Chapter 21 at section 1981.

4. LIMITATIONS OF THE STATUTORILY DEFINED COMPARATOR IN THE EEA

4.1. Introduction

By prohibiting employers from providing employees that perform the same work, similar work or work of equal value with different terms and conditions of employment because of protected characteristics or arbitrary grounds, the EEA gives effect to the concept of formal equality which requires that like cases be treated alike.²²⁸

Where an employer treats similarly-situated employees alike in relation to their terms and conditions of employment or in instances where there are no similarly-situated employees of a comparative group treated more favourably, there can be no finding of discrimination under section 6(4) of the EEA. It is therefore a prerequisite for the success of a claim under this statutory provision that a comparator be identified.²²⁹

As set out in chapter 2, the comparator that must be produced by a complainant in a claim under section 6(4) of the EEA is statutorily defined as (i) an employee; (ii) of the same employer as the complainant; (iii) that performs the same work, substantially similar work or work of equal value to the complainant. The paragraphs that follow demonstrate that the requirement to produce a comparator as

²²⁸ That said, Regulation 7(f) of the Employment Equity Regulations, 2014, which identifies the existence of a shortage of relevant skill or the market value in a particular job classification as a possible factor justifying a differentiation in terms and conditions of employment, seems to recognise that formal equality has its limitations. This defence would allow the appointment of, for example, an African female engineer at a higher salary because of her market value.

²²⁹ *Mangena and Others v Fila South Africa (Pty) Ltd and Others* (2010) 31 ILJ 662 (LC) at para 6.

defined acts as a limitation on the efficacy of section 6(4) of the EEA meeting its stated objective of giving effect to the constitutional right to equality.²³⁰

4.2. The need to produce the correct comparator at the outset

The Labour Court has held on numerous occasions that a mere allegation of disparate treatment is insufficient to establish a valid cause of action in a claim of unfair discrimination.²³¹ Rather, it is incumbent on the complainant to allege (and later prove) that the disparate treatment exists because of a prohibited ground and the discrimination is relative to another person, that is, a comparator must be identified. Thus, a failure to identify a comparator in a pleaded case may be fatal to a claim. Take for example the case of *Simmadari v ABSA Bank Limited*²³² where the applicant's claim of *inter alia* alleged unfair discrimination on the grounds of race was dismissed pursuant to an exception to her pleadings. In assessing the articulation of the applicant's cause of action in her statement of case, the Labour Court found that she had merely alleged differentiation on the grounds of race but failed to identify a comparator at the outset in her pleaded case. Instead, a specific comparator was identified only in the pre-trial minute. Accordingly, the court held that the complainant's claim under the EEA did not disclose a valid cause of action.²³³

²³⁰ Isaac Joory 'Arguments against the politicized role of comparators in article 14 discrimination cases' 5 *Cambridge Student L. Rev.* (2009) at 40. See also Suzanne B. Goldberg 'Discrimination by comparison' 120 *Yale Law Journal* 728 (2010-2011) at 751.

²³¹ *Bayete* supra (n138) at 1119A-B. *Ntai* supra (n135) at 218F.

²³² *Simmadari v ABSA Bank Limited* (2018) 39 ILJ 1819 (LC) ("*Simmadari*").

²³³ *Simmadari* supra (n232) at 1834H to 1835A. See also *Mzobe & others and Fencerite (Pty) Ltd* (2016) 37 ILJ 1767 (CCMA).

As explained in section 2.2.2 above, a claim of unfair discrimination in terms of section 6(4) of the EEA requires a complainant to allege and provide that there is a difference in terms and conditions of employment between his or her and the comparator, that is, an employee of the same employer performing (i) the same; (ii) substantially the same work; or (iii) work of equal value. In order to ensure that a statement of case is not excipiable, it will be necessary for a complainant to set out the facts which sustain the conclusion that disparate treatment exists, this disparate treatment is because of a ground listed in section 6(1) of the EEA and that he or she performs the same work, substantially the same work or work of equal value to that of the chosen comparator. While seemingly clear requirements, cases of discrimination often ‘begin from emotionally charged but inartfully pled complaints, which are built upon mistaken legal foundations and then hindered by the plaintiff’s ineffective investigations into relevant circumstances’.²³⁴

As Fredman pointed out, the most relevant information to an equal pay claim lies in the hands of an employer.²³⁵ While section 78(1)(b) of the BCEA accords employees the right to discuss their terms and conditions of employment with fellow employees, the likelihood of an individual complainant sourcing and obtaining sufficient information on the extent of pay disparities from her comparator is limited, particularly given the allegation of discrimination. Given that there is no pre-litigation discovery or means of subpoenaing information for purposes of pleading, it becomes increasingly difficult for a complainant to correctly identify a comparator

²³⁴ Brian D. Patterson ‘The jurisprudence of discrimination as opposed to simple inequality in the international service’ (2007) *GA J Int’l & Comp L* 36(1) at 25.

²³⁵ Fredman op cit (n179) at 207.

doing similar work or work of equal value.²³⁶ As pointed out by Goldberg, ‘the evaluation of jobs is an immensely complex task which fortunes have been made by firms of consultants’.²³⁷ The average complainant approaching the CCMA or the Labour Court for recourse in a section 6(4) dispute is unlikely to have the resources to pursue (or the cooperation of the employer to participate in) a job evaluation system in anticipation of litigation. In the absence of ‘detailed analyses of the skill, knowledge and responsibilities demanded by each job [identified in a claim] and the working conditions under which it is performed’²³⁸ the ability of a complainant to correctly identify the correct comparator at the inception of a section 6(4) claim is compromised.

Further, the concepts of “same”, “similar work” and “work of equal value” are mutually exclusive and, without artfully drafted pleadings, it is not open for the complainant to use the safety net of alternative grounds for establishing a claim under section 6(4) of the EEA.²³⁹ Attempting to hinge one’s bet on one of the comparisons being legitimate would result in a challenge to the formulation of a claim at the inception of the dispute.

With this problem in mind, in order to ensure that the majority of section 6(4) discrimination cases are not stillborn at the conceptual stages of the litigation, the possible solution would be to permit the CCMA or the Labour Court to disregard the complainant’s choice of comparator once the discovery stages of the litigation

²³⁶ Pre-action “discovery” may however be available in terms of section 50 of the Promotion of Access to Information Act 2 of 2000. See Fredman *op cit* (n179).

²³⁷ Goldberg *op cit* (n230) at 271.

²³⁸ Goldberg *op cit* (n230) at 271.

²³⁹ *Mangena and others v Fila South Africa (Pty) Limited supra* (n229) para 15.

reveals the chosen comparator to not be a true comparator, and to construct a hypothetical comparator against which it will consider whether there is evidence to support the contention that the granting of terms and conditions of employment to the complainant was tainted by a ground set out in section 6(1) of the EEA. This is the example adopted by the United Kingdom following the Court of Appeal decision of *Balamoody v United Kingdom Central Council for Nursing, Midwifery and Health Visiting*.²⁴⁰ In *Balamoody* the complainant was a State Registered Nurse who was removed from the register of nurses on account of misconduct relating to drug management. The complainant sought to have his name restored to the register and, in doing so, complained that the matron of the nursing home, a white lady, was guilty of misconduct and responsible for the matters for which he had been convicted. The allegations against the matron were later investigated and she was found not guilty of any offences. The complainant's request for the restoration of his name to the registrar was therefore denied.

Subsequently, the complainant initiated a claim of unlawful race discrimination against the decision-making health authority. These claims were dismissed by the Employment Tribunal as frivolous and of no substance given the absence of a true comparator being identified (that is, no one else had been found guilty of any offences) to establish a *prima facie* case.²⁴¹ The Employment Appeal Tribunal considered whether the Employment Tribunal ought to have utilised a hypothetical comparator when assessing the claim but ultimately concluded that because a specific case of discrimination had been made in this instance, there was

²⁴⁰ *Balamoody v United Kingdom Central Council For Nursing, Midwifery & Health Visiting* [2001] EWCA Civ 2097 (6 December 2001) ("*Balamoody*").

²⁴¹ *Balamoody* supra (n240) para 23.

no need to go through a process of identifying a hypothetical comparator and then coming to the conclusion that none such would be appropriate.²⁴²

On appeal from the Employment Appeal Tribunal to the Supreme Court of Judicature Court of Appeal (Civil Division), the court found that it was incumbent on the Employment Tribunal to construct a hypothetical comparator given the possibility that the conclusion that the matron was not guilty of any offences could be a result of race discrimination. In this regard, the court of appeal aligned itself with the comments of Lindsay J in *Chief Constable of West Yorkshire v Vento*²⁴³ that:

...[w] here there is no evidence as to the treatment of an actual male comparator whose position is wholly akin to the applicant's, a tribunal has to construct a picture of how a hypothetical male comparator would have been treated in comparable surrounding circumstances. Inferences will frequently need to be drawn. One permissible way of judging a question such as that is to see how unidentical but not wholly dissimilar cases were treated in relation to other individual cases. It is not required that a minutely exact actual comparator has to be found. If that were the case then isolated cases of discrimination would almost invariably go uncompensated.

The court of appeal in *Balamoody* was cautious to point out that not every case requires a 'robustly interventionist' approach by the Employment Tribunal such that it takes on making out a case for a complainant. Each case ought be assessed on an individual basis.²⁴⁴

While the adoption of a similar approach to claims pursuant to section 6(4) of the EEA may assist in the ventilation of legitimate complainants by unsophisticated

²⁴² *Balamoody* supra (n240) para 27.

²⁴³ See the headnote to *Chief Constable of West Yorkshire v Vento* [2001] IRLR 124 quoted in *Balamoody* supra (n240) para 60.

²⁴⁴ *Balamoody* supra (n240) para 61.

litigants, as evident from section 4.5 below, the use of hypothetical comparators comes with its own challenges.

4.3. The requirement that the comparator be an employee employed by the same employer

Given that section 6(4) of the EEA requires the comparator in a discrimination claim to be an employee employed by the same employer as the complainant, it is possible for employers to avoid liability under this section by arranging their corporate structures so that separate entities are established principally for the purpose of maintaining differences in terms and conditions of employment between employees based on a proscribed or arbitrary ground.

For example, it is possible for a company to split its operations within a group structure such that the labour intensive work is undertaken by employees employed by a production company whereas employees undertaking administrative and management services are contracted to a separate entity which provides services to the production company through a management agreement. Employees in the production company will therefore be precluded from raising a claim of discrimination citing an employee in the management company as a comparator. An example of segregating a workforce in separate entities was seen in the case of *Allonby v Accrington & Rossendale College*.²⁴⁵

In *Allonby*, 341 part-time lecturers were employed by the Accrington & Rossendale College (“College”) under successive one year contracts in terms of which their rate of pay was determined by the level at which they were teaching. By

²⁴⁵ *Allonby v Accrington & Rossendale College* [2004] IRLR 224 (ECJ) (“*Allonby*”).

1996, legislative changes required part-time lecturers to be accorded equal or equivalent benefits to full-time lecturers. In an effort to reduce its overheads, the College elected to terminate or not renew the contracts of part-time lecturers and, instead, offered to re-engage them through agencies. Of the 341 hourly-paid part-time lecturers who were made redundant by the College in 1996, 110 were men and 231 were women. Upon their re-engagement by the College through an agency, the part-lecturers' pay was then determined as a proportion of the fee agreed between the agency and the College.

Following her transfer to an agency, Ms Allonby's rate of pay was reduced and she lost a series of benefits linked to her employment. Ms Allonby brought a claim alleging that the College was discriminating against her as a contract worker and that the agency was obliged by law to pay her equally, that is, proportionate to the relative difference in the time and value of the work conducted by a full-time lecturer at the College.

Following a referral of the dispute to the Court of Justice of European Communities, the court considered whether Article 141(1) of the EC Treaty²⁴⁶ which enjoins each Member State to ensure that the principle of equal pay for male and female workers for equal work or work of equal value is applied, must be interpreted to enable a woman whose contract of employment with an undertaking has not been renewed and who is immediately made available to her previous employer through another undertaking to provide the same services is entitled to rely on the principle of equal pay, using as her comparator a man employed by her previous employer

²⁴⁶ The Treaty establishing the European Community Treaty C325/1 (Consolidated version 2002) available at <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12002E/TXT&from=EN> (last accessed 8 January 2019).

performing the same work or work of equal value. Despite the fact that Ms Allonby continued to do the same work at the College, albeit through an agency, the court concluded that Ms Allonby was not entitled to rely on the principle of equal pay using her former male colleagues at the College as a comparator. The court reasoned that the fact that the level of pay received by Ms Allonby is influenced by the amount which the College pays the agency is not a sufficient basis for concluding that the College and the agency constitute a single source responsible for the disparity or which could restore equal treatment.²⁴⁷

Adopting a narrow approach like the court in *Allonby* opens the doors for unscrupulous employers to deliberately segregate a workforce to avoid the application of section 6(4) of the EEA. Although the South African Labour Courts have not hesitated to look beyond the employing legal entity to determine whether the contractual arrangements between the parties or the labels they have attached to their relationship hide the true status of their relationship in the past,²⁴⁸ I submit that a similar approach to the Canadian example of deeming individuals to be employed by the same establishment for purposes of founding a claim of discrimination where separate establishments are established or maintained by an employer solely or principally for maintaining differences in terms and conditions of employment on discriminatory grounds ought to have been adopted in the South African context.

Apart from the above, given the socio-economic impact apartheid has had on the South African workforce, it is possible for there to be a homogenous

²⁴⁷ *Allonby* supra (n245) para 46 to 48.

²⁴⁸ Laubscher op cit (n133) at 814 and her reference to *Unitrans Supply Chain Solutions (Pty) Ltd & another v Nampak Glass (Pty) Ltd & others* (2014) 35 ILJ 2888 (LC) and *TMS Group Industrial Services (Pty) Ltd t/a Vericon v Unitrans Supply Chain Solutions (Pty) Ltd* (2015) 36 ILJ 197 (LAC).

workforce²⁴⁹ amongst a labour intensive production company such that all potentially comparable employees share the same personal trait identified as the ground for discrimination, for example, race. Further, employers may also avoid liability under section 6(4) by electing to engage the individuals treated more favourably as independent contractors.²⁵⁰ Where this occurs, a claim will be complicated by the evidentiary burden of first establishing that such arrangements are in fact disguised employment relationships. Given that the need for a comparator is codified in section 6(4), in the absence of a comparator, a complainant will not get out of the proverbial starting blocks in his or her claim.²⁵¹

4.4. The need for the comparator to be contemporaneous

Landman suggests that in pursuing an equal pay dispute, a complainant's chosen comparator must normally be contemporaneous, that is, 'doing the same job or a job of equal value at the same time'.²⁵² Identifying a contemporaneous comparator in large workforces where there are multiple employees engaged in standardised roles may pose little difficulty, however, the need for a contemporaneous comparator becomes more challenging when one is faced with a specialist workforce where employees are categorised into bespoke roles based on their varied competencies or at senior or executive levels where there are no multiple incumbents in a particular portfolio.²⁵³ Requiring a complainant in a claim under section 6(4) of the EEA to

²⁴⁹ Goldberg op cit (n230) at 759.

²⁵⁰ Sandra Fredman "Background paper for the Working Group on Discrimination against Women in Law and Practice (the Working Group): economic and social life" (2013) *Anti-discrimination laws and work in the developing world: a thematic overview* available at www.ohchr.org/Documents/Issues/Women/WG/ESL/BackgroundPaper2.doc (last accessed 15 December 2017).

²⁵¹ *Impala Platinum Ltd v Jonase and Others* (2017) 38 ILJ 2754 (LC) at para 13.

²⁵² Landman op cit (n17) at 346.

²⁵³ Goldberg op cit (n230) at 755.

identify a contemporaneous comparator could therefore result in the perpetuation of disproportionate pay differentials along the lines of *inter alia* sex or race.

One possible way of addressing the challenges faced by a narrow formulation of a contemporaneous comparator is to amend section 6(4) of the EEA to specifically deal with the issue that a comparator need not be contemporaneous in a manner similar to section 64(2) of the EqA. Section 64(2) of the EqA specifically provides that, to rely on the sex equality protections and rights prescribed in sections 66 and 67 of the EqA, the work undertaken by the comparator need not be done contemporaneously with the complainant. Alternatively, the South African courts and tribunals could adopt a generous interpretation of the statutorily defined comparator in a manner similar to the European Court in the case of *Macarthys Ltd v Smith*²⁵⁴ where the court permitted the complainant to compare herself to her predecessor who had received a higher rate of pay than her or of *Diocese of Hallam Trustee v Connaughton*²⁵⁵ where the United Kingdom Employment Tribunal permitted a complainant to use her immediate successor as her comparator given that her successor's contract 'was so proximate to her own as to render him an effective comparator, as effective as if actual'.

4.5. The absence of a hypothetical comparator

As set out in section 2.2.4 above, while the Code of Good Practice encourages the use of a hypothetical comparator²⁵⁶ where there are no comparable male-dominated

²⁵⁴ *Macarthys Ltd v Smith* 1980 ICR 672.

²⁵⁵ *Diocese of Hallam Trustee v Connaughton* [1996] IRLR 505 at para 15.

²⁵⁶ Paragraphs 6.4 and 6.5 of the Code of Good Practice.

jobs to female-dominated jobs within an employer's organisation, the plain wording of section 6(4) of the EEA contemplates an actual comparator.

The use of a hypothetical comparator as suggested by the Code of Good Practice would enhance a complainant's ability to found a claim at an organisation where systematic discrimination may make it difficult to establish differential treatment that meets the section 6(4) test, similar to the experience in the case of *County of Washington v Gunther* in the United States of America.²⁵⁷ In *Gunther*, the respondents were employed as guards in the female section of a jail who filed a suit under Title VII alleging *inter alia* that they had been paid less than the male guards in the male section of the jail. The District Court dismissed the claim given that it failed to satisfy the "equal work" standard of the Equal Pay Act. On appeal, however, the Supreme Court of the United States recognised that requiring sex-based wage discrimination claims to satisfy the "equal work" standard of the Equal Pay Act would 'mean that a woman who is discriminatorily underpaid could obtain no relief – no matter how egregious the discrimination might be – unless her employer also employed a man in an equal job in the same establishment, at a higher rate of pay'. The Supreme Court went further to suggest that an adoption of the reasoning advanced by the District Court and petitioner on appeal would also mean that a woman employed in a unique position at a company would not be able to obtain legal redress even if her employer admitted that her salary would have been higher had she been a man.²⁵⁸

²⁵⁷ *County of Washington v Gunther* 452 U.S. 161 (1981).

²⁵⁸ *County of Washington v Gunther* supra (n257) 178 and 179.

Although permitting the use of a hypothetical comparator would allow for greater scope to address pay discrimination by challenging societal prejudices and structural norms, I am hesitant to propose the removal of the legislative requirement for a comparator to establish a claim under section 6(4) of the EEA. Firstly, ‘[r]emoving the comparator would make it harder to ascribe actions to inequitable treatment based on a protected characteristic’.²⁵⁹ Secondly, the benefit of an actual comparator allows for a court or tribunal to engage with empirical evidence of differentiation rather than making assumptions or judgments based on sociological analyses.²⁶⁰ This would avoid allegations of the courts showing little deference to the managerial prerogative exercised by employers and ‘using their powers to institutionalise their own social views into legal mandates’.²⁶¹ Thirdly, the costs of pursuing a claim of discrimination in terms of section 6(4) of the EEA premised on a comparison with a hypothetical comparator would inevitably escalate as the need for expert evidence to explain how stereotypes operate to the disadvantage of the complainant and to the advantage of the hypothetical comparator.

Accordingly, I would propose that, similar to the outcome of the consultation of the Equality Bill in the United Kingdom, our courts and tribunals retain flexibility on whether there is a need for an actual comparator on a case by case basis.²⁶²

²⁵⁹ The Equality Bill – Government response to the consultation’, July 2008 (Cm 7454) at [7.10] available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/238707/7454.pdf (last accessed 6 January 2018).

²⁶⁰ Goldberg op cit (n230) at 793.

²⁶¹ Goldberg op cit (n230) at 793.

²⁶² The Equality Bill – Government response to the consultation’, July 2008 (Cm 7454) at [7.10].

5. SOME CRITICISMS OF THE REGULATED METHODOLOGY FOR ASSESSING WORK OF EQUAL VALUE IN SOUTH AFRICA

Complaints premised on work being the same or substantially the same in that they may be considered interchangeable permits the use of a relatively uncomplicated exercise of cross-checking employees' key areas of responsibility, competency and requirements for their roles. The more problematic scenario is a complaint premised on the work of the complainant and the comparator being of equal value.

The Employment Equity Regulations, 2014 set out a methodology to be employed when assessing whether work is of equal value. This requires an objective evaluation of the roles of the complainant and comparator having regard to the factors set out in Regulation 6(1)(a) to (d) which include (i) the responsibility demanded of the work; (ii) the skills, qualifications, prior learning and experience required to perform the work; (iii) the physical, mental and emotional effort required to perform the work; and (iv) the conditions under which work is performed, to the extent relevant. Evident from these factors, the Employment Equity Regulations, 2014 prescribe that it is the content and characteristics of a particular job as opposed to the personal characteristics of the incumbents or operational requirements of the employer that ought to be compared.

Notably, the Employment Equity Regulations, 2014 fail to provide any guidance on the extent to which critical areas of dispute in the evaluation of jobs

ought to be approached.²⁶³ For example, to what extent should the physical effort required to perform the work be balanced with the mental effort associated with the exertion of a particular set of skills? How are these factors to be measured? Is expert evaluation of these factors required when a comparison is being conducted or is the mere say-so of the employer or a consulting party sufficient? Regrettably, the Code of Good Practice provides no further elucidation on these issues, merely stating that '[t]he weighting attached to each of these factors may vary depending on the sector, employer and the job concerned. These factors do not constitute any particular preference in respect of weighting allocation.'²⁶⁴ The other glaring omission in the methodology prescribed in the Employment Equity Regulations, 2014 and guidelines outlined in the Code of Good Practice is the frequency of the assessments.²⁶⁵

The consequences of the above include that the employer is seemingly free to decide how to quantify the factors, a possible lack of uniformity in the implementation of job evaluations within a workplace, the continued application of an outdated evaluation as a means of legitimising discrepancies in terms and

²⁶³ Bourne and Whitmore cited in Laubscher op cit (n133) at 816 caution that courts should not make a 'too minute an examination' or 'place emphasis upon trivial distinctions which...are not likely to be reflected in the [employees'] terms and conditions of employment. For example, in *Shields v Coomes Holdings Ltd* [1978] IRLR 263 cited in Laubscher op cit (n133) at 816 it was held that a comparison should not be made of the contractual difference in the complainant and comparator's contracts but rather the responsibility and work actually undertaken between the employees and the frequency with which they are done.

²⁶⁴ Code of Good Practice, para 5.6.

²⁶⁵ See *Eaton Limited v Nuttall* [1977] ICR 272 at 277H cited in *Thomson v Diageo plc* [2004] All ER (D) 86 (Jun) EAT which found that a 'valid job evaluation study' would be a test that is thorough in its analysis and capable of impartial application such that it should be possible, 'by applying the study, to arrive at the position of a particular employee at a particular point in a particular salary grade without taking other matters into account except those unconnected with the nature of the work.' Phillips P went on to find that a job evaluation study which requires 'management to make a subjective judgment concerning the nature of the work before the employee can be fitted into the appropriate place in the appropriate salary grade, would seem to us not to be a valid study...'

conditions of employment and the *ex post facto* moderation of weighting of factors once an employer has had sight of the case articulated by a complainant. It is also likely that there is only a real resolution of these substantive queries through a protracted litigation process.

In addition to the criteria referred to above, Regulation 6(2) of Employment Equity Regulations, 2014 provides that any other factor indicating the value of work may be taken into account in evaluating work, provided that the employer shows that the factor is relevant to the assessment. No further guidance is provided by either the Employment Equity Regulations, 2014 or the Code of Good Practice as to what would render a factor as relevant to the assessment. This is possibly an attempt by the legislature to avoid the challenges of prescribing a “one size fits all” approach and impinging on an employer’s prerogative to determine what considerations are relevant to its specific business considerations. However, I submit that a failure to provide guidelines as to what would be considered relevant to an assessment of the value of work provides scope for the application of employer subjectivity and consequently the possible perpetuation of an underestimation of worth of jobs and engendered stereotypes within an organisation.

Although one of the Code of Good Practice’s stated objectives is to encourage employers to manage remuneration policies and practices through *inter alia* proper consultation processes, there is no requirement that the evaluation of the value of work be through a consultative or collective process.²⁶⁶ The extent to which employees and their representatives are involved in the assessment of work is therefore at the discretion of the employer. In my submission, the absence of a

²⁶⁶ Code of Good Practice, para 1.3.

requirement that there be a consultative process in the assessment of the value of work is a missed opportunity to create further legitimacy for the exercise of an employer's discretionary powers in the assessment of the value of work in its organisation and consequential application of policies regulating terms and conditions of employment.²⁶⁷ Further, employee participation in the evaluation process would result in increased awareness and understanding of the requirements of various roles within an organisation which not only limits the scope of an employer implementing discriminatory means of evaluation, but may also operate to reduce the referral of claims premised on ill-informed perceptions of the value of work.

²⁶⁷ Marie-Thérèse Chicha 'A comparative analysis of promoting pay equity: models and impacts' (Geneva) International Labour Office (2006) available at https://www.ilo.org/wcmsp5/groups/public/@ed_norm/@declaration/documents/publication/wcms_d ecl_wp_27_en.pdf (last accessed 6 January 2018) at 54.

6. THE PROBLEMATIC SCOPE OF DEFENCES IN THE SOUTH AFRICAN CONTEXT

6.1. Critique on the scope of defences

Once a difference in the terms and conditions of employment between a complainant and his or her comparator is established, and that the complainant and the comparator are found to perform the same work, similar work or work of equal value, the question then turns to whether the differentiation is prohibited for a reason set out in section 6(1) of the EEA. The complainant is required to establish a causal link between the differentiation and a listed or analogous ground.²⁶⁸ Once this causal link is established, the employer is required to justify the discrimination that exists.

Regulation 7 of the Employment Equity Regulations, 2014 prescribes a number of factors that could justify the differentiation in treatment. Where an employer relies upon one of the factors enumerated in Regulation 7 to justify the differentiation in the terms and conditions of employment between the complainant and comparator, it will be required to demonstrate that the factor relied upon caused the difference. One would assume that an employer pleading multiple defences to the differentiation would not be permitted to do so as alternative defences in order to avoid a rationalisation for its conduct after the fact. Rather, it would be more appropriate for an employer to explain the extent (perhaps expressed as a

²⁶⁸ Section 11 of the EEA. See *Minister of Correctional Services & others v Duma* (2017) 38 ILJ 2487 (LAC) at para 22. *Cekiso and Premier FMCG (Pty) Ltd* (2017) 38 ILJ 2615 (CCMA) at para 18. In *SA Municipal Workers Union and Another v Nelson Mandela Bay Municipality* (2016) 37 ILJ 1203 (LC) the court held that in a wage discrimination claim, the complainant must show a nexus between the differentiation on the grounds claimed and her different treatment, which excludes other reasonable inferences. See also Laubscher op cit n133 at 809.

percentage) to which the differentiation in terms and conditions of employment can be attributed to each of the defences relied upon.

Having regard to the scope of the defences, it is arguable that the legislature maintained a significant degree of deference to employer prerogative, particularly when regard is had to the fact that reliance can be legitimately placed on more subjective factors such as performance, competence, potential and market value of an employee's skills. Permitting reliance on these factors arguably means that disparate treatment may always be attributed to seemingly non-discriminatory reasons. Some of these factors are discussed in detail below.

6.2. Seniority

Similar to the United States of America, the Employment Equity Regulations, 2014 do not require a formal seniority system in the workplace (for example, as agreed in a collective agreement) before reliance can be placed on this defence.²⁶⁹ However, undoubtedly, an employer must be able to identify the factors used to measure seniority and that these factors are uniformly and consistently applied.

The defence of seniority was raised by the respondent in the case of *Ntai v South African Breweries Ltd.*²⁷⁰ The three black male applicants were employed by the respondent as trainers in its training institute together with two white males. The applicants alleged that their employer's practice of paying them lower salaries than their white counterparts performing the same work constituted unfair race discrimination and accordingly constituted a residual unfair labour practice as

²⁶⁹ See *EEOC Whitin Mach. Works*, 699 F.2d 688, 689 (4th Cir. 1983) where the seniority system defence was permitted despite there being no formal system in place.

²⁷⁰ *Ntai supra* (n135).

contemplated in item 2(1)(a) of Schedule 7 to the LRA.²⁷¹ While the respondent admitted that there was difference in the employees' salaries which was significant, it denied that the difference was based on or caused by race. Rather, the respondent relied on (i) a series of performance-based pay increments; (ii) the greater experience of the comparators; and (iii) their seniority to justify the differentiation.²⁷² Having considered the evidence before it, the court was satisfied that the pay differentials between the employees could be attributed to the remuneration history of the comparators, namely the regrading of their jobs in 1992, their seniority/experience and accumulative performance related increases. In the absence of a significant challenge to the evidence presented by the respondent or evidence to establish that the alleged unwillingness on the part of the respondent to close the pay gap was related to or based on race, the court found no basis upon which it could 'legitimately interfere' with the decision of the respondent.²⁷³ Accordingly, the court found that there was no merit in the contention that the size of the pay gap was caused by race. *Ntai* demonstrates the continued deference by our courts to the exercise of employer prerogative in instances where a clear case of the abuse thereof has not been established.²⁷⁴

²⁷¹ *Ntai* supra (n135) para 2.

²⁷² *Ntai* supra (n135) para 25.

²⁷³ *Ntai* supra (n135) para 62.

²⁷⁴ See also *Pioneer Foods (Pty) Ltd v Workers Against Regression and Others* (2016) 37 ILJ 2872 (LC) at 2881F-G where the court held that '[n]othing in the EEA precludes an employer from adopting and applying a rule in terms of which newly appointed employees start at a rate lower than existing long-serving employees.' Compare this to *Ndlela & others v Philani Mega Spar* (2016) 37 ILJ 277 (CCMA) where the employer offered a provident fund to all of its employees once they had completed five years' service with it in an effort to retain employees. The Commissioner found that, in the absence of empirical or objective evidence that the benefit would result in staff retention, the differentiation based on seniority was arbitrary and unfair. She therefore held that the employer had unfairly discriminated against the applicant employees.

While the application of the facially neutral seniority system has long been embraced as a means of limiting employer prerogative in the allocation of benefits and pay, cognisance must be given to the possibility of its application unintentionally perpetuating past discriminatory employment practices, particularly given the barriers to employment previously facing black people in South Africa, as well as women.²⁷⁵ Accordingly, I propose that the defence of seniority or length of service to justify differentiation in terms and conditions of employment of employees performing the same or similar work or work of equal value be scrutinised with reference to *inter alia* the history of the industry in which the employer operates, the historical composition of the workforce and barriers to employment facing members of designated groups prior to concluding the operation of the seniority system is fair and neutral.

6.3. Performance

In terms of Regulation 7(1)(c) of the Employment Equity Regulations, 2014, an employer may rely on the respective performance of a complainant and the comparator to justify a differentiation in terms and conditions of employment. The only prescribed limitation on this defence is that the employees must be equally subject to the performance evaluation system and the performance evaluation system must be consistently applied. Therefore, significant scope for the application of managerial prerogative when evaluating performance remains. In this regard, there is no express limitation on the adoption of a performance evaluation system that places reliance on the subjective assessments by different supervisors who may have

²⁷⁵ Stephen Utz 'New Definition of Seniority System Violations under Title VII: He Who Seeks Equity...' (1977-1978) 56 *Tex L Rev* 301.

different management styles. Further, there is no express requirement in the Employment Equity Regulations, 2014 that there be a proportionate correlation between employee performance evaluations and the discrepancy in pay.

In order to mitigate against a possible abuse of managerial prerogative in justifying pay differentials based on performance, I propose that closer scrutiny be given to performance evaluation systems that do not rely solely on objective criteria for the assessment of an employee's performance. Further, the approach of the United States circuit courts that a 'merit system must be an organi[s]ed and structured procedure whereby employees are evaluated systematically according to predetermined criteria' and 'employees must be aware of the merit system and the merit system must not be gender based' or based on any other listed or arbitrary ground ought to be applied when determining the appropriateness of this defence when considered against the State's objective when introducing section 6(4) of the EEA.²⁷⁶

6.4. Shortage of skills and market value

Regulation 7(f) of the Employment Equity Regulations, 2014 permits reliance on *inter alia* the shortage of relevant skills or the market value of a particular job classification as a factor that would justify a difference in terms and conditions of employment. Reliance on market value or a skills shortage has been recognised in other jurisdictions as an objectively justifiable ground for unequal pay.²⁷⁷

²⁷⁶ See *Rdyuchowski v Port Authority of New York and New Jersey*, 203 F.3d 135 (2d Cir. 2000) and the circuit court decisions cited therein.

²⁷⁷ For example, *Enderby v Frenchay Health Authority* [1993] IRLR 591 (ECJ).

However, market value is not necessarily a neutral factor and can lead to the perpetuation of discrimination due to historical societal discriminatory employment practices.²⁷⁸ I am therefore inclined to agree with the judgment of Lord Denning in the case of *Clay Cross (Quarry Services) Ltd v Fletcher*²⁷⁹ in the United Kingdom that permitting reliance on market forces that are unrelated to job qualifications may render the pay discrimination prohibition a ‘dead letter’. Where an employer is able to rely on extrinsic forces as a defence to pay disparities, ‘the door would be wide open. Every employer who wished to avoid the statute would walk straight through it.’²⁸⁰

I therefore propose caution be applied when accepting skills shortages and market value or forces as a rationale for disparate treatment in, for example, male and female dominated jobs when used as justification for unequal pay between employees performing work of equal value and the approach of the Canadian Human Rights Commission placing a heavy burden of proof on employers relying on market forces as a defence be applied in the South African context.

²⁷⁸ *Corning Glass v Brennan* 417 U.S. 188 (1974). Shelley Kroll ‘Beyond Equal Pay for Equal Work: recent developments in the United States, Great Britain, and Canada’ (1984) 7 *B.C. Int’l & Comp L Rev* 179 at 198.

²⁷⁹ *Clay Cross (Quarry Services) Ltd v Fletcher* [1979] I.C.R. 1.

²⁸⁰ *Ibid.*

7. CHALLENGES ARISING FROM THE ADMINISTRATION AND INSTITUTION OF CLAIMS IN SOUTH AFRICA

As referred to earlier in this dissertation, challenges to discriminatory practices pertaining to the terms and conditions of employment of employees performing the same work, substantially the same work or work of equal value are complaint based. In this regard, section 10 of the EEA provides that an employee may refer a discrimination dispute in terms of section 6(4) to the CCMA within six months after the act or omission that allegedly constituted unfair discrimination.²⁸¹ Following the referral of the dispute, the CCMA must attempt to resolve the dispute through conciliation.²⁸² Where a dispute remains unresolved after conciliation, it may be referred to the Labour Court for adjudication. The CCMA may however arbitrate the dispute where the employee alleging the discrimination earns below the earnings threshold determined by the Minister of Labour in terms of section 6(3) of the BCEA or where the parties consent to the arbitration of the dispute.

With this in mind, the question that arises is whether the current dispute resolution model prescribed by the EEA facilitates the achievement of its stated objective of obtaining pay or remuneration equity in the workplace.²⁸³ For the reasons that follow, I submit that the response to this question is “no”.

²⁸¹ Section 10(2) of the EEA.

²⁸² Section 10(5) of the EEA.

²⁸³ Code of Good Practice, para 1.2.

7.1. Challenges experienced by individual complainants

As demonstrated in chapter 4 of this dissertation, an individual, complaint-based approach to challenging pay discrimination places a significant burden on employees who are often under resourced, unassisted and unfamiliar with the complexities associated with the articulation and evidential substantiation of pay discrimination claims.²⁸⁴ This is particularly given the challenges referred to in section 4.2 above to obtaining the requisite information to formulate a coherent claim prior to the institution of proceedings.

Although a discovery process is available to litigants in the Labour Court (as well as in terms of Rule 29(1) of the Rules for the Conduct of Proceedings before the CCMA), a ‘person requiring discovery is in general only entitled to discovery once the battle lines are drawn and the legal issues established. It is not a tool designed to put a party in a position to draw the battle lines and establish the legal issues.’²⁸⁵ Thus, until such time as an applicant in a section 6(4) dispute is able to precisely delineate the scope of his or her complaint, the discovery process will not be at the applicant’s disposal. This is particularly so given that the relevance of the information required through the discovery process is assessed with reference to the

²⁸⁴ Fredman op cit (n179) at 206. While it is not necessary for an applicant to anticipate and negate every defence that might be available to the employer party, applicants cannot pursue an equal pay claim without disclosing (i) the personal circumstances of each applicant; (ii) his or her post in the organisation; (iii) level of remuneration; (iv) the chosen comparator; (v) the basis of the comparison and without asserting the basis on which any differential is alleged to constitute unfair discrimination in the form of a breach of the principle of equal work for the same or similar work, or work of equal value – *Brilliant and Others v Gauteng Gambling Board* (JS276/15; JS721/14) [2015] ZALCJHB 379 (12 October 2015) at para 9.

²⁸⁵ Van Loggarenberg *Erasmus Superior Court Practice* (2nd ed) vol 2 at D1-458 – D1-459.

pleadings and it is the party seeking discovery who bears the onus of proving that he or she is entitled to discovery.²⁸⁶

I therefore submit that the legislature ought to have been mindful of these obstacles and its potential to deter employees from pursuing claims under section 6(4) of the EEA. Means of addressing these challenges could have included:

The creation of a commission or an investigative unit of the Department of Labour or CCMA similar to the United States Equal Employment Opportunity Commission (“EEOC”) which is responsible for the enforcement of federal anti-discrimination laws such as Title VII and the Equal Pay Act. The EEOC is endowed with the authority to investigate claims of discrimination, file lawsuits on behalf of the complainants or in the public interest and litigate these cases. The possible advantages of the establishment of a commission or unit in South Africa with powers similar to those of the EEOC referred to above include (i) the identification of claims without reasonable cause before parties are embroiled in a process of costly and lengthy litigation; (ii) the likelihood of there being a greater motivation to settle disputes at conciliation where there is a coherent and well-researched claim articulated against an employer; and (iii) creating a buffer between an employee and her employer where the commission or unit litigates on the complainants behalf. This may assist in diluting the adversarial atmosphere created by a dispute by an

²⁸⁶ *Continental Ore Construction v Highveld Steel and Vacuum Corporation Ltd* 1971 (4) SA 589 (W) at 598D-F. *Swissborough Diamond Mines (Pty) Ltd v Government of the Republic of South Africa* 1999 (2) SA 279 (T) at 311A; *Zono v Minister of Correctional Services & others* (2009) 30 ILJ 2976 (LC) at para 31.

individual complainant and allowing greater scope for the preservation of the ongoing employment relationship.

The creation of a two-stage process for the management and resolution of claims based on a difference in terms and conditions of employment where the complainant and the comparator are alleged to conduct work of equal value, as seen with the example of the procedure established for the hearing of equal value claims by the Employment Tribunal in the United Kingdom.²⁸⁷ In this regard, the first stage essentially requires a merit assessment to be conducted by the presiding officer to determine whether it will proceed with the determination of the dispute before it or whether it is necessary to first appoint an independent expert to evaluate the jobs and establish facts relevant to the claim in order to effectively adjudicate the claim and prescribe an appropriate remedy.²⁸⁸ Examples of the circumstances in which the tribunal may make an order appointing an independent expert to assist it include where a party is not legally represented or where it is of the view that insufficient information may have been disclosed by a party.²⁸⁹ The second stage of the process is the hearing of the claim. I submit that the introduction of an initial stage similar to the above in the adjudication of claims

²⁸⁷ <http://www.equalpayportal.co.uk/the-law/> (Last accessed on 6 January 2019).

²⁸⁸ Employment Tribunals (Constitution and Rules of Procedure) (Amendment) Regulations 2004 (as amended) available at <http://www.legislation.gov.uk/uksi/2004/2351/regulation/2/made> (Last accessed 9 January 2019). Independent Data Services Ltd *IDS employment law handbook: "equal pay"* (2011) Thomson Reuters at 186.

²⁸⁹ Employment Tribunals (Constitution and Rules of Procedure) (Amendment) Regulations 2004 (as amended) at item 6(1) of Schedule 6.

alleging work of equal value under section 6(4) of the EEA would not only assist in rooting out claims without reasonable cause, but it would also provide much needed assistance in the form of an independent expert to thoroughly investigate and report on the complex issue of when work is considered to be of equal value.

Empowering the Department of Labour or a statutory institution specialising in “equal pay” disputes to commission independent evaluations of employers’ job evaluation systems where there are allegations of subjectivity or bias, as with the example of the Canadian Human Rights Commission.²⁹⁰ This would facilitate a proactive approach to addressing discriminatory employment practices as opposed to being reactive to the institution of a claim.

7.2. Overburdened dispute resolution *fora*

The South African dispute resolution *fora* tasked with the resolution of disputes arising from section 6(4) of the EEA are under significant capacity constraints. Recent experience in litigating in the Labour Court, Johannesburg has been that matters are allocated trial dates, at the earliest, between 12 to 18 months after the filing of a pre-trial minute. In respect of the CCMA, during the 2017/18 financial year, an average of 754 new cases were referred every working day.²⁹¹

²⁹⁰ Kroll op cit (n278) at 220.

²⁹¹ Commission for Conciliation, Mediation and Arbitration annual report 2017/2018 financial year. Available at <http://www.ccma.org.za/About-Us/Reports-Plans/Annual-Reports> (accessed 6 January 2019).

Given the evidential complexities that arise in “equal pay” disputes, the adjudication of these disputes are likely to be protracted. Furthermore, evidence surrounding issues relevant to the adjudication of such disputes such as job evaluation systems, market forces and performance evaluation are highly specialised. It is therefore arguable that it would be a more effective use of state resources to have specialists initially processing and adjudicating claims under section 6(4) of the EEA, with a right of appeal to the Labour Court, rather than requiring the Labour Court to be a forum of first instance or to require CCMA commissioners to acquire expert knowledge of such issues.

A specialist tribunal which deals exclusively with issues surrounding “pay discrimination” and pay equity ought to have been established to *inter alia* provide guidance on the interpretation and application of the requirements surrounding the concept of equal pay for equal work and the reduction of income differentials within the workplace, similar to the Canadian Human Rights Commission, as well as perform training and dispute resolution functions. In order to ensure compliance with South Africa’s obligations to ensure the application of the principle of equal remuneration for work of equal value, this tribunal ought to have been endowed with oversight powers to monitor and verify compliance. Furthermore, consideration could further have been given to establishing sectoral committees, comprising of employer and employee parties similar to a bargaining council, to formulate job evaluation methods and tools that can be used by companies in a given sector.²⁹²

²⁹² Chicha op cit (n267) at 59.

8. CONCLUSION

Discrimination claims premised on pay disparities were entertained by the South African labour courts prior to the enactment of the current section 6(4) of the EEA. Having considered the requirements for establishing a claim under section 6(4) of the EEA, the scope of defences available to an employer to respond to a claim of discrimination and the challenges facing litigants in the administration and institution of claims, it is my submission that section 6(4) takes the advancement of the constitutional protection of equality no further. The reasons therefor are summarised below.

8.1. An employer's prerogative is largely maintained

Although a process of juridification has resulted in the codification of a prohibition against discriminatory practices in respect of the granting of terms and conditions of employment to employees performing the same work, substantially the same work or work of equal value, in the absence of a right to equal pay in such circumstances, there remains a significant preservation of an employer's autonomy to determine the terms and conditions that are granted to employees.

In the absence of a general obligation on non-designated employers to 'correct the institutional structures which give rise to the discrimination' or make 'systematic progress towards pay equity', until such time as a complaint results in an order directing an employer to take steps to prevent the same unfair discrimination or a similar practice occurring in the future in respect of other employees, there is no mandatory requirement to address disparities in terms and conditions of employment for employees conducting the same work, substantially the same work or work of

equal value.²⁹³ Neither is there a proverbial “carrot” to adopt an equal pay practice in the workplace, for example, as is the case with implementation of broad-based black economic empowerment initiatives to obtain a rating pursuant to the Broad-Based Black Economic Empowerment Act 53 of 2003. Thus, the ability to achieve equality remains primarily within the hands of the employer.

8.2. The limitations of a complaints-led model

A complaints-led model merely assists with providing a remedy to aggrieved complainants and does not provide a means to examine and rectify structures that perpetuate discrimination. As explained in section 1.4 above, this only provides a partial framework for the achievement of equality.

What is notably missing from the so-called “equal pay” provisions of the EEA, the related Employment Equity Regulations, 2014 and Code of Good Practice is a requirement that an employer engage with its workforce on the assessment of the value of work in its organisation, the consequential application of policies regulating terms and conditions of employment as well as the extent to which structural or societal prejudices impact the evaluation of work. Doing so, I submit, would have increased the awareness and understanding of the requirements of various roles within an organisation which, in turn, would serve to limit the scope of an employer implementing discriminatory means of evaluation and reduce the referral of claims premised on ill-informed perceptions of the value of work. Further, and perhaps most importantly, a consultative or consensus driven approach to the evaluation of work would have created a ‘co-operative culture for equal pay’ and greater

²⁹³ See the powers of the Labour Court in section 50(2)(c) of the EEA. Fredman, *supra* 284.

legitimacy for the exercise of an employer's discretion in the allocation of terms and conditions of employment to its employees based on the value of their work.²⁹⁴

8.3. The limitations of a statutorily-defined comparator

Apart from these omissions in construction of section 6(4) of the EEA, other shortcomings in its formulation include the narrowly defined comparator which is a prerequisite for the establishment of a case of discrimination pursuant thereto. The requirement to produce the correct comparator at the outset of litigation poses a significant hurdle to a complainant, particularly given the restrictions on obtaining sufficient data in support of a claim at the inception thereof, which often results in employees being unsuited prior to a proper investigation into the complaint.

8.4. The complexities associated with evaluating the value of work

Neither section 6(4) of the EEA, the Employment Equity Regulations, 2014 nor the Code of Good Practice provide comprehensive guidance on the extent to which critical areas of dispute in the evaluation of jobs ought to be approached. Nor do they require a consultative or consensus-driven process between an employer and its workforce to assess the value of work in the organisation. Consequently, significant autonomy is afforded to an employer to decide how to quantify the value of work. This not only results in a possible lack of uniformity in the implementation of job evaluations within a workplace, but also facilitates the continued application of outdated evaluations as a means of legitimising discrepancies in terms and conditions of employment.

²⁹⁴ Fredman discussed in Victoria Hooten 'This is a (Wo)Man's world: reforming UK Equal Pay' (2015) 3 *Legal Issues J* 65 at 83.

8.5. The deference to employer prerogative in a consideration of defences

For the reasons discussed more fully in chapter 6 above, the legislature maintained a significant degree of deference to employer prerogative when formulating the suite of defences available to an employer when faced with a dispute pursuant to section 6(4) of the EEA. In this regard, reliance may legitimately be placed on more subjective factors such as performance, competence, potential and market value of an employee's skills. Permitting reliance on these factors arguably means that disparate treatment may always be attributed to seemingly non-discriminatory reasons.

8.6. The failure to create a specialist statutory tribunal or commission to assist with *inter alia* the investigation of claims and dispute resolution

In light of the complaints-led model of South Africa's so-called equal pay law, the role of the already overburdened Labour Court and CCMA in the application of section 6(4) of the EEA is limited to dispute resolution functions. This is insufficient to assist with the effective enforcement of "equal pay" compliance.

Firstly, given the complexities associated with the proper articulation and ventilation of an "equal pay" dispute, the Labour Court and CCMA provide insufficient support to employees and employers to understand and resolve "equal pay" disputes. Consideration ought to have been given to the creation of a specialist commission or tribunal which assumes responsibility for the investigation of claims of discrimination, filing lawsuits on behalf of the complainants, litigating these cases, educating, providing guidance on and monitoring the implementation of "equal pay" and requisite evaluations in the workplace, as well as the appointment of experts to establish facts relevant to the resolution of a claim.

Secondly, the Labour Court or the CCMA only facilitates a reactive approach to eliminate pay discrimination in the workplace. In order to ensure the proper protection of the right to equality, a statutory institution specialising in “equal pay” disputes ought to have been endowed with the power to commission independent evaluations of employers’ job evaluation systems where there are allegations of subjectivity or bias. As set out above, this would permit with the proactive approach to addressing discriminatory employment practices.

In the premises, for these reasons canvassed in my analysis of section 6(4) of the EEA, I submit that it only partially assists in giving effect to the constitutional protection of equality. Equality in the form of equal pay for equal work is therefore likely to remain a Tantalus.

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