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The SABPP Women's Report 2015: Equal Pay for Equal Value

Anita Bosch (Editor)
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The SABPP Women's Report 2015

Women's pay: Equal pay for equal value

Anita Bosch (Editor)



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Foreword

The gender pay gap is much lamented and, at times, I've been asked whether knowing that there are real structural inequalities between women and men in the workplace makes me feel despondent. My answer to that would be no. In fact, the more we are able to articulate these inequalities, the more likely we are to find ways of addressing these, especially through good human resource management practices.

The topic of this year's Women's Report was chosen based on the amendments to the South African Employment Equity Act and resultant inducement for organisations to ensure that there are no gender pay gaps that may lead to litigation. It's always amusing to see how the law can sharpen and redirect the focus of any hardened board or management team. Nevertheless, gender pay inequalities have been with us since the start of paid work for women, and unfortunately, as can be seen from Chapter 1, may not be all that easy to eradicate. Pay inequalities have taken on a structural element, which is embedded in our way of thinking about work, efficiency, and profit. These structural impediments are not immediately evident, and are often dismissed and legitimised by referring to the pure market capital model as justification.

Now that South Africa has embarked on legislated non-discrimination, titled: equal pay for equal value, the burden rests heavily on human resource management practitioners to uncover potential cases of pay inequity, and to address these with innovative remedies. Mark Bussin and Ronel Nienaber bring their experience of serving on boards to the third chapter, where they deliberate the reasons why boards should pay attention to gender pay differences. They provide information that, together with Chapter 1, could start informing board members about the origin and nature of gendered pay. In addition, Italia Boninelli provides a detailed and thorough explanation of a gender pay audit. Illustrating vast experience in the management of human resources at a national and global level, she highlights how an audit's results may be misleading, and how structural inequalities may be dealt with.

Without a doubt, the last chapter is a must-read for all HR practitioners, who will inevitably need to explain how equal value in pay may be interpreted from a labour law perspective and how a company can ensure that they do not end up in litigation on the matter. Hugo Pienaar provides a comprehensive explanation, with examples, of the intricacies involved in the interpretation and execution of the law.

This seems to be the dawn of a new era for HR practitioners. Pay inequalities and associated legal implications have moved the dial, and we now have to be knowledgeable about the origins of the gender pay gap in order to understand the ways in which it may manifest. We also have to be sensitive to the obscured forms of pay inequality and how its persistence negatively impacts employee morale and engagement. It is, however, in the addressing of structural pay inequality that HR practitioners will be able to make the greatest contribution to workplace equality. Let the work begin!

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CHAPTER ONE

Reasons for the gender pay gap – what HR practitioners should know

Prof. Anita Bosch

The focus of this chapter is on the findings of research conducted in various parts of the world on gender pay inequities and linking these to human resource management practices and solutions. The chapter is written in a pragmatic style, to bring attention to the steps that human resource practitioners can take to bring change into effect.

Differences in pay for the genders might not seem like a topic that is deserving of much attention, given the plethora of other urgent matters that human resource management practitioners face. A startling fact, articulated by Giapponi and McEvoy¹, brought the matter into perspective for me: many women are paid less than what men are, even though they are just as educated as those men, and women in the USA “lose between \$700,000 and \$2 million over their lifetime to unfair pay practices. Because women live longer than men, elderly women face financial jeopardy because of the pay inequities they suffered during their working lives”². Unfair pay practices perpetuate societal inequalities and keep families in poverty. Poverty fuels global instability. It therefore stands to reason that, other than it being a moral imperative, HR practitioners who address gender pay inequality are making a considerable impact on the stability of the communities in which they live and, ultimately, on national and global stability.

In the studies under review, five main themes were identified that provided reasons for gender pay differences. Below, I expand on these themes, and provide comments on how HR practitioners might address these.

Skills development and careers

Where differences in pay for work of equal value can be related to race, gender, age, or other considerations, they may be discriminatory. The fact that there are a number of interrelated reasons for remuneration differences makes the identification of discrimination quite difficult. The burden of proof is often so cumbersome that job incumbents resort to leaving the organisation, apply deviant practices to make up for the perceived shortfall, or psychologically disengage from their work.

The Equal Opportunity for Women in the Workplace Agency in Australia found that **women’s skills are often undervalued**, which leads to **occupational segregation**³. Skills such as caring, nurturing, and organising, which are generally associated with women, do not carry a high monetary premium. Clear evidence of this can be found in, for instance, the teaching profession, where salaries are quite low for work that ultimately has a very high social and economic impact. Very often, especially at primary school level, the teachers are primarily women.

If children are not adequately taught at school, they cannot productively contribute to the economy, and these poorly educated adults often resort to delinquent behaviour, which carries a high social cost. So, whilst it may be argued that there are a great number of teachers available and that the skill of teaching is therefore not scarce, therefore teachers are not paid well, **two important facts may be used as rebuttal**.

Firstly, if teaching were revered by societies for the impact that it could make on national development, talented young adults would view it as a viable profession, which, in turn, would increase the level of skill and proficiency of teachers. The level of impact of teaching would improve, raising competition in the market for such positions, and teachers would be able to command a higher salary. Secondly, the long-term cost of undervaluing ‘soft’ skills has such a high social cost that nations cannot afford to continue to devalue care. The input and attention that a mature, concerned adult can provide into developing the mind of a child is difficult

1 Giapponi, C. C. & McEvoy, S. A. (2006). The legal, ethical, and strategic implications of gender discrimination in compensation: Can the Fair Pay Act succeed where the Equal Pay Act has failed? *Journal of Individual Employment Rights*, 12(2), pp. 137-150.

2 Giapponi, C. C. & McEvoy, S. A. (2006). The legal, ethical, and strategic implications of gender discrimination in compensation: Can the Fair Pay Act succeed where the Equal Pay Act has failed? *Journal of Individual Employment Rights*, 12(2), p. 147.

3 Equal Opportunity for Women in the Workplace Agency. (2012). *Gender pay gap: The facts, why it is important and what actions can be taken*.

to equate with the worth of a stock exchange deal. What salary would you pay the person who optimally cares for your child? Would you be able to afford her if you had to pay market-related rates?

HR practitioners should consider their personal views about the value that skills bring to the workplace and to society. Our personal views are often translated into workplace practices and policies such as our company's stance on the development of people or the value that is attached to all types of work. As people practitioners, we are able to influence mind-sets.

Further differentiators in women's pay are aspects such as the taking of **career breaks** and **lower investment in women's training and development**⁴. Most school-leaving girls are aware that, should they decide to have children, they would have to combine their careers with the care that children require. Modern family structures are emerging, where men become stay-at-home fathers, but, in South Africa, that seems to be the exception rather than the norm. Dual-career couples are more often the norm than single-income families, and single-income families where the woman earns the salary are very common.

Taken together, the care burden remains on the shoulders of women, and, therefore, career breaks, such as maternity leave or taking time out to raise children, are said to hamper women's pay prospects. **If you are not visible at work, or your CV has a gap that is non-work-related, your prospects of earning a high salary on return to work, irrespective of your skills, are not outstanding.** Companies also often take the view that they would rather invest in the development of workers who will provide a return on their investment, rather than investing in women who will eventually fall pregnant and resign. Furthermore, workplaces reward those who work disproportionately long hours⁵. Often, women cannot work such long hours, due to their care responsibilities.

Gaps in CVs should not be seen as an impediment to the development of other skills from which the organisation could benefit. Not unlike male workers who returned to work after compulsory national service, women who re-enter the workplace after a career break will require some development investment. These returning workers are often very committed, and display a whole range of additional, useful skills that were developed in other domains of their lives. Gaps in CVs should also become more common as the new generation takes unpaid sabbaticals and other career breaks. Similarly, taking time off to raise a family should be viewed as a normal practice.

Modes of work, job changes, and pay

When the gender pay gap is assessed, the comparison is not straightforward, in that many factors, such as the hours spent at work, full-time vs. part-time work, job type, and whether workers are paid weekly, per day⁶, and so forth, often obfuscate potential underlying discrimination. Merely stating that women work shorter hours than men do, and therefore earn less than men, is not a valid justification for pay differences, as the hourly rate that these women earn is often also lower than that of men doing the same work for a full working day.

When a woman changes jobs, she is often offered only a slightly higher salary than the one that she received at her previous employer. She therefore may remain at a low level of pay, even though the skills required and level of responsibility of the new job might be considerably higher than those of her previous job. Organisations are able to get away with such discrimination when the new organisation requires a payslip from her previous employer. By providing such, she opens herself up to being offered less than what the job is worth at the onset of salary negotiations.

HR practitioners make use of job evaluation, and place a particular job on a certain pay level within the organisation's salary structure. The HR manager should know what the justifiable pay should be for a particular job. Since organisations want to limit salary negotiations, it is easier to ask for an old payslip and give the new incumbent a 10% raise on the previous salary. This practice should be interrogated, and inconsistencies in allocating salaries to a specific pay band and level eradicated – even though the organisation might argue that the practice brings short-term budgetary relief.

4 Equal Opportunity for Women in the Workplace Agency. (2012). *Gender pay gap: The facts, why it is important and what actions can be taken.*

5 Herald Reporter. (2015). *Gender pay gap still remains a reality.* 27 April 2015.

6 Lips, H. M. (2013). *Acknowledging discrimination as a key to the gender pay gap.* *Sex Roles*, 68, pp. 223-230.

Pay transparency⁷ is synonymous with ethical employment practices.

Wage determination and collective bargaining

The role of unions in wage determination during collective bargaining cannot be underestimated. Often, collective bargaining is done by male negotiators, and it remains doubtful whether unions specifically strategize on matters influencing women's pay before negotiations commence. More specifically, it remains doubtful that union negotiators are informed regarding the economic principles that underpin structural gender inequality created through collective bargaining. Karamessini and Ioakimoglou⁸ argued that "wage setting is a political, cultural, and economic process, embedded in an institutional and societal context." According to these authors, wage setting is not merely an economic process driven by market forces, but rather that wages are determined based on the "value of the labour power."

Women's labour, as explained at the beginning of this chapter, is often undervalued or not given a monetary equivalent with which to determine its economic value. Therefore, if wages are determined based on the value of labour, it stands to reason that the characteristics and skills that women display may be undervalued during the wage determination process. This would lead to "low valuation of the jobs that women do,"⁹ and wage discrimination would lead to "unequal remuneration for the same job"¹⁰.

In Greece, the gender pay gap was explained predominantly by noting that a greater concentration of women in the workforce of an industry led to an overall lower level of pay for the whole industry (for both men and women), compared to industries dominated by men¹¹. Similarly, in Kenya, "industries and occupations which require fewer skills have disproportionately

more female workers"¹². A secondary important pay differentiator was tenure in jobs¹³. Individuals who were able to hold a specific job without breaks earned significantly higher salaries than women who took breaks.

HR practitioners can inform themselves of potential structural causes of gender pay disparities that are caused during wage determination and collective bargaining, and negotiate to eradicate these, in good faith, with the union. Such gestures during negotiations can go a long way in building and maintaining healthy employment relationships.

School subject choices of girls

It may seem surprising to request HR practitioners to consider how they could influence the subject choices of school-going girls. After all, HR practitioners deal with people at work. Smart HR practitioners think about the sustainability of their talent pipeline even before the entry of talent into the workforce, and **extraordinary HR practitioners consider how they may influence and eradicate negative trends in their talent pipeline that are perpetuated over time.**

The subject choices that girls make at school, whether they identify with, enjoy, and excel at mathematics, science, and technology, or regard these areas of study as a boy's domain make a huge difference in the outcome of their future pay. Very often, girls regard themselves as incompetent at maths and science, and therefore do not identify with these skills, which have, over time, become scarce worldwide. At present, skills scarcity drives high pay. Women who hold a general bachelor's degree in social sciences or humanities, as well as women with a business studies major, except for accounting, are more likely to earn lower incomes than those who hold bachelor's degrees in the sciences or accounting¹⁴.

Laurie found that the main reason for the lower pay for women with degrees in social science or humanities, or with a business major was that they were placed into

7 Travis, M. A. (2014). Gender pay gap: Lessons from the social model of disability. *Denver University Law Review*, 91(4), pp. 893-923.

8 Karamessini, & Ioakimoglou. (2007). Wage determination and the gender pay gap: A feminist political economy analysis and decomposition. *Feminist Economics*, 13(1), pp. 31-66.

9 Karamessini, & Ioakimoglou. (2007). Wage determination and the gender pay gap: A feminist political economy analysis and decomposition. *Feminist Economics*, 13(1), p. 34.

10 Karamessini, & Ioakimoglou. (2007). Wage determination and the gender pay gap: A feminist political economy analysis and decomposition. *Feminist Economics*, 13(1), p. 34.

11 Karamessini, & Ioakimoglou. (2007). Wage determination and the gender pay gap: A feminist political economy analysis and decomposition. *Feminist Economics*, 13(1), pp. 31-66.

12 Agha, R. U., Agha, J., & Dabalen, A. (2013). Sources of the persistent gender wage gap along the unconditional earnings distribution: Findings from Kenya. *Oxford Development Studies*, 41(1), p. 100.

13 Karamessini, & Ioakimoglou. (2007). Wage determination and the gender pay gap: A feminist political economy analysis and decomposition. *Feminist Economics*, 13(1), pp. 31-66.

14 Morgan, L. A. (2008). Major matters: A comparison of the within-major gender pay gap across college majors for early-career graduates. *Industrial Relations*, 48(4), pp. 625-650.

job types that paid lower salaries¹⁵. This implies that, even if a woman is as educated as a man, she might earn a lower salary, due to her being selected for a job type that pays a lower salary. It may, therefore, be well worth the time and effort of HR practitioners to assist schools in identifying girls who excel at mathematics and science very early on, and to provide support and peer group networking for these girls, to ensure that they are able to make different choices by the time they reach high school and university. Working into the talent pipeline at school level provides a greater likelihood of a future supply of girls who have scarce skills.

Motherhood penalty – fatherhood advantage

Mistra and Strader¹⁶ penned a compelling read regarding the role of parenthood in determining penalties and advantages. They found that, “While mothers earn significantly less than childless women with the same characteristics – referred to as a motherhood penalty – fathers earn somewhat more than childless men with the same characteristics – referred to as a fatherhood bonus. **Research shows that, rather than declining over time, the motherhood penalty remains stable, controlling for factors such as education and experience**”¹⁷. The motherhood penalty is said to realise when women take a career break, but Mistra and Strader found that this is not the case in the USA, and that the motherhood penalty is more pronounced for white women¹⁸. Furthermore, the fatherhood advantage is seemingly fuelled by employers’ perception of men being the breadwinners. Those who are perceived to be a more likely to be a breadwinner are advantaged through higher earnings¹⁹, compared to men who are not regarded as breadwinners.

HR practitioners should be vigilant for signs of discrimination against women who indicate that they would like to start a family. Furthermore, women should not be placed on the ‘mommy track’ due to employer perceptions that they are not sufficiently ambitious or committed to their jobs. These types of subtle discrimination often surface during selection-

and promotion processes. Care should also be taken regarding management’s perceptions of employees who have children, those who are childless, and views about race. The racial aspect receives great attention in South Africa – the other diversity aspects seemingly get very little thought.

Conclusion

Pay inequality is certainly an emotive topic. Money determines, not only the quality of life of women and families, but also their access to opportunities that may positively contribute to their future. The five themes that have been discussed are recurring but not exhaustive. The themes highlight major areas of global research on gender-based remuneration practices. Gender pay discrepancies are fraught with assumptions that cannot consistently be explained by the market model of human capital, as is presently purported. HR practitioners and board members are advised to take heed of the arguments that are presented in this chapter, as major changes can take effect through slight changes in perceptions of leaders about pay.

15 Morgan, L. A. (2008). Major matters: A comparison of the within-major gender pay gap across college majors for early-career graduates. *Industrial Relations*, 48(4), pp. 625-650.

16 Mistra, J. & Strader, E. (2013). Gender pay equity in advanced countries: The role of parenthood and policies. *Journal of International Affairs*, 67(1), pp. 27-41.

17 Mistra, J. & Strader, E. (2013). Gender pay equity in advanced countries: The role of parenthood and policies. *Journal of International Affairs*, 67(1), p. 28.

18 Mistra, J. & Strader, E. (2013). Gender pay equity in advanced countries: The role of parenthood and policies. *Journal of International Affairs*, 67(1), p. 29.

19 Mistra, J. & Strader, E. (2013). Gender pay equity in advanced countries: The role of parenthood and policies. *Journal of International Affairs*, 67(1), p. 29.

CHAPTER TWO

The gender pay audit – practical steps for multi-national and local companies

Mrs Italia Boninelli

The long-term competitiveness of a country is dependent on full utilisation of its human capital. No country or economy can afford to under-utilise more than half of its human capital. Therefore, women need to be brought into the mainstream of the economy, for justice and ethical reasons as much as for efficiency and productivity. The gender inequality gap is measured on four fronts: economic participation and opportunity, education, political empowerment, and health and survival¹.

This chapter will provide an overview of women's economic participation and empowerment from a South African legislative and global organisational policy perspective. It addresses the processes that HR practitioners can utilise to identify the gender pay gap through appropriate analysis, often referred to as an audit, and what practitioners should do about pay differentials once identified.

Legislative context

The majority of countries now have legislation enforcing non-discrimination that specifically addresses gender issues. South Africa is no different, and has established the Commission for Gender Equality, which has the power to monitor, investigate, research, educate, lobby, advise, and report on issues concerning gender equality². Gender equity and pay discrimination also feature in the Employment Equity Act 55 of 1998 (as amended), specifically addressing unfair discrimination, and stating that "an employer must ensure that employees are not paid different remuneration for work

of equal value based on race, gender or disability"³. South Africa is also a co-signatory to a number of international conventions that set standards for gender equity, such as the International Labour Organization's Protocol on Decent Work and Working Conditions, the UN Global Compact 10 Principles, and the SADC Protocol on Gender and Development 2008, to mention but a few⁴. The legislative and standards frameworks are clearly in place. Yet, in the Global Gender Gap Index 2014 rankings, while South Africa ranked 18th out of 142 countries overall, it ranked only 83rd out of 142 countries in the category *Wage equality for similar work*⁵. While we have made significant progress in gender equality in a number of areas, it appears that the gender pay gap remains a problem.

Preparing for the remuneration audit

Reviewing HR- and remuneration policies and procedures

Any audit related to human resources should commence with a review of all HR policies, to ascertain whether there are any conditions that explicitly or by default result in unequal treatment of staff based on gender, race, or any other discriminatory condition. An example of this would be different retirement ages for women and men, which would need to be reviewed and amended.

Secondly, there should be a detailed remuneration policy in place. Listed companies with a remuneration sub-committee of the board and that publish an Annual Report will invariably have such a policy. This is a requirement of the King III Code of Good Practice for companies in South Africa⁶, but is also widely considered best practice by shareholders and regulators in other countries.

1 World Economic Forum. (2014). *The Global Gender Gap Report 2014, South Africa report*. Accessed 15 April 2015, <http://reports.weforum.org/global-gender-gap-report-2014/economies/#economy=ZAF>

2 Government of South Africa. (1996). *Constitution of the Republic of South Africa, No. 108 of 1996*, p. 92.

3 Government of South Africa. (2014). *Employment Equity Act 55 of 1998, as amended*, p. 13.

4 Business Engage Association. (2015). *Best practices in gender mainstreaming, Johannesburg*, pp. 14-18.

5 World Economic Forum. (2014). *The Global Gender Gap Report 2014, South Africa report*. Accessed 15 April 2015, <http://reports.weforum.org/global-gender-gap-report-2014/economies/#economy=ZAF>

6 Institute of Directors in Southern Africa. (2009). *King Code of Governance for South Africa 2009, Johannesburg*, p. 30.

Such a remuneration policy should clearly spell out how the company applies key remuneration principles such as:

- *a pay curve designed according to the applicable pay band and job grade;*
- *pay for performance, and differentiation in pay according to an employee's measurable deliverables;*
- *internal equity between equivalent roles; and*
- *market benchmarking, including the principle of positioning guaranteed pay at a set point (e.g., the median of the applicable markets) and an approved practice of paying higher than the median where there is a shortage of specialist and/or key technical skills.*

The policy should, furthermore, specify the approach to determining:

- *basic pay (monthly or annual salary);*
- *benefits (medical, retirement, life cover, leave, and any other guaranteed benefits); and*
- *any incentives (short-term, e.g., bonuses; long-term, e.g., shares; and any retention schemes that involve remuneration, e.g., retention bonuses; or remuneration-in-kind, such as paid studies of a significant nature).*

These policies should be transparent and easily accessible to all. It is also preferable to have detailed written procedures for the practical processes to be followed in determining increases, promotions, incentives, etc. Clarity around remuneration policies and procedures ensures greater transparency. It ensures that individuals are appropriately remunerated and informed in this regard, and it makes leadership accountable. Such policies also result in consistency in the practice of remuneration. Both transparency and consistency go quite some way in avoiding pay discrimination.

However, moving towards stricter governance and transparency in an environment where clear inequities exist is not without some risk, as inequities becoming known can have a negative impact on the work climate. A 'clean-up' phase may be required before full transparency can be achieved, but this should not be an excuse to delay; rather, it should be the motivation to address issues as soon as possible.

Conducting the remuneration audit

The process of conducting a remuneration audit to establish the existence of any discriminatory differentials requires careful planning and an understanding of all the factors that potentially impact pay. A simplistic analysis that relies on comparing the average pay of women and men within a band may produce the conclusion that there is a clear gap. However, this argument may be countered with the response that every pay decision is the specific outcome of that role and that individual, conveniently deflecting attention away from the structural issues underlying potential pay discrimination. It is thus important to clarify a set of guidelines within which the pay audit is conducted.

Preparing the data

The first step is to set up the database for the pay audit. The following, while not an exhaustive list, are some key sets of data and principles that should underpin a pay audit.

- **Accuracy of remuneration data** – *This should be self-evident, but bears re-emphasizing. Ensure that the data used to conduct the audit are fully up to date, and that all data are extracted at the same point in time. Also, do not compare data from different geographical locations of the organisation without converting all to the same currency and also considering the impact of fluctuating exchange rates, local market practices, and legislative requirements, as well as differentials in the cost of living for the locations.*
- **Basic pay, total pay, and total package comparisons** – *Comparisons across all aspects of pay need to be conducted. The reason for this is that one may not find gender discrimination in basic pay, but it may well exist in benefits or incentives. Thus, the following need to be considered:*
 - *basic pay;*
 - *total pay = basic pay + benefits; and*
 - *total package = basic pay + benefits + incentives.*



- **Biographical data** – *The following information is required: gender, function or department, length of service with the company, length of time in role, geographic location of the role, qualifications and any special skills required for the role, the qualifications and special skills the individual possesses, performance appraisal ratings (preferably more than one year's), a history of how the incumbent was placed in the role (external recruit, internal promotion, demotion, etc.), information from the talent management system on whether the incumbent is considered to be part of the talent pool, type of contract (including work hours and extent of travel), and any other information that could be relevant.*
- **Grading systems** – *A sufficient amount of information is required to assess how accurately jobs have been graded in the organisation, and whether there has been 'grade creep'⁷ in some jobs (and the reasons for that), as this may influence the required actions.*
- **Clarity of role vs job titles** – *Many jobs have the same title, but, upon closer examination, they are not the same (or are not even really the same grade). This requires updating the role description, which may include interviewing the manager of that role to obtain the required information as part of the job evaluation process.*
- **Pay scales and relevant market data for each grade and function** – *If the pay scales have not been set according to remuneration structuring principles in relation to a specifically chosen market position (e.g., the 50th percentile) against the identified benchmark (companies of approximately the same size and turnover operating in the same industry or similar markets), but are rather the result of increasing old pay scales in accordance with inflation, relevant market survey data need to be obtained.*

Analysis

Once all the data have been obtained, it should initially be categorised by grade or band, and then by function or occupation. As occupations require different qualifications and experience, and are subject to different premiums in the market, as a result of specific skills shortages, it is best to conduct a within-occupation gender wage-gap analysis, rather than a within-grade

analysis. (Some of the issues concerning gender concentration in specific occupations are discussed in the section *Actions to be Taken*). All the roles should be categorised by grade or band, and then the following should be considered.

- *What are the averages for basic pay, total pay, and total package for men versus women in that occupation at that grade, e.g., for Financial Managers on a Lower D Band (if you are using Paterson grading)? Are there large differences, i.e. 10% or more? Note that, depending on the circumstances, even smaller differences, such as 5%, may be an indication of structural issues in the way women are paid, compared to men.*
- *Are there any incumbents paid outside of the official pay scale for that occupation at that grade (assuming that the pay scales are relevant and appropriately benchmarked)?*
- *If an incumbent is paid above the scale, determine the reasons, e.g., it may be someone with very long service who is near retirement. While this may not necessarily be justified, it is a problem that is of short duration, and may therefore be 'grandfathered,' i.e. although the rules may change, this individual's conditions of employment will not change.*
- *Similarly, if an incumbent is paid below the scale, determine the reasons. For example, perhaps the person was recently promoted, and the jump from the previous level was so large that an interim increase was granted at the time of the promotion, and a further increase will be granted after six months in the role (I personally prefer to immediately appoint people on the correct salary for the role, but some companies may take a staggered approach when it is expected that the person faces a considerable learning curve in reaching competence in the new role).*
- *What is the distribution of pay within the scale? Are women clustered below the mid-point of the pay scale/the median of the market data while men are clustered above the mid-point/median?*

⁷ 'Grade creep' refers to the phenomenon where the criteria used to evaluate the level of jobs have become well-known in the organisation, and line managers manipulate the way role descriptions are written to encapsulate the required elements to get the job upgraded, resulting in higher pay.

- Do specific factors justify any observed differences? Consider the following:
 - **Differences in relevant qualifications or special skills.** Note that the qualifications or special skills should be directly required for the role and/or contribute to measurably different performance outcomes. An example would be where a mining engineer requires a government-issued certificate of competence in order to be authorised to carry out certain work, and without which the scope of his work would be substantially limited. An example of where this would probably not count is in an administrative position that does not require a degree, but because the man has a degree and the woman with longer service and more experience does not. In this instance, the qualification is used erroneously to justify paying the man more.
 - **Differences in length of service or in role.** Significant experience in a role often results in demonstrably better outputs, but this needs to be shown, not just assumed.
 - **A history (preferably over more than one year) of superior performance ratings.** Note that a justification of a history of superior performance rewarded with merit increases for men does not necessarily exclude gender pay discrimination if the underlying assumption could be that this reflects an assumption of gender performance disparity⁸. This may necessitate an investigation into the way performance appraisals are done.
 - **Specific job location or -conditions.** Jobs in major cities generally pay more than jobs in small towns and rural areas, based partly on a higher cost of living and differing job markets. Another consideration is a job requiring extensive travel.
 - **Any quantifiable factor that is relevant for that business should be considered.**

This process should then be repeated for every function, across every grade. Any differences larger than a selected percentage, e.g. 5%, that cannot be rationally explained as indicated above should be considered potential gender-based pay differentials that require further investigation and, possibly, remedial action.

Considerations in determining the next step to address discrimination

Any suggestions for remedial action can only be used as guidelines, as the conditions in each company differ, and the HR practitioner conducting the pay audit will have to develop a remedial plan specific to the circumstances, based on the findings. However, the following are points for consideration.

- **Averages of basic pay, total pay, and total package.** When gender differences are discovered at one or more levels of pay, specific action plans must be put in place to address each element. For example, if the disparity is not in basic pay, but in benefits or incentives, this must be addressed through policy changes supported by senior management (and, where required, signed off by the remuneration committee). However, as discrepancies in basic pay often have a multiplier effect (e.g., retirement funding may be a percentage of basic pay, as may short- and long-term incentives), this is often the area requiring the most attention.
- **Paying outside of the scale.** Being paid below the scale for the job effectively means that the incumbent is not being paid a market rate for the job, and this is rarely, if ever, justifiable. If there are performance issues, these need to be addressed through the correct performance management processes, and the person should then be managed up or out. If paying below the scale is due to the promotion of someone who has a significant learning curve to reach full competence in the new role, the appropriate development- and coaching programmes should be in place to ensure that the person becomes competent as soon as possible. In all cases, payment below the minimum of the scale should not be allowed to persist; pay should be aligned with the scales within a very short period of time – six months or less. Where individuals are paid above the scale, the reasons need to be determined (e.g., the person may have been demoted from a more senior position). Usually, the best approach is to grandfather them on current conditions, and curtail future increases until their remuneration is aligned with the scale. However, where higher pay occurs due to specific skills shortages setting high premiums on particular jobs, it may be preferable to ring-fence those jobs, and then ensure that, within that job family, gender pay gaps do not exist.

⁸ Hart, Melissa. *Missing the forest for the trees: Gender pay discrimination in academia*. In *Denver University Law Review*, 91(4), p. 877.

- **Gender clusters within a pay scale.** There are different reasons for separate and lower clusters of pay for women than for men. Firstly, this may be an indication of gender bias that needs addressing. Secondly, it may be symptomatic of historical female underrepresentation in the occupation, with the small number of women in that grouping all being newer to the company, with a shorter length of service. This is particularly prevalent in previously male-dominated occupations, such as mining.

Thirdly, it may also be an indication that women are generally placed in lower-status, more administratively oriented positions, compared to men. This will indicate structural issues around pay discrimination. While the first issue can be addressed with special interim increases to align the women's pay, the issue of underrepresentation is one that, without intervention, will take many years to correct.

- The company should ensure that, through its search and recruitment policies, bursary and scholarship policies, and its training and development programmes, focus is placed on attracting, developing, and retaining more women in these roles. The third issue is often the most difficult to address. It is related to the fact that, from selection and placement, training and development, to placement on the talent list, women are viewed and treated differently, and, unless addressed, this will continue to compromise the career prospects of women.

Women often do well in their discipline in more junior technical roles, but men are either given broader accountabilities, which will strengthen their general business acumen across the entire value chain much earlier in their careers, or are coached to seek such opportunities for themselves. Women stay in their technical roles and take on less valued duties, which situation does little to enhance their career prospects. Such structural issues are difficult to address, as they require a review of management attitudes and biases, as well as special attention to every aspect of the total human resources system.

- **Differences in relevant qualifications or special skills.** Often, when there are shortages of specific skills, companies will pay a premium to attract suitable candidates. This often results in inequities in the pay of the new recruits and existing staff. However, when there are long-standing differentials between women and men based on a legacy of qualifications and/or special skills, intervention is required.

While there may be justification for paying a premium for relevant qualifications or special skills, if these are lacking in the short-term, the company has to address the structural issues leading to gender pay gaps in these areas of qualifications and/or special skills in the long term through appropriate development programmes and other HR interventions. Also, while there is not enough space here to address issues of study choices and unconscious biases in young women making occupational choices, companies could assist at school level by educating girls about different career choices. This will go some way in addressing this concern.

- **Differences in length of service or in role.** While length of service and tenure in the role should result in greater experience and, as a result, better judgment and outcomes, this is not always the case. Sometimes, ten years' experience is one year's experience repeated ten times, with no significant improvement in knowledge or output. However, length of service, combined with consistently good performance, will result in pay differentials that may well be justified, within limits. All incumbents should still be paid within a market-related range, although newcomers to a role may be paid lower in the range than experienced incumbents with many years in the role.
- **Performance-based pay differences.** The way in which performance appraisals are done may result in gender inequity. The criteria for evaluation should be clear and consistently applied. Non-job-specific factors, such as willingness to work unreasonable hours (which women with domestic responsibilities cannot do), should not influence performance appraisal ratings. Role descriptions should clearly set out accountabilities for the role, which then assist in setting key performance indices, which should be applied consistently.

While less-than-satisfactory performance management practices on the part of line managers may result in structural pay disparities, I am not suggesting that the solution to this is to banish merit-based pay and replace it with 'service increments,' i.e. increments set at years of service or years in role. While this ensures that people in the same role with the same length of service are paid the same, it does not mean that everyone is performing at the same level, and may inadvertently create inequalities.

- *Specific job location or conditions. Individuals who are prepared to take jobs in undesirable locations and/or with difficult working conditions are often rewarded with pay premiums. Also, jobs in specific geographic locations will be paid differently compared to those in other locations, e.g., a job in Johannesburg will pay more than the same job in Durban. Market surveys are often an easy reference source to establish whether these pay differentials are warranted, and not the result of gender discrimination.*

Once all the issues have been analysed and the remedial actions identified, an accurate costing of the alternatives needs to be done. The support of senior management and even the board is essential for the required steps to be executed successfully. Careful consideration needs to be given to how the steps will be implemented and communicated within the organisation. Lastly, the lessons learnt must be reflected in the HR- and remuneration policies and procedures, to ensure more equitable and consistent practices going forward.

Conclusion

The gender pay gap is, unfortunately, still a reality in many South African companies. There may be many reasons for this, both historical and structural, but it is essential that senior leadership and, in particular, the HR executive identify inequity and devise a remedial plan of action to address this, in order to avoid future challenges, comply with legislation, and, more importantly, treat all their staff with the same dignity and respect, and recognise the full value of the women they employ through equal pay for equivalent work.



CHAPTER THREE

The gender pay gap – a boardroom perspective

Prof. Mark Bussin and Dr Ronel Nienaber

Gender pay inequality is the elephant in the (board)room. Although the topic is often raised in executive meeting- and boardroom agendas, too little time and effort is spent on addressing it, as evidence-based information about the nature and extent of pay inequality is not always available, and board members have differing views about the origins and impact of inequality. In as far as remuneration governance goes, gender pay inequality is a real issue. In this chapter, we provide an explanation of the importance of board-level attention to the problem, and provide information that could encourage boards to open debate on the matter.

Why should directors be concerned about pay inequities?

Gender pay discrimination is an important issue, because, ultimately, the board is responsible, not only for setting the remuneration philosophy and policy in an organisation, but also for its implementation. Imagine discovering that there are overt or even covert actions leading to gender discrimination – influencing any type of decision-making, not just pay. Damage to the brand alone could run into millions, severely tainting the organisation's image and attractiveness as an employer of choice. Gender pay discrimination should concern any board of directors. Admittedly, boards should not concern themselves with pay-related details below the executive committee level, but, in this instance, a once-off audit would be well worth doing. However, the platform from which to understand the status of gender pay equity should not be legislation or a threat of court action. It should be because gender equity on all levels makes business sense, and paying women who bring equal, albeit perhaps a different, value to the workplace the same as their male counterparts is just good governance.

Gender pay inequality over the ages

The origin of gender pay inequality stems from, amongst others, the ancient issue of gender discrimination or sexism. By definition, gender discrimination is prejudiced discrimination based on a person's sex or gender. In practice, an overwhelming number of instances of discrimination occurs against women. The first documented evidence of this originates from ancient Rome, where women were forbidden by law to vote or hold public office¹. Employers later concluded that, since women were not the primary breadwinners, they did not have to earn the same wage as their male colleagues.

During World War I, many women took over men's jobs while the men served in the armed forces – earning significantly less than what the men earned. When this fact came to their attention, it led to several strikes during this period. One of the first strikes for equal pay was in 1918, when women tram drivers went on strike². During World War II, in 1942, the National War Labour Board, which had a significant influence on relations between employers and employees, encouraged employers to equalise wages paid to women and men who produce work of comparable quality and quantity, and are working in the same operation³.

Admittedly, during the 1970s, the status of women in the workplace was defined by a tendency to work in lower-paying, predominantly female roles. Less than 20% of first-line managers were women. This situation changed over the past 20 years. Women in the USA now occupy more than 45% of first-line managerial positions, and represent more than 50% of university graduates⁴. Yet, a recent study indicated that, although American professional men and women were, since the early 2000s, far more likely to start their careers on the same salary, over time, women become disadvantaged from a pay point of view, mainly because of taking time off to take care of family commitments (39%), reducing their

1 Frier, B. W. & McGinn, T. A. J. (2004). *A case book on Roman family law*. Oxford University Press.

2 *The history of the struggle for equal pay*. (n.d.). <http://www.striking-women.org>

3 *The history of the struggle for equal pay*. (n.d.). <http://www.striking-women.org>

4 Blau, F. D. & Kahn, L. M. (2000). *Gender differences in pay*. *The Journal of Economic Perspectives*, 14(4). American Economic Association.

hours of work during their children's early development stages (42%), or resigning altogether (27%). When they then return to work, they appear to be at a significant pay disadvantage compared to their male counterparts⁵.

An American company was recently found to be paying their female employees 78 cents for the same work for which men were earning a dollar. This meant that a woman had to work roughly a year for the same amount of money that a man earned in just over nine months. Once discovered, the company had to pay all affected women 28 cents in compensation for every dollar they had earned in the last ten years. This rectification was a substantial cost to the company and an embarrassment to the board, and probably damaged the company's brand. Recently, South African-born movie star Charlize Theron successfully negotiated an extra US\$10 million for her role in the film *The Huntsman* after she was informed through an anonymous email that she was paid much less than her male co-star Chris Hemsworth⁶.

The International Labour Organisation (ILO) Global Wage Report 2014/15 states that women's average wages are 4% to 36% less than men's, and that this gap widens in absolute terms for higher-earning women⁷. The Office for National Statistics (ONS) in the UK reported that, in 2012, the average pay for women working full-time was only 85.1% of that of men⁸. The gap appears to be the widest in South Korea and Japan, where men earn well over 30% more than their female counterparts, and the smallest in Belgium and New Zealand, both of which have gender wage gaps of less than 10%⁹. In South Africa, it is estimated that women earn, on average, 15% less than their male counterparts, based on data on a large subset of South African corporates collected by a private remuneration firm. It is therefore clear that the progress in narrowing the gender pay gap over the last 100 years has been painfully slow¹⁰.

The value women bring to the workplace

Boards are always concerned about the bottom line and value creation. "Diversity of gender brings diversity of thought. Getting more women involved reduces

groupthink, unlocks fresh perspectives, and fosters innovation and organisational creativity – ultimately emulating a diverse customer base. Only with a broad range of viewpoints can a board make governance and advisory functions meaningful and offer a balanced approach to risk management"¹¹. Research has shown that women bring different perspectives and leadership styles to business, and positively affect organisational performance and financial results.

The following advantages of implementing gender-equal employment practices have been identified¹²:

- a) *expansion of a pool of job candidates at all levels who are attracted to the field, despite their gender;*
- b) *a positive influence on the employment brand and the organisation's status as an employer of choice;*
- c) *an increase in productivity and innovation by introducing new ways of working, strengthening team dynamics, and improving decision-making;*
- e) *enhancement of relationships with local communities (Anglo American and Rio Tinto both stated that, by employing women, the economic benefits of a project are greatly enhanced, as these extend into the local community and positively influence relationships with community leaders);*
- f) *a positive impact on sales revenue, market growth, and shareholder returns (women make or influence up to 80% of the buying decisions related to consumer goods; PepsiCo consciously draws on the insights of their women employees to understand household patterns and what influences buying decisions); and*
- g) *compliance with statutory and regulatory requirements, reducing the organisation's risk profile.*

Organisations must be able to adapt quickly if they are to survive in today's increasingly competitive market. They need to adapt to new competitors from angles that were previously never considered, and they need to be able to understand the cultures and the people of the countries into which they are expanding. "...We must support the rise of women leaders in the public and private sectors because they bring first-hand knowledge and understanding of these challenges, and their perspectives will add great value as we shape

5 Patten, E. (2015). *On equal pay day: Key facts about the gender pay gap*. <http://www.pewresearch.org>

6 Berman, J. (2015). *Charlize Theron proves you're better off when you know your co-workers' pay*. *The Huffington Post* 1/12/2015. <http://www.huffingtonpost.com>

7 International Labour Organization *Global Wage Report 2014/15*. <http://www.ilo.org>

8 Bovill, D. (2013). *Patterns of pay: Results from the Annual Survey of Hours and Earnings, 1997–2012*. Office for National Statistics.

9 Phillips, M. (2014). *How can the gender gap be closed?* <http://www.intheblack.com/articles/2012/01/11/how-can-the-gender-pay-gap-be-closed>

10 21st Century Pay Solutions. (2014). *Gender Survey*.

11 Walton, D. (2014). *Executive perspective: Investing in equality the potential of boardroom diversity*. <http://www.thomsonreuters.com>

12 International Finance Corporation. (2013). *Investing in women's employment: Good for business, good for development*. <http://www.skillsforemployment.org>

policies and programs that will eliminate barriers to bring women into all economic sectors”¹³.

According to the ILO, overcoming gender-based pay inequality will address a number of problems facing societies worldwide¹⁴ by:

- a) *improving the economic status of women;*
- b) *changing stereotypical views regarding the value women bring to the organisation, their aspirations, preferences, capabilities, and suitability for certain roles;*
- c) *improving women’s financial independence and enhancing their status in society;*
- d) *making women and children less vulnerable to poverty;*
- e) *reducing recourse to child labour; and*
- f) *increasing productivity levels.*

“Since women account for one-half of the potential talent base, it follows that a nation’s growth depends on whether and how it educates and utilises its female talent. Economies in both developed and developing countries will never fully leverage their power to achieve sustainable growth until every woman has an equal right to learn, earn and succeed¹⁵.”

If women contribute equally, why should they not earn equally?

Gender pay equality legislated

It is a pity that the failure of boardrooms around the world to successfully root out gender pay inequality (just one of many forms of discrimination) had to give rise to a plethora of legislative frameworks issued by many governments worldwide. Countries that introduced legislation requiring equal pay for equal work, inter alia, include the USA, the UK, Iceland, Australia, Turkey, Canada, Taiwan, South Africa, and all member countries of the European Union. The downside of this type of legislation is that it degrades the matter of pay equality to a numbers and compliance issue, as opposed to a focus on fairness and a basic right to equality.

Although each piece of legislation has its own definition of equal pay for equal work, the overriding principle of non-discrimination in remunerating for work includes that pay should be based on the kind and quality of work done, and not on the age, race, sex, religion, political association, ethnicity, or any other individual or group characteristic unrelated to ability, performance, and qualification¹⁶. “Although the law on equal pay may seem complicated, its purpose is simple – to ensure that where women and men are doing equal work they should receive the same rewards for it”¹⁷.

South Africa ratified (adopted) the ILO’s Discrimination (Employment and Occupation) Convention 1958 (No. 111) on 5 March 1997, and the Equal Remuneration Convention 1951 (No. 100) on 30 March 2000. The ILO aims to improve working conditions globally by setting minimum standards in Conventions. The Equal Remuneration Convention 1951 (No. 100), the Discrimination (Employment and Occupation) Convention 1958 (No. 111), the Workers with Family Responsibilities Convention 1981 (No.156), the Maternity Protection Convention 2000 (No. 183), the 1998 Declaration on Fundamental Principles and Rights at Work, and the Convention on the Elimination of all Forms of Discrimination against Women form the international legal and policy framework for promoting gender equality in the world of work.

Convention No. 100 commits ratifying countries or states to ensuring that pay equity is applied to all employees by means of national legislation, wage determinations, collective bargaining, or a combination of these means. Convention No. 111 requires ratifying countries or states to implement a national policy to promote equality of opportunity and treatment of men and women in employment and occupation. This includes equality of opportunity and treatment with respect to recruitment, training, promotion, and advancement, as well as remuneration and conditions of work¹⁸. The international legal framework supporting South Africa’s legislation on equal rights is further augmented by the Universal Declaration of Human Rights (1948), the European Social Charter (1996), and the European Equal Pay Directive (1975)¹⁹.

13 Clinton, H. (2011). *Keynote speech APEC Summit on Women and the Economy*. <http://www.americanrhetoric.com>

14 Oelz, M., Olney, S., & Torney, M. (2013). *Equal pay: An introductory guide*. <http://www.ilo.org>

15 *Performance with purpose: The promise of PepsiCo, Sustainability Report (2010)*. <http://www.pepsico.com>

16 <http://www.businessdictionary.com>

17 *Equality Act 2010 Code of Practice*. <http://www.equalityhumanrights.com>

18 <http://www.ilo.org>

19 Truter, L. (2015). *Equal pay for work of equal value: Legislative framework*. <http://www.sara.co.za>

In terms of Convention No. 100, the principle of equal remuneration for work of equal value is the principle underlying pay equity. Pay equity is, in essence, about fairness in pay. The two terms are, however, often used interchangeably. Both terms are concerned with redressing the undervaluation of jobs typically performed by women. Pay equity entails that the same or similar jobs are paid equally, and that jobs that are not the same but are of an equal value are paid equally¹⁷.

Although the ILO uses equal pay for equal work and equal pay for work of equal value interchangeably, the table below sets out the differences between the two terms²⁰.

According to Hlongwane²¹, the concept of equal pay for equal work implies that employees, regardless of their gender, who perform substantially similar work within the same work environment should receive the same remuneration.

However, equal pay for work of equal value refers to women being employed in a traditionally female-dominated environment, whose work has the same value as that of men working in a traditionally male-dominated environment. The men and women should earn similar remuneration, despite different role descriptions²².

Further clarification on the requirement of equal pay for work of equal value in South Africa is included in the Draft Code of Good Practice on Equal Pay for Work of Equal Value (Code)²³. The main purpose of the Code is “to provide practical guidance to employers and employees on how to apply the principle of equal remuneration for work of equal value in their workplaces. This Code seeks to promote the implementation of remuneration equity in the workplace by employers, including the State, employees and trade unions through human resources policies, procedures, practices and job evaluation processes^{24 25}.”

Equal pay for equal work	Equal pay for work of equal value
Equal pay compares the pay of incumbents in the same or very similar jobs.	Pay equity compares the value and pay of different jobs, such as nurse and electrician.
Either men or women can complain that their work is undervalued. If a female incumbent is paid less than a male incumbent in the same job, she can file a complaint. This also applies to the male incumbent.	Only people (both men and women) in jobs traditionally reserved for women can complain that their work is undervalued. If nurses are paid less than electricians by the same employer, they can file a complaint.

20 http://www.payequity.gov.on.ca/en/resources/what_diff.php. Government of Ontario, Canada.

21 Hlongwane, N. (2007). *Commentary on South Africa’s position regarding equal pay for work of equal value*. <http://www.saflii.org/za/journals>

22 Hlongwane, N. (2007). *Commentary on South Africa’s position regarding equal pay for work of equal value*. <http://www.saflii.org/za/journals>

23

24 *Employment Equity Act No. 55 of 1998, as amended.*

25 *Draft Code of Good Practice on Equal Pay for Work of Equal Value, Department of Labour, South Africa*. <http://www.gov.za/documents/employment-equity-act-code-good-practice-equal-pay-work-equal-value-draft>



South Africa's employment equity and labour legislation prohibits any form of unfair discrimination in the workplace, also focusing, in alignment with the ILO Conventions, on pay discrimination, not only related to gender, but to all aspects of employment.

Closing

Gender-based pay inequality is a stubborn and universal problem. Ever since women entered the labour market, they have, on average, been paid less than their male counterparts. Implementing legislation to regulate this inequality is a noble action, but what is needed is a real step change: responsible directors and executives who advocate non-discriminatory practices and not just superficially study pay reports that, on the face of it, appear to be in order to tick boxes as part of an Employment Equity Act report-filing exercise. The reasons for gender-based pay gaps are well known: historical stereotypes, cultural factors, ingrained mind-sets, and continuous discriminatory practices that are too costly to change. We need to stop focusing on the barriers and start focusing on the solutions.

Board members should be concerned until they receive formal confirmation from management that there are no discriminatory pay practices, and that no discriminatory practices of any kind are condoned in their organisations. Pay equity should no longer be a matter of choice; it should simply be a matter of good governance.

CHAPTER FOUR

The meaning of equal value in terms of pay

Prof. Hugo Pienaar

The Employment Equity Act (EEA) No. 55 of 1998 was amended by Act 47 of 2013 to strengthen the EEA's objective of achieving equity in the workplace through the pursuit of two key objectives, namely (a) the promotion of equal opportunity and fair treatment in the workplace and (b) implementation of affirmative action to redress the disadvantages in employment experienced by designated groups.

This chapter examines the principle of equal pay for work of equal value as created by the amendment to Section 6(4) of the EEA and as developed in the Regulations.

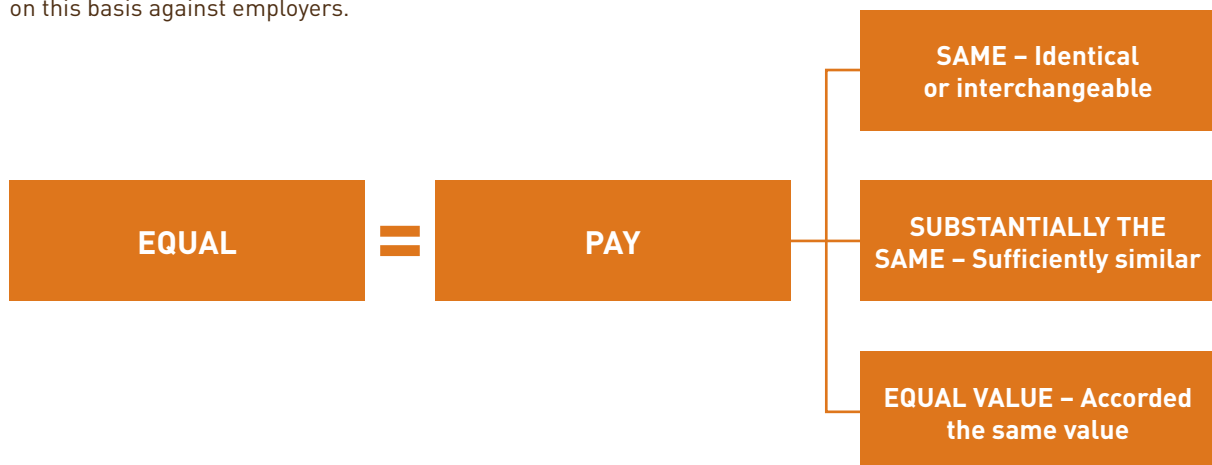
Although our courts have acknowledged the principle of equal pay for work of equal value on several previous occasions, the number of successful claims that have been instituted are minimal, due to the claimant having chosen the wrong comparator. This particular aspect has been addressed by the EEA and the Regulations. It is anticipated that the statutory inclusion of the equal pay principle will bring about an influx of claims brought on this basis against employers.

Importance of equal pay for equal value

The importance of understanding the concept of equal pay for equal value from a human resources (HR) perspective is immeasurable, as a clear understanding of what is meant by *equal value* and the possible justifications for not paying employees equally will go a long way in protecting companies' interests. It will enable HR practitioners to assess and address the circumstances under which they should pay employees equally, and limit the number of future equal pay claims.

What does *equal value* mean?

The principle of equal pay applies to work that is the same, substantially the same, or of equal value (referred to as "work of equal value"), when compared to an appropriate comparator. In essence, where comparable work is of equal value, employees rendering such comparable work should receive equal pay. Given, however, that the equal pay provisions are found in the EEA, a claim can only be successful if the inequality was based on unfair discrimination. We elaborate on all of these concepts below.



Section 6 (1) of the Employment Equity Act 55 of 1998 (based on the South African Bill of Rights Section 9 Subsection 3)

An employer is not permitted to unfairly discriminate against any employee on any of the following listed grounds: race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, or birth.

In terms of Section 6(2) (a) of the EEA, an employer may discriminate if the discrimination is based on (a) inherent requirements of the job or (b) affirmative action.

Equal pay under the EEA

Section 6(4) of the EEA, as from 1 August 2014, reads as follows:

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

Section 6(4) has created the requirement of equal pay, and prohibits differentiation in terms and conditions of employment, including employment policies and practices, amongst employees who work for the same employer and who fall within the category of work that is the same, substantially the same, or of equal value. A differentiation, as envisaged in Section 6(4), constitutes unfair discrimination, if it is directly or indirectly based on one or more of the listed grounds set out in Section 6(1) of the EEA, or any other arbitrary ground.

New ground – arbitrary ground?

Section 6 of the EEA has been amended to include an additional ground for discrimination, being “any other arbitrary ground.” Prior to the amendment, where employees sought to establish unfair discrimination on an unlisted ground, they were required to illustrate that the basis upon which they alleged unfair discrimination is analogous to a listed ground. The Labour Court has held that a ground will be regarded as analogous when it has the potential to impair fundamental human dignity.

This change creates consistency with the terminology used in the Labour Relations Act (LRA) 66 of 1995, which prohibits discriminatory dismissals. Cases interpreting Section 187(1)(f) have accepted that an arbitrary ground is one that has the potential to impair human dignity, such as discussed in *New Way Motor & Diesel Engineering (Pty) Ltd v Marsland*¹. The inclusion of the term arbitrary ground may be seen as introducing a different approach, and that there are now three grounds of discrimination, namely the listed grounds, unlisted/analogous grounds, and arbitrary grounds.

The employee’s ‘comparator’

An employee who seeks to prove that he or she is being unfairly discriminated against in respect of remuneration must compare his or her position to that of another employee, and needs to prove that he or she works for the same employer, performs the same or substantially the same work, or that such work is of equal value as envisaged in the amended EEA. This was already the position prior to the amendments. The Labour Court, in *Mangena & Others v Fila South Africa (Pty) Ltd*², considered the duty on a claimant when bringing an equal pay claim. The Court determined that the claimant must identify a suitable comparator, prove that the work done by the comparator is the same or similar, or establish that the jobs of the comparator and claimant, while different, are of equal value. Furthermore, the claimant has to show that the reason for the differentiation was one of the listed grounds.

The ‘same employer’

The Courts, in interpreting the concept of employer, have indicated that, in determining the identity of the employer, it is important to look beyond the legal entity, and to rather assess the substantial relationship between the parties. Ultimately, the exercise would be geared at giving effect to substance, rather than form.

In *Unitrans Supply Chain Solutions (Pty) and Another v Nampak Glass (Pty) Ltd and Others*³, the Labour Court was required to determine what the term employer meant in the context of Section 197 of the LRA. In the process of delineating the definition, the court stated the following:

¹ *New Way Motor & Diesel Engineering (Pty) Ltd v Marsland (2009) 12 BLLR 1181 (LAC)*

² *Mangena & Others v Fila South Africa (Pty) Ltd & Others (2009) 102 BLLR 1224 (LC)*

³ *Unitrans Supply Chain Solutions (Pty) and Another v Nampak Glass (Pty) Ltd and Others (2014) 35 ILJ 2888 (LC)*

... this court has not hesitated, ... , to recognise and give effect to an employment relationship, and specifically, to recognise a party as the true employer despite the labels that the parties have attached to their relationship, and despite the confines of any contracts between them.

An employer, therefore, is not necessarily the party who is deemed to be the employer, but is rather the person who acts in such a capacity in relation to the employee. The purpose of this is to counteract attempts by employers to circumvent and avoid the requirements imposed by law.

The same applies in the context of the EEA. To determine who the employer is, the Court would investigate the relationship between the parties. Regardless of any formal structures, such as contractual agreements, if the relationship resembles one of an employment relationship, the asserted employer will be deemed the employer, and be liable to adhere to all the obligations imposed by law.

Employers' duties in terms of pay differentials under the EEA

In the context of pay differentials in the workplace, employers are tasked with the duty to eliminate any unfair discrimination. Employers must adopt measures to eradicate differences in terms and conditions of employment, including remuneration of employees who perform work of equal value, if those differences are directly or indirectly based on a listed ground or any arbitrary ground. In the process of the employer ensuring that employees are not paid differently, the employer is to ensure that pay differentials are not due to race, gender, or disability.

Below are some scenarios that help elucidate what constitutes same work, similar work, and work of equal value.

- **Scenario 1 – same work**

A female sales manager is entitled, under her contract of employment, to an annual bonus, calculated by reference to a specified number of sales. She discovers that a male sales manager working for the same employer and in the same office receives a higher bonus under his contract, for the same number of sales.

The female sales manager can bring an equal pay claim under the EEA on the basis that she is performing the same work as the male sales manager.

- **Scenario 2 – similar work**

X is a female canteen worker who prepares meals for the administrative staff. Y is a male colleague who prepares meals for the directors. X and Y are not paid the same, even though they do similar work.

A may bring a claim for equal pay, as X and Y both work for the same employer, and perform similar work.

- **Scenario 3 – work of equal value**

A private hospital with several branches in different areas around the Gauteng region employs cleaners (who are primarily female). The hospital also employs porters (who are primarily male). Both cleaners and porters perform substantially the same work; however, the hospital has a bonus scheme for porters, but not for cleaners.

The cleaners, in this instance, can bring an equal pay claim of unfair discrimination regarding the bonus scheme (remuneration) on the basis that the work performed by the two occupations is of equal value.

- **Scenario 4 – hypothetical comparator**

A male employee leaves employment with remuneration of Rx per year, and is immediately replaced by a female applicant at Rx - y per year in the same post. There are no other similar positions in the company. May the new employee use the former employee as a comparator and claim unfair discrimination?

It is unclear whether the post of the outgoing employee can be used as a comparator. UK law, however, allows such a former position in the same company as a comparator, in exceptional circumstances.

The process to assess unfair discrimination

The Employment Equity Regulations, 2014 (Regulations)

The Regulations provide for a systematic approach in assessing whether an employee has a legitimate equal pay claim, and whether the employer has a justifiable defence for pay differentials.

Regulation 2 prescribes the criteria and methodology for assessing work of equal value, as contemplated in Section 6(4) of the EEA.

Regulation 3 imposes an obligation on all employers to eliminate unfair discrimination by taking steps to eliminate differences in terms and conditions of employment, including remuneration of employees who perform work of equal value.

Regulation 4 provides a number of definitions for the term work of equal value, which will allow for a broad approach in the interpretation of the term. The Courts will likely encounter questions such as whether work is of equal value where there are differences in the scope of the work performed.

The term work of equal value means and includes the following:

- *the work is the same as the work of another employee of the same employer, if their work is identical or interchangeable; or*
- *the work is substantially the same as the work of another employee employed by that employer, if the work performed by the employees is sufficiently similar that they can reasonably be considered to be performing the same job, even if their work is not identical or interchangeable; or*
- *the work is of the same value as the work of another employee of the same employer in a different job, if their respective occupations are accorded the same value according to Regulation 6 of the EEA.*

Regulation 5 sets out the methodology or test to be applied when assessing equal pay claims. The first step is to consider whether the work concerned amounts to work of equal value. This will be done with reference to the criteria listed in Regulation 6.

The second step is to determine whether there is a difference in terms and conditions of employment (including remuneration) where the work is of equal value (the same, substantially the same, or of equal value).

The third step is to establish whether, with reference to the grounds of justification, the difference amounts to unfair discrimination. This involves an enquiry into whether the differentiation established in the second step was based on one of the listed grounds or on an arbitrary ground (i.e. was discriminatory), and, if so, whether one of the defences (grounds of justification) applies. Where the differentiation was discriminatory and no defence exists, the employer will be found guilty of unfair and discriminatory employment practices.

Regulation 6 provides a list of objective criteria to assess whether work is of equal value. The respective jobs must be assessed with reference to the following criteria:

- *the responsibility demanded of the work, including responsibility for people, finances, and material;*
- *the skills, qualifications, including prior learning and expertise, required to perform the work, whether formal or informal;*
- *physical, mental, and emotional effort required to perform the work; and*
- *to the extent that it is relevant, the conditions under which the work is performed, including the physical environment, psychological conditions, and the time when and geographic location where the work is performed.*

The employer is also entitled to take any other criteria into account when assessing whether work is of equal value, provided that the employer can show that the criteria are relevant.

Employers will not be able to rely solely on job descriptions or job titles in assessing whether work is of equal value. An assessment of the actual work performed by the respective employees is crucial. Importantly, the employer must ensure that the assessment under Regulation 6 is conducted in a manner that is free of bias on any of the listed grounds.

Where the Minister of Labour issues a sectoral determination (under Section 55 of the Basic Conditions of Employment Act 75 of 1997) that justifies the value attached to an employee's work, an employer is entitled to rely on the sectoral determination to justify differentiation in terms and conditions of employment. The employer may only rely on this sectoral determination if it applies to the sector in which the employer is operational.

Justification for differences in remuneration

Regulation 7

Regulation 7 is instructive. Provided that the difference in terms and conditions of employment is not unfair discrimination and is "fair and rational," the employer can differentiate between employees by taking into account one or more of the following factors:

- *seniority and length of service;*
- *qualifications, ability, competence, or potential;*

- *performance, quantity, and/or quality of work (provided that employees are subject to the same performance evaluation system, which is consistently applied);*
- *demotion due to operational requirements;*
- *temporary employment for purposes of gaining experience and/or training (internships, learnerships);*
- *shortage of relevant skill or the market value in a particular job classification; and*
- *any other relevant factor that is not discriminatory.*

If an employer relies on one or more of the above factors to justify a differentiation in terms and conditions of employment, the employer must ensure that the differentiation is not biased against any employee or group of employees. The employer must also ensure that the differentiation is applied in a proportionate manner.

Disputes

Who decides if the pay discrimination is fair or unfair?

While the Labour Court is the primary adjudicator of unfair discrimination disputes, employees can, in certain circumstances, refer the matter to the Commission for Conciliation, Mediation and Arbitration (CCMA) or the relevant bargaining council for arbitration.

Section 10 of the EEA has created three instances in which the CCMA instead of the Labour Court has jurisdiction to consider claims of unfair discrimination:

- *sexual harassment claims;*
- *any unfair discrimination cases where the employee earns under the earnings threshold of the Basic Conditions of Employment Act 75 of 1997, currently set at R205 433.30; and*
- *where parties consent to the jurisdiction of the CCMA.*

After a commissioner has issued an arbitration award in a claim for unfair discrimination, either party has the right to institute appeal proceedings in the Labour Court.

Burden of proof

In terms of Section 11, there are two possibilities.

- *If the alleged discrimination is based on one of the grounds listed in Section 6(1) of the Act, the burden falls on the employer to prove, on a balance of probabilities, that such alleged discrimination did not take place. Alternatively, if it is found that discrimination did take place, the employer will need to show that the differentiation was rational and not unfair or otherwise unjustifiable.*
- *If the alleged discrimination is based on an “arbitrary ground,” the burden of proving the claim would fall on the employee. The complainant would be required to prove, on a balance of probabilities, that the conduct of the employer was not rational, amounted to discrimination, and that the discrimination was unfair.*

The future of equal pay claims in South Africa

The legislature has now provided a statutory mechanism for equalising the disparity between employees who perform work of equal value. The amendments place a duty on employers to conduct a review of their existing recruitment and employment policies relating, not only to remuneration, but also to benefits, rewards, performance evaluations, and employment equity. Finally, they created certainty in the manner in which equal pay claims will be considered.

Important employment law aspects for HR practitioners to take note of:

- *HR practitioners should review all employment contracts across the companies’ specific bands of income and skills.*
- *An assessment should be made of those employees who perform the same or similar work, or work of equal value, but are paid differently.*
- *Where the differentiation in payment cannot be justified in terms of Regulation 7, the company should take steps to ensure that there is an equalisation of payment, to avoid the risk of equal pay claims in future.*
- *Where the differentiation can be justified in terms of Regulation 7, such contracts need not be reviewed; however, it will be beneficial to the company to include the justification in the employees’ HR file, for record purposes. This will enable the company to defend equal pay claims, should the need arise.*

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Equality, Diversity and Inclusion – An International Journal (<http://www.emeraldgrouppublishing.com/products/journals/journals.htm?id=edi>)

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