THE EEA AMENDMENTS AND EQUAL PAY FOR WORK OF EQUAL VALUE
Integrity, quality, consistency.
THE AMENDMENTS AT A GLANCE

• **Section 6(1)**
  - “and any other arbitrary ground”

• **Section 6(4) and 6(5)**
  - Equal pay for the same work, similar work and work of equal value
  - Regulations

• **Section 10**
  - Disputes to CCMA arbitration if:
    - parties agree; or
    - claim concerns sexual harassment; or
    - employee alleging unfair discrimination earns below R205,433.30 per annum
  - Appeal (not review) to the LC
    - Within 14 days of award
THE AMENDMENTS AT A GLANCE

• Section 11: Burden of proof
  • *Harksen v Lane*

    • Discrimination alleged on listed ground
      - Employer must prove
        » Did not take place; or
        » Differentiation is rational, not unfair or otherwise justifiable

    • Discrimination alleged on an “arbitrary ground”
      - Complainant must prove
        » Conduct is not rational
        » Amounts to discrimination
        » Discrimination is unfair

• Section 27
  • Added “unfair discrimination” to income differentials section
EQUAL PAY: WHY BE CONCERNED

- Section 6(4) – no substantive change in the law
  - *TGWU and another v Bayete Security Holdings* (December 1998)
    - Unfair labour practice: item 2(1)(a) of Schedule 7 to LRA
    - Pay equity claim
    - Pay differentials are justified by the fact that employees had different levels of responsibility, expertise, experience, skills and the like

- *Louw v Golden Arrow Bus Services* (December 1999)
  - Unfair labour practice: Item 2(1)(a) of Schedule 7 to LRA
  - *Fairness requires that persons doing equal work should receive equal pay*
  - *It is an unfair labour practice to pay different wages for work of equal value if the reason for doing so is discrimination on arbitrary grounds or a listed ground*

- *Ntai & Others v SAB* (November 2000)
  - Unfair labour practice: Item 2(1)(a) of Schedule 7 to LRA
  - Alleged discrimination on basis of race between employees performing the same work (training instructors)
'I think women are foolish to pretend they are equal to men, they are far superior and always have been.'

WILLIAM GOLDING
WHY BE CONCERNED?

- Wage differentials between men and women – a global trend anyway
  - Australia: 16%
  - Canada: 20%
  - France: 13%
  - Germany: 22%
  - Japan: 28%
  - South Korea: 39%
  - UK: 20%

- Section 6(3): Sexual harassment
  - Prior to 1 December 1999 – unfair labour practice
    - LRA 1956
    - Schedule 7 of LRA
  - After 1 December 1999 – applicable law EEA
    - 1,605
WHY BE CONCERNED?

SIGNIFICANT RISKS

- Unfair discrimination litigation
  - Award that is just and equitable
  - Damages
  - Compensation
  - Order to comply
  - Order to prevent
  - Attorneys’ costs
  - Management costs and time associated with litigation

- Unions can bring claims obo many e-ees (must be identified)
  - Class actions?

- Reputational damage

- Unhappy workforce
THE CONTEXT: INTERNATIONAL NORMS

INTERNATIONAL LABOUR ORGANISATION – CONVENTION 100

EQUAL REMUNERATION

• Adopted on 29 June 1951
• Ratified by South African Parliament on 30 March 2000
• Art 2(1): Each member state shall … promote and ensure the application to all workers of the principle of equal remuneration for men and women workers for work of equal value

CONVENTION 111 CONCERNING DISCRIMINATION IN RESPECT OF EMPLOYMENT AND OCCUPATION

• Adopted on 4 June 1958
• Ratified by South African Parliament on 5 March 1997
• Art 2: Each member state shall pursue a national policy to promote equality of opportunity and treatment of employment with a view to eliminating any discrimination
THE CONTEXT: INTERNATIONAL NORMS

UNIVERSAL DECLARATION OF HUMAN RIGHTS (1948)
• Art 23(2): Everyone, without any discrimination, has the right to equal pay for equal work

INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS
• Art 7(a) guarantees the right to “fair wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work”

EUROPEAN SOCIAL CHARTER (3 May 1996)
• Art 4(3): With a view to ensuring the effective exercise to a fair remuneration, the Parties undertake to recognise the right of men and women workers to equal pay for work of equal value
USA: EQUAL PAY ACT (1963)

- Employers must provide equal pay for men and women who perform equal work, unless the difference in pay is based on seniority, a merit system or some other factor other than sex.

- Work is “equal” if the job duties are “substantially equal”
  - Jobs will be “equal” if the performance of the jobs requires equal skill, effort, responsibility and is performed under similar working conditions.

- Not equal value
- Justification for differences include:
  - Shift differentials (performing work at a different time of the day)
  - Higher educational qualifications and experience (but these must have some relationship to the job)
  - Salary matching (in order to retain employees)
  - Profits (performance based sales commissions)

The focus is on duties actually performed, and not on title or inaccurate job descriptions.
US: TITLE VII OF THE CIVIL RIGHTS ACT (1964)

• Prohibits discrimination in employment on the basis of race, colour, religion, sex or national origin

• Bennett Amendment:
  • It is an unlawful employment practice to discriminate with respect to compensation because of sex, race, colour, religion, national origin

• Justification:
  • Seniority, merit, quality/quantity of production, location

• Equal value??
  • County of Washington v Gunther – equal value ✓
  • AFSCME v State of Washington – equal value ✗
  • EEOC Guidelines on the Bennett Amendment: equal work, not equal value

• Must prove intent to discriminate
FOREIGN STATUTES

EUROPE: TREATY OF ROME (25 March 1957)

- Member states must ensure and maintain the application of the principle that men and women should receive equal pay for equal work
- *Defrenne v Sabena*: this means equal pay for jobs that are objectively similar

EUROPEAN EQUAL PAY DIRECTIVE – 1975

- Equal pay: for the same work or for work to which equal value is attributed
- Member states must, *inter alia*:
  - Abolish all discrimination between men and women arising from laws contrary to the principle of equal pay
  - Take steps to ensure that provisions in contracts contrary to the principles of equal pay are null and void
  - Take measures to protect employees from dismissal where employee has instituted equal pay claim

Where a job classification system is used for determining pay, it must be based on the same criteria for both men and women and so drawn up as to exclude any discrimination on grounds of sex.

Equal Pay Directive, 1976
FOREIGN STATUTES

UK EQUAL PAY ACT (1970)

- This Act inserts an implied equality clause into contracts of employment where a woman is
  - engaged in like work with a man in the same employment; or
  - is performing work which has been rated equivalent to that of a man in the same employment; or
  - is performing work of equal value to a man in the same employment

- A male worker “in the same employment”:
  - man employed at the same establishment by the same employer or
  - by employers under the same control; or
  - at different establishments where common conditions are observed e.g. through a common collective agreement

- Jobs must be shown to be similar or of equal value by means of an analytical job evaluation study

Job must be rated equivalent under an analytical job evaluation scheme which includes an assessment of the jobs of the applicants and the comparators.
Bromley v H&J Quick
Sex does not constitute a reasonable factor justifying differences in wages

Canadian Human Rights Act

FOREIGN STATUTES

CANADIAN HUMAN RIGHTS ACT (1977)

• Section 11: It is a prohibited discriminatory practice to establish or maintain differences between male and female employees employed in the same establishment performing work of equal value

• Whether employees are performing work of equal value, the applicable criteria are:
  • skill
  • effort
  • responsibility
  • conditions under which the work is performed
Where the employer relies on a system in assessing the value of work, the system:
- must operate without sexual bias;
- be capable of measuring the relative value of work of all jobs in the establishment
- assess skill, effort, responsibility and working conditions relevant to the job

**FOREIGN STATUTES**

**CANADIAN HUMAN RIGHTS ACT**

- Justifications (Canadian Human Rights Commission Guidelines)
  - Factors must be applied consistently and equitably
  - Performance ratings
  - Seniority
  - Down-grading of position
  - Rehabilitation assignment
  - Demotion procedure
  - Temporary training position
  - Internal labour shortage
  - Regional wage rates

- An employer may not reduce wages in order to eliminate a discriminatory practice
THE PHILOSOPHY BEHIND EQUAL PAY FOR WORK OF EQUAL VALUE

Inequality between men and women in employment relates to structurally imbedded patriarchal and sexist perceptions.

"Separate spheres"
- Women confined to the home sphere
- Men allowed in the public sphere
- "Women’s work" vs "men’s work"

Race wrt South Africa’s apartheid past
- Channeled black people into unskilled and poorly remunerated ranks

Constitutional commitment to substantive equality
- Equal pay for work of equal value seeks to address the undervaluing of work traditionally done by women
SOUTH AFRICA: THE EMPLOYMENT EQUITY ACT

SECTION 6

• No employer may unfairly discriminate, directly or indirectly, against any employee (includes job applicant), in any employment policy or practice, on a wide variety of grounds, such as race, sex, gender, HIV status, language, political opinion, age and religion or any other arbitrary ground.

• Differentiation based on the listed grounds in order if:
  • Inherent requirement of the job
  • Affirmative action in compliance with the Act

• Harassment on any of the listed grounds constitutes unfair discrimination
SECTION 6(4)

6(4)

• A difference
• in terms and conditions of employment
• between employees of the same employer
• performing
  • the same or
  • substantially the same work or
  • work of equal value
• that is directly or indirectly based on any one or more of the grounds listed in subsection (1)
• is unfair discrimination.
SECTION 6(4) UNPACKED

Must INTENT TO DISCRIMINATE be proven?

- No
- *What is relevant is not intent to discriminate, but the impact of the alleged discrimination*
  - A Rycroft *Preventing and Proving Work-place Discrimination*

- Unfair discrimination claims are claims *sui generis*
  - Not breach of contract which ordinarily requires intention or negligence
  - EEA creates strict liability
    - No requirement to prove intent, even though a discriminatory act might be accompanied by intention, negligence or motive
  - *Louw v Golden Arrow Bus Services*
SECTION 6(4) UNPACKED

“A DIFFERENCE

• What percentage difference would amount to discrimination?
  • 1%
  • 15%
  • 30%

• While a small difference might cause employees not to sue, s6(4) does not prescribe that in order to be actionable, the difference must be “significant” or “material”.

• Any “difference” may therefore be the basis of a claim
SECTION 6(4) UNPACKED

IN TERMS AND CONDITIONS OF EMPLOYMENT

- Section 6(1) prohibits unfair discrimination in any “employment policy or practice”
  - recruitment procedures, advertising and selection criteria;
  - appointments and the appointment process;
  - job classification and grading;
  - remuneration, employment benefits, and terms and conditions;
  - the working environment and facilities;
  - training and development;
  - performance evaluation systems;
  - promotion;
  - transfer;
  - demotion;
  - disciplinary measures other than dismissal;
  - dismissal.

- 6(4): Not only “remuneration”
SECTION 6(4) UNPACKED

EMPLOYEES OF THE SAME EMPLOYER

• Different legal entities in the same corporate group?
  • Piercing the corporate veil
  • Unitrans case

• Different offices of the same employer
  • Different geographic location
    – Recognised basis for differentiation
    – Regulation 4(1)(d): geographic location relevant to assessment of value attributed to the job
    – See also Canadian Human Rights Act and Guidelines: regional rates of wages but here relevant to assessment of individuals performing the work
SECTION 6(4) UNPACKED

PERFORMING THE SAME WORK

- Work is identical or interchangeable
- Job title not determinative
- Assessment of actual duties performed

PERFORMING SUBSTANTIALLY THE SAME WORK

- Work not identical or interchangeable BUT
  - sufficiently similar
  - so that they can reasonably be considered to be the same
- Objective assessment of actual duties and responsibilities required
SECTION 6(4) UNPACKED

PERFORMING WORK OF EQUAL VALUE

Phase 1 of inquiry:
- Is the work “of equal value”?
  » Must be comparing apples with apples
- Is there in fact a “difference”

If so, phase 2 of inquiry:
- Is the “difference” because of “unfair discrimination”?
SECTION 6(4) UNPACKED

EQUAL VALUE

Criteria for assessing the comparative value/worth of jobs:

- Responsibility
  - people
  - finances
  - materials

- Skills, qualifications, prior learning required to perform the work

- Effort
  - physical
  - mental

- Work context, i.e. conditions under which the work is performed
  - physical environment (e.g. underground vs on surface)
  - psychological conditions
  - time when (night work vs normal day work)
  - place where (geographic location)
SECTION 6(4) UNPACKED

REBUTTING AN INERENCE OF UNFAIR DISCRIMINATION

• Must prove that the reason/cause for the differentiation is not “because of” any one or more of the [listed grounds] / an arbitrary ground

• Comparing individuals actually performing the work with reference to:
  • seniority / length of service
  • qualifications / ability / competence / potential
  • performance / quality of work / quantity of work
    – performance evaluation system equally applied
  • “red-circling”
  • temporary position for purpose of training/gaining experience
  • shortage of relevant skill / market value
  • any other relevant factor

• Must have policy in place which is communicated to e’ees
These are principles of justice, equity and logic which may be taken into account in considering whether an unfair labour practice has been committed.

Louw v Golden Arrow Bus Services

APPLICATION THROUGH THE CASES

Warehouse supervisors vs buyers

- Louw v Golden Arrow Bus Services [2000] 3 BLLR 311 (LC)
  - It is not an unfair labour practice to pay different wages for equal work or work of equal value. It is, however, an unfair labour practice if the reason or cause for the unequal pay is direct or indirect discrimination
  - Warehouse supervisor vs buyer
  - Wage gap between Louw and Beneke
    » 1990: 53.3%
    » 1993: 57.5%
    » 1998: 61.6%
  - Job comparison showed jobs not of equal value
  - Factors: problem-solving, pressure of work, knowledge, job impact, comprehension, qualifications, experience
  - No unfair discrimination
APPLICATION THROUGH THE CASES

The court is required to interpret the EEA in compliance with South Africa’s public international law obligations.

*Mangena & Others v Fila South Africa (Pty) Ltd & Others* [2009] 12 BLLR 1124 (LC)

- The claimant must
  - identify a comparator
  - prove that the work done by the comparator is the same, similar or of equal value
  - establish, *prima facie*, that the reason for the differentiation is one of the prohibited grounds
  - onus then on employer to prove justification/fairness

- Administrative clerk role vs Sale or Return (SOR) role
  - Shabalala: involved in elementary mechanical work, producing price stickers, internal delivery notes
  - McMullin: regular stock takes at customer premises, reconcile accounts, receiving orders from sales representatives, scrutinizing orders, checking available stock

- Jobs not the same or of equal value
- No discrimination
APPLICATION THROUGH THE CASES

JUSTIFICATION CONSIDERED

Seniority and length of service

*Ntai & Others v South African Breweries Limited* [2001] 2 BLLR 186 (LC)

- Training instructors
  - Radebe, Ntai, Boekhouer (black) vs Tellis & Wyer (white)
  - Difference in pay about 15%

- Real reasons for differentiation were:
  - employment history
  - seniority
  - performance increases over time

- No unfair discrimination based on race

In basing a claim on an “arbitrary ground” the claimant must prove that the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of the claimant as a human being.
APPLICATION THROUGH THE CASES

JUSTIFICATION CONSIDERED

Performance, quality and quantity of work

• *Mthembu v Claude Neon Lights* (1992) 13 ILJ 422 (IC)
  – *Paying black employees less than white employees in a similar role is not unfair discrimination if the difference is based on a relevant factor such as merit or productivity*

“Red circling”

• Not acceptable where the demoted employee’s new role does not require her/him to exercise the special skills that justified the prior higher salary
THE CONTENTIOUS ISSUES

JUSTIFICATION CONSIDERED

• Scarce skill?
  – *Ntai:*
    » *There may be instances where the employer may need to pay a premium for scarce skills or experience and this may justify differentiation*
  – Market forces themselves could reflect entrenched discrimination – must therefore be approached with caution

• Cost of providing equal remuneration?
  – Canada – may not reduce salary in order to achieve equal pay
THE CONTENTIOUS ISSUES

JUSTIFICATION CONSIDERED

• Ability to bargain?
  – Approach with caution
  – If not linked to scarcity of skill or market value of particular job classification, potentially risky
  – UK case (1979) *Clay Cross (Quarry Services) Ltd v Fletcher*
    » An employer cannot avoid his obligations by saying: ‘I paid him more because he asked for more’; or ‘I paid her less because she was prepared to come for less.’ If any such excuse was permitted the [Equal Pay] Act would become a dead letter. Those are the very reasons why there was unequal pay before the statute. They are the very circumstances in which the statute was intended to operate.
  – UK case (1987) *Rainey v Greater Glasgow Health Board*
    » Where there is no question of intentional sex discrimination a difference which is connected with economic factors affecting the efficient carrying on of the employer’s business may be relevant.
LITIGATION PROCESS

• Referral to conciliation (CCMA)
  • 6 months after act/omission that constitutes alleged unfair discrimination

• If conciliation is unsuccessful:
  • Arbitration before CCMA if:
    – employee earns below prescribed threshold (R205,433.30)
    OR
    – parties agree to arbitration
  • Adjudication by the Labour Court

• If arbitration: possibility of an appeal (not review) to the Labour Court, as well as subsequent appeals to the LAC and CC

• If adjudication, possibility of appeal to LAC and CC
COMMENTS ON JOB EVALUATIONS

• Analyzing the worth of jobs by means of a job evaluation scheme may contribute to the realization of equal pay for work of equal value.

• Results of a job evaluation study may serve as a defence to an equal pay claim (*Louw v Golden Arrow Bus Services*).

• Must be gender (and race) neutral.
  • Be alive to “different spheres of work” and traditional under-valuing of “women’s work”
    – E.g. comparison of manual labourer vs secretary
    – E.g. comparison of porter vs nurse

• “Job evaluation” listed as “employment policy or practice” – could therefore itself be open to attack if not race/gender neutral.
“Both job candidates are equally educated, equally experienced and equally qualified, but one can play *Layla* on his armpit!”
THANK YOU