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# Pay discrimination litigation: Lessons learned

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**Orientation:** We investigated the reasons for success or failure of pay discrimination claims in South Africa.

**Research purpose:** To learn from reasons for judgements in equal pay litigation to clarify pertinent legal concepts and principles related to equal pay, towards improved pay practices.

**Motivation of the study:** To clarify the concepts of justifiable and unfair pay discrimination. To make recommendations preventing unnecessary breakdown of the employer-employee relationship, curtailing unproductive pay discrimination legal action.

**Research approach/design and method:** Content analysis was used to categorise the reasons for the success or failure of 22 pay discrimination litigation cases brought before the CCMA, Labour Courts, and the Labour Appeal Court (1999–2020). Cases were examined prior to and after amendments Section 6(4), of the *Employment Equity Amendment Act* 47 of 2013.

**Main findings:** Contrary to the expectation of more positive outcomes for employees after changes to the EEA came into effect, 21 out of 22 cases were unsuccessful. Legal reasons are detailed in the findings. Claimants were from the lower income bands. Case arguments often misguided. Union representation seems ineffectual.

**Practical/managerial implications:** There is a lack of understanding of the requirements to argue unfair pay discrimination before a court. Organisations should mediate in cases where employees claim unfair discrimination, to prevent the irretrievable breakdown or the employer–employee relationship resulting in litigation. Organisations should refrain form intentional or unintentional unfair discrimination.

**Contribution/value-add:** This study demonstrates that employees and their representatives lack knowledge of pay discrimination legislation. We provide explanation of pertinent concepts and principles when judging the merits of a pay discrimination case.

**Keywords:** pay discrimination; prohibited grounds; equal pay for work of equal value; equal pay legislation; comparators; prima facie case; grounds for differentiation.

## Introduction

Unfair pay discrimination continues to be a persistent issue globally (Treleaven & Fuller, 2021), and one of the key measures worldwide to address pay discrimination is legislation (Heymann et al., 2020). Heymann et al. (2020) note that the impact of anti-discrimination laws has not been widely researched and recommend that future studies include less industrialised countries, such as those in Africa. This article addresses this gap by investigating the outcomes of litigation in South Africa through an analysis of reported cases, specifically noteworthy cases brought before the courts prior to and after amendments contained in the *Employment Equity Amendment Act* (EEA) 47 of 2013, specifically Section 6(4), which came into effect on 01 August 2014. This Amendment Act brought material changes to the (EEA, 1998) by coding the principle of equal pay for equal work, which was aimed at, among others, amending certain definitions relating to the prevention of unfair pay discrimination, to enable referrals of disputes for arbitration to the Commission for Conciliation, Mediation and Arbitration (CCMA), and to clarify the burden of proof in allegations of unfair discrimination (Government of South Africa, 2013).

The study aimed at determining: (1) what legal concepts and provisions South African HR practitioners should understand to improve equal pay conditions, (2) whether there is a difference in positive outcomes for pay discrimination claims that were made before and after changes in strengthening pay equality in the *Employment Equity Act* in 2014 and (3) what recommendations can be made to strengthen pay equality.

Although pay discrimination laws set out the requirements that must be met in order to succeed with a claim, claimants (also referred to as 'plaintiffs' in legal parlance) and HR practitioners often need expert assistance to interpret the requirements and determine whether a case has merit. This study was not aimed at critiquing the legislation. Instead, given that pay inequality is one of the main employment issues in South Africa (Fisher et al., 2021), we set out to clarify pertinent concepts related to pay discrimination, to inform HR practitioners and employees, including their union representatives. This is done by showing patterns in the reasons for judgements in equal pay litigation.

Based on the findings, we make recommendations that may be useful in any organisational setting, including the role that HR practitioners could play in preventing legal action with regard to equal pay, especially with regard to vulnerable groups in the labour market. We believe that informed HR practitioners could, through robust equal pay practices, carefully planned transparency (Bosch & Barit, 2020) and informing disgruntled employees regarding the legal principles in this domain, make a significant contribution to avoiding and/or halting litigation, thereby preventing the destruction of the employer–employee relationship and the damaging ripple effects of such actions on employee relations.

## The South African pay equality legal landscape

South Africa has a comprehensive anti-discrimination legal framework (Animashaun, 2019), aimed at overcoming the inequalities created by previously legislated discrimination. Despite the country's economy being regarded as emerging (Ezeoha & Botha, 2012), its Constitution (*Constitution of the Republic of South Africa*, 1996) and legislation are of the most advanced in the world (Davis & Klare, 2010; Keevy, 2009) and include legislation that puts the right to equality into practice (Section 9 of the Constitution). The right to pay equality is therefore derived not only from the constitutional right to equality but also from South Africa's ratification of the International Labour Organization's (ILO) Equal Remuneration Convention 1951 (No. 100). The (EEA, 1998) expressly prohibits unfair discrimination in respect of pay. However, research has shown that few pay discrimination claims have been successful in court (Vettori, 2014).

In this article, the terms *pay*, *wage* and *remuneration* are used interchangeably. Remuneration is defined in the EEA Code of Good Practice on Equal Pay/Remuneration for Work of Equal Value, in Section 2.4, as follows:

> The term 'remuneration' as defined in the *Basic Conditions of Employment Act*, 1997 (Act No. 75 of 1997), as amended and other labour legislation includes **any payment in money or in kind, or both**, made or owing to any person in return for working for another person…. (n.p.)

## The Constitution 1996

The Constitution is the highest law of South Africa and provides direction, principles and limitations that frame all South African laws. The main set of principles that guide the South African Constitution is contained in the Bill of Rights as outlined in Chapter 2 of the Constitution (*Constitution of the Republic of South Africa*, 1996). With regard to pay equality, Section 7, '… affirms democratic values of human dignity, equality and freedom'. Chapter 2 furthermore instructs that '[t]he state must respect, protect, promote and fulfil the rights in the Bill of Rights' and also points to the limitations contained with specific reference to Section 36 and other parts of the Bill. Within the Bill of Rights, Section 9 details the concept of equality, which also applies to pay equality. Sub-section 9(3) states that employers:

> … [*M*]ay not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. (n.p.)

With regard to the constitutional right to equality and employment-related discrimination claims, 'the provisions of the EEA, not the Constitution, must be relied on by employees alleging unfair discrimination' (Du Toit, 2007, p. 1).

## The *Employment Equity Amendment Act* 55 of 1998 and the *Employment Equity Amendment Act* of 2013

The EEA was amended through the *Employment Equity Amendment Act 47 of 2013* and the Employment Equity Regulations 2014. Both came into effect on 01 August 2014.

Section 5 of the EEA states that, 'Every employer must take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy and practice'.

Section 6(1) introduces the concept of *unfair discrimination* and indicates that 'no person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice….' In clarification, 'discrimination' refers to discerning difference and not to being unjust. The EEA, in Section 6(2), outlines two instances that are not regarded as unfair discrimination, namely affirmative action and 'distinguishing, excluding or preferring any person on the basis on an inherent requirement of a job'. When considering inherent requirements of a job, the ILO Equal Remuneration Convention 1951 (No. 100), in Article 3, instructs employers to take 'measures … to promote objective appraisal of jobs on the basis of the work to be performed'.

Research has shown gender pay inequality through undervaluing of certain job types, such as caring and

cleaning, which are predominantly performed by women (Crowley, 2016). In this regard, the EEA Code of Good Practice on Equal Pay/Remuneration for Work of Equal Value (p. 12) states that 'the use of job evaluation does, in itself, not ensure that there is an absence of unfair discrimination'. South Africa's Labour Court in *Mangena & Others v Fila South Africa (Pty) Ltd & Others [2009] 12 BLLR 1224 (LC)* (par. 5) noted that 'structural inequality' was present due to the historical 'value *attributed to particular jobs', and that 'a systemic approach' had to be employed to ensure pay equality. It is therefore incumbent on HR practitioners to interrogate the assumptions on which decisions about pay equivalence between job types are made – even though an organisation may rely on a trusted job evaluation system that has been utilised for some time.*

## *Employment Equity Amendment Act* code of good practice on equal pay/ remuneration for work of equal value

To guide employers in promoting pay equality through objective and fair job evaluations, the Amendment Act added the principle 'equal pay for equal work' in Section 6(4), in addition to stating that pay equality should be determined between people performing 'the same' or 'substantially the same' work. Determinations of pay inequality could be based on any of the three principles. However, employees who wish to make a claim of unfair pay discrimination should not rely solely on these three considerations, as important considerations regarding differences between the people who occupy jobs, not the nature of the work only, are taken into consideration when making such a determination. Therefore, HR practitioners should always ensure that differences in the remuneration and conditions of employment should be 'justified on fair and rational grounds' (EEA, 2013), covering both the nature of the work (the nature of a job) and the specificity of the individual that occupies the job.

## Test of unfair discrimination

While ILO Convention 111 treats 'unfair discrimination' as a single concept, South African law does not automatically consider discrimination unfair. In *Harksen v Lane and Others* (1998) 1 SA 300 (CC), the Constitutional Court provided a test to determine unfair discrimination (par. 53). This process entails a two-stage analysis. When determining unfair discrimination, the *Harksen* test requires the Court to first establish discrimination and there after whether the discrimination is unfair. Firstly, courts have to determine whether the differentiation in question is based on a listed ground. If the differentiation is not based on a listed ground, the Court will determine whether the ground is based on 'attributes and characteristics which have the potential to *impair the human dignity* of persons or to affect them adversely in a comparably serious manner to a listed ground' (Naidoo et al., 2018, par. 38). Secondly, if the discrimination had been found on a listed ground, unfairness will be presumed. If it is not found on a listed ground, the complainant will have to establish the unfairness. The test developed in the *Harksen* case is viewed as the leading authority in unfair discrimination cases (Garbers & Le Roux, 2018).

According to the (EEA, 1998), unfair discrimination in pay occurs if an employer provides different conditions of employment to employees performing the same work or work of equal value. In addition, the difference in employment conditions may not be based on any of the grounds listed in Section 6(1) (which are based on the grounds stated in the *Equality* clause of the Constitution) or any arbitrary ground. In other words, discrimination is only regarded as unfair if it occurs on a ground that is prohibited in the law (Du Toit, 2009).

## Justifiable/fair discrimination

Regulation 7 of the Employment Equity regulations, '*Factors Justifying Differentiation in Remuneration'*, lists grounds that are not considered unfair, which include, among others, seniority, length of service, performance, quality or quantity of work, temporary employment, skills shortages and 'other relevant factors'. As noted, the claimant having established that discrimination does occur does not automatically mean the lawsuit will be successful. In certain instances, an employer could prove that, even though discrimination in pay occurs, there is a justifiable reason for such discrimination (see Section 11 of the EEA; *Mangena & Others v Fila SA (Pty) Ltd & Others (2010) 31 ILJ 662 (LC)*, at par. 7; Vettori, 2014). In this regard, the regulations of the (EEA, 1998) provide several listed grounds on which an employer can justify differences in terms and conditions of employment, thereby showing that, even though the employer is paying two people differently, the difference is fair and rational.

## Burden of proof (onus): '*Prima facie*' versus 'balance of probability'

Section 11 of the (EEA, 1998) states, 'Whenever unfair discrimination is alleged in terms of this Act, the employer against whom the allegation is made must establish that it is fair'.

This means that the employee (claimant) only has to establish a *prima facie* case before the court. *Prima facie* means the facts of the case are, at first glance, sufficient to presume or accept that the allegations are true, until proven otherwise (Thomson Reuters, n.d.). Only once the requirement of establishing a *prima facie* case has been satisfied does an evidentiary burden rest on the opposing party (the employer) to rebut the claimant's evidence. Establishing a *prima facie* case is a lower standard of proof than is required in rebutting such a case. Rebuttal requires a preponderance – greater in quantity or

importance – of clear and convincing evidence disproving the *prima facie* case.

Mere differential treatment between individuals is not sufficient to establish a *prima facie* case in terms of the EEA (Garbers & Le Roux, 2018; EEA, 1998). In the context of a pay discrimination claim, it is important that the claimant be cognisant that there is a distinction between *discrimination* and *unfair discrimination*. The term *unfair discrimination* refers to differential treatment of a disadvantageous or harmful nature, while *discrimination* is regarded as differentiation where people are treated differently in ways that are legally permitted, based on rational and fair decisions (Du Toit, 2009). For example, it is legally permitted for an employer to differentiate employees' pay based on, for instance, their qualifications or length of service. Therefore, a difference in pay between employees is not, *per se*, unfair (Hlongwane, 2007).

In summary, the main criterion to satisfy in a pay discrimination claim is the establishment of discriminatory employment conditions, on a specific prohibited listed ground, between employees who perform the same work or work of equal value. Therefore, the claimant's employment conditions and work must be compared with a comparator – at least one other employee (Vettori, 2014). Furthermore, the claimant must show that the difference in pay is caused by a specific listed ground for differentiation which is prohibited by law (see *Mangena & Others v Fila SA (Pty) Ltd & Others (2010) 31 ILJ 662 (LC)*, at pars. 6–7).

The factors that are considered by a court when deciding on fair or unfair discrimination include comparing the claimant's job against the job of the comparator, and also making a comparison between the person occupying the job and the comparator, based on 'skill, responsibility, physical and mental effort, and the conditions under which the work is performed' (Ebrahim, 2016, p. 8) and 'performance, potential, expertise, education, attitude, entry level and market forces' (Ebrahim, 2016, p. 8), 'productivity, absence of family responsibility and objective job evaluation' (Ebrahim, 2017, p. 12).

# Method

The study received ethical clearance (USB-2021-24297).

## Sampling and data collection

We gathered secondary data available in the public domain. We sampled cases that were heard by the CCMA, Labour Courts and the Labour Appeal Court. These were reported, that is, court judgements that had been published in law reports and indexed between 1999 and 2020. It is important to note that data sources with South African case law do not represent every case brought before the abovementioned forums. We sourced the cases from two primary legal databases, namely Jutastat and LexisNexis. These databases publish the most pertinent and precedent-setting judgements. Pay discrimination cases on Jutastat were already categorised under the heading 'Pay Differentials'. To ensure rigour and an exhaustive search, we performed a separate search on Jutastat, utilising the following keywords: *equal pay*, *pay differentials*, *pay discrimination* and *pay equity*. This additional search did not yield any new cases. A total of 20 Jutastat cases were included for analysis. Utilising the same keywords on LexisNexis yielded 26 cases. After eliminating duplicates, the sample consisted of 22 cases.

The sample of 22 reported cases was considered sufficient, as the traditional approach to the interpretation of case law has been to interpret only a few cases and comment on the themes they contain and their potential social impact (Hutchinson & Duncan, 2012). Furthermore, the sample of 22 cases was considered sufficient based on the principle of judicial precedent in South Africa's legal system. Courts are bound by the outcomes and principles set by a previous court in a similar case. This means that, once a legal principle has been set, it generally cannot be deviated from by another court on the same or lower level in hearing a similar matter (Devenish, 2007). A court of final jurisdiction is also bound by its own decisions and can only depart from its own decisions if it is convinced that the previous decision was clearly wrong (see *National Union of Metal Workers of South Africa v Eskom Holdings SOC Ltd and Others (J735/21) [2021] ZALCJHB 182*). The purpose of this doctrine is to create 'legal certainty, predictability of the outcome of litigation, the protection of vested rights, and uniformity and equality in the application of legal principles' (Van Niekerk, 2013, p. 106). Furthermore, only those cases that are current, topical, precedent-setting and that deal with significant points in law are considered for publishing in law reports (Pillay & Kader, 2020). Therefore, we could not consider every case that has been brought before the CCMA, the Labour Courts or Labour Appeal Court.

## Analysis and research rigour

The data were analysed using content analysis (cf. Hsieh & Shannon, 2005). In our analysis, we dealt with more cases than what is traditionally done using the interpretive method of analysing case law. The judgements were grouped into themes and counted, in order to identify both apparent and implied patterns and trends in the textual data (cf. Kleinheksel et al., 2020; Serafini & Reid, 2019), as well as the number of cases under each. The method allows the researcher to analyse a larger number of cases, which provides a measure of the themes and patterns in case law (Hutchinson & Duncan, 2012).

Section 6(4) of the (EEA, 1998), which specifically addresses pay discrimination, came into effect on 01 August 2014. Prior to this date, the (EEA, 1998) did not contain any specific provision addressing pay discrimination.

The inclusion of cases heard prior to 01 August 2014 allowed us to consider whether the courts applied the same principles relating to the applicable legislation prior to and post-2014. For purposes of this timeline comparison, we split the cases into two groups, namely those heard in the period 1999–2014 and those heard 2015–2020.

In addition to analysing the reasons for the forums' decisions for or against the claimants, we sorted the cases according to the following categories: the job level of the claimant; the gender of the claimant; and whether the claimant was represented by a trade union, to determine whether any additional underlying patterns were evident.

Our findings are reported, first, according to the outcomes and the reasons for the judgements, followed by the findings regarding the categories of job level, gender and union representation.

## Findings and discussion

Before Section 6(4) of the (EEA, 1998) came into effect on 01 August 2014, the court judged cases of pay discrimination based on the general anti-discrimination provisions of Section 6(1) of the EEA. Of the 22 cases under study (both periods), seven were brought before the court before Amended Section 6(4) came into effect, and the remaining 15 after. A total of 21 were found in favour of the employer; thus, only one claimant was successful – in the period after Section 6(4) of the (EEA, 1998) came into effect (01 August 2014). Prior to this date, all cases under study were unsuccessful.

In the one case where judgement was granted for the claimant, the Commissioner's decision was based on the rationality of the difference in pay based on educational qualifications. The Commissioner held that, given the historical inequality of education in South Africa, the employer's discrimination based on qualifications was not rational. At the time, few (and mostly white) employees in the agriculture sector held Grade 12. The Commissioner held that the claimant being paid significantly less than the comparators despite years of loyal service was resulting in a loss of dignity for the claimant and thus constituted unfair discrimination.

In the 21 cases under study in which the claimants were not successful, the courts' decisions were based on Table 1.

**TABLE 1:** Reason for judgement against claimants.

| Reason | Pre-amendment | Post-amendment |
|---|---|---|
| Claimants were unable to present a *prima facie* case of discrimination | 4 | 8 |
| Claimants did not use an appropriate comparator | 0 | 1 |
| Claimants did not prove that their work is of equal value | 1 | 4 |
| The discrimination was not unfair, as the grounds for a difference in pay were justifiable in terms of the EEA | 2 | 1 |

Note: Reason are discussed in the article, together with examples from case law.

### Claimants did not make a *prima facie* case of unfair discrimination

Discrimination is only prohibited if it occurs on a ground that is prohibited in terms of the law (Du Toit, 2009). Therefore, in order for a claimant to successfully bring an unfair pay discrimination claim, it is not sufficient to only demonstrate that discrimination occurred; the claimant has to prove that the discrimination occurred on one of the grounds listed in Section 6(1) of the (EEA, 1998) or, alternatively, on an arbitrary ground. In the case of *Mangena & Others v Fila SA (Pty) Ltd & Others (2010) 31 ILJ 662 (LC)*, the court reiterated that 'a mere allegation of discrimination does not establish *prima facie*' pay discrimination (par. 7).

The requirement of a *prima facie* case regarding the ground on which pay discrimination cases are brought presents difficulty to the claimants. In this regard, a distinction is drawn between a listed ground and an arbitrary ground. A listed ground is any of the 13 grounds listed in Section 6(1) of the Act (*Constitution of the Republic of South Africa*, 1996), such as gender or marital status. An arbitrary ground has been interpreted by the courts to be a ground *related to* a listed ground that has the potential to degrade a person's human dignity (Naidoo et al., 2018).

In the case of *Naidoo & Others v Parliament of the Republic of SA (2019) 40 ILJ 864 (LC)*, the claimants alleged unfair discrimination on an arbitrary ground, namely nepotism (pars. 3–4). The court applied a narrow interpretation of 'arbitrary ground', which entails that the ground must affect human dignity and requires that the claimants define the ground (pars. 24 and 30). It is therefore not sufficient for an applicant to state that the ground is arbitrary; the claimant must show that the ground is *related to* a listed ground. In this matter, the court rejected the claimants' claim, as the claimants had failed to show that the ground amounted to unfair discrimination – in other words, that it had a detrimental effect on their human dignity (pars. 45–47). On appeal (*Naidoo & Others v Parliament of the Republic of SA* (2020) 41 (ILJ) 1931 (LAC)), the Labour Appeal Court endorsed the narrow interpretation of 'arbitrary ground' and confirmed that the ground on which the claim of unfair discrimination is made 'must have the potential to impair human dignity' (Naidoo, 2018 par. 38). Furthermore, 'the court held that the complainants are required to define the ground on which they claim unfair discrimination' (par. 28).

Another example where the claimants experienced difficulty in satisfying the burden to prove that discrimination occurred was the case of *Mangena & Others v Fila SA (Pty) Ltd & Others (2010) 31 ILJ 662 (LC)*. In this case, the claimants alleged that the employer discriminated against them on the basis of birth, that is, parentage or family relations, among other things. They averred that the difference in pay between them and the comparator was due to the comparator's father having worked for the employer for a long time. Upon the

father's death, the comparator approached the employer for financial assistance, and the employer then agreed to increase the comparator's pay to assist the family. On this basis, the claimants alleged that the conduct of the employer constituted unfair discrimination on the basis of birth, among other things:

> The court rejected this claim, and stated that unfair discrimination did not occur, as it was a mere act of charity on the part of the employer, which, according to the court, could possibly be regarded as a benign form of favouritism. (par. 4)

Although the *Mangena* case was decided before the introduction of an 'arbitrary ground' to Section 6(1) of the EEA, the question regarding a narrow versus broad interpretation of discrimination was raised. The court arguably adopted a narrow approach in determining whether the act of charity by the employer constituted unfair discrimination. This is because the conduct of the employer, which the court noted to be a charitable act (and a form of favouritism), may seem neutral in certain contexts but could have an adverse effect on the human dignity of the complainant.

Du Toit (2021) evaluated the grammatical meaning of the concept nepotism, which the court in the *Naidoo* case rejected as a potential ground for unfair discrimination. In this context, he considered whether 'arbitrary' treatment of an employee is truly divorced from an attack on the 'value of our humanity'. By considering the grammatical meaning of the term nepotism and the impact that it may have on victims, he concludes that nepotism could potentially constitute a denigration of the right to human dignity and the right to equality of victims. A similar argument can be applied to the concept of favouritism as referred to in the Mangena case. Accordingly, affording 'arbitrary' a broader rather than narrow meaning may provide workers legal recourse, which, on a narrow interpretation, employees would not have (Du Toit, 2021, p. 13).

Since the addition of 'arbitrary ground' in the EEA, the difference between the narrow and broad interpretation of 'arbitrary ground' has been addressed by the Labour Appeal Court in the case of *Naidoo*, where the Court endorsed the narrow approach to 'arbitrary ground'.

One of the reasons advanced for a narrow approach is said that it would make it 'a font of a remedy for remedies with virtually no limits' (Du Toit, 2021, p. 9). However, this view has been critiqued in that it fails to interpret Section 6(1) of the EEA in a purposive manner and that it limits the remedies for employees against potentially indirect discrimination (Du Toit, 2021; Garbers & Le Roux, 2018).

A potential lesson from the aforementioned cases is that claimants have to carefully consider the grounds on which they rely. They must be able to set out their grounds and explain how their human dignity is impaired with reference to the grounds listed in Section 6(1) of the (EEA, 1998). It is not sufficient for claimants to frame their cases according to their emotions and notions of natural justice.

## Claimants did not use an appropriate comparator

In terms of the (EEA, 1998), claimants must compare their work with that of another employee to demonstrate discrimination. In some of the cases, the claimant had difficulty establishing an appropriate comparator. In the case of *SA Municipal Workers Union & another v Nelson Mandela Bay Municipality (2016) 37 ILJ 1203 (LC)*, three claimants alleged, in the first instance, that their employer unfairly discriminated against them as a group in comparison to another group (Claim 1). They also alleged that the employer discriminated against one of them, one Ms Tetyana, who claimed that she was paid less for the same or similar work on the basis of gender (Claim 2). The claimants thus also compared their own pay, in addition to comparing their pay with that of a comparator. In terms of the second claim, the male plaintiffs claimed that they did not know why they received more than the female plaintiff, but submitted that it could be attributed to discrimination on the basis of gender. They noted that, although they had the same grievance as the female employee (Claim 1), they were of the view that the female employee was worse off in comparison to them (par. 15).

Ms Tetyana's case (Claim 2) was that she was remunerated on Grade 15, while one of her male colleagues was remunerated on Grade 16. However, there were two other male colleagues who were also remunerated on Grade 15, therefore, at the same level as Ms Tetyana (par. 31). This suggested that Ms Tetyana's gender was not necessarily the reason for the difference in pay.

The court denied the discrimination claim based on gender (Claim 2) because the claimants had failed to show that there was a causal link between the pay discrepancy and the gender of the claimant (par. 37). Ms Tetyana noted that she had framed her claim on the basis of gender discrimination because she thought that it was 'traditional for females to be paid less than men' (par. 33). The case illustrates that the mere allegation of past injustice is not sufficient to be successful in a pay discrimination claim. A further indication that Ms Tetyana's claim was not properly formulated as a gender discrimination claim is that she acknowledged that she would still have brought the claimant if the comparator were female (par. 35).

## Claimants did not show that the work is of equal value

The principle of equal pay for work of equal value, including different jobs that require the same skill and effort, is a contentious issue (Hucker, 1999), as determining such value is difficult (Beniyama, 2020). Article 3(1) of the International

Labour Organization (ILO) Equal Remuneration Convention recommends that the value of work be determined in accordance with an objective job evaluation system. In the case of *Mangena & Others v Fila SA (Pty) Ltd & Others (2010) 31 ILJ 662 (LC)*, the court expressly stated that it had no experience in job grading or estimating the value of jobs. Therefore, the claimant must provide evidence that enables the court to make such an assessment (par. 15). In this case, the court rejected the applicant's claim due to a lack of sufficient evidence to establish that the claimant's work was of a value equal to that of the comparators (par. 17).

Additional insights gained from the cases analysed in this study are discussed in the following sections.

# Additional insights

## Claimants are mostly from occupational categories in the lower income bands

We found that the claimants in the pay discrimination cases were mostly from occupational categories in the lower occupational levels. This could be due to prominence of trade union activity in these categories. Among the claimants in the cases under study were protection officers (*Naidoo & others v Parliament of the Republic of SA* (*2019) 40 ILJ 864 (LC)*), a secretary (*Ncongwane and Emakhazeni Local Municipality (2019) 40 ILJ 1153 (CCMA)*) and a librarian (*Zvigo and Society of Jesus in SA* (2017) *38 ILJ 2645 (CCMA)*). The occupational level of claimants is relevant to the issue of access to justice and the affordability of expert witnesses to assist claimants in proving their claims.

Furthermore, pay discrimination in higher hierarchical levels may be widespread, with claimants reluctant to pursue cases because they are concerned about being branded 'a troublemaker', which could negatively impact their ability to secure future employment, and they may be subjected to retaliation and harassment for suing their employers. Research has found that fear of retaliation is one of the factors that contribute to gender pay inequalities (Lindsay, 2021). Transparency of pay information within organisations when an employee is concerned about unfair discrimination (Bosch & Barit, 2020) would be a helpful mechanism with which claimants could strengthen their cases. Such transparency would also assist employers to avert potential litigation and should be introduced carefully and with due consideration of worker readiness for such transparency. Caulfield (2021), on the other hand, argues against regulatory pay transparency in circumstances where organisations act morally. It should be noted that the *Protection of Personal Information Act* (RSA, 2013) may place certain limitation on the disclosure of pay information of other employees.

## Ineffective assistance by trade unions

We further examined whether trade union representation contributed to the success of claimants' cases. Overall, 11 claimants (4 pre-amendment; 7 post-amendment) had union representation, while 11 did not. Only one claimant (post-amendment) that had union representation was successful.

In our analysis of the cases, trade union representation was prominent in bringing the cases before the court. However, none of these cases were successful. This raises questions regarding trade union representatives' ability to provide support in pay discrimination cases, a doubt confirmed by Uys and Holtzhausen (2016). Trade unions should ensure that their representatives are adequately educated and remain updated on legislation. Alternatively, they should utilise subscription fees to employ the services of legal experts and professional job evaluators.

Collective bargaining only featured in one of the analysed cases, when it was used to set pay differentials (*Pioneer Foods (Pty) Ltd v Workers Against Regression & Others (2016) 37 ILJ 2872 (LC)*). The collective agreement in question provided that newly appointed employees be paid 20% less than long-service employees. The court decided that 'pay differentials on the basis of length of service do not constitute unfair discrimination'. Although collective agreements are binding and enforceable, it should be noted that the law protects employees' rights by providing that employees cannot contract out of their core legally mandated rights.

It is, therefore, important to consider the purpose of collective agreements regarding pay differentials, and whether the provisions of such agreements adhere to the principle of equal pay for work of equal value. The reasons for the pay differentials in the collective agreement should be considered in determining whether the pay differentials are fair and why they should be introduced. The rationale for paying existing employees more should therefore be made clear and documented during collective bargaining.

# Recommendations

In concord with Lobel (2020), who states that the future of pay equity laws lies in structural reforms that empower multiple actors in the pay equity system, especially employees and employers, 'to share information, identify disparities, negotiate corrective action, and work together toward a more equal and fair market' (p. 611), this section outlines the role that various actors should play in supporting equal pay for work of equal value.

**Employers** should aim to ensure equal pay for work of equal value based on the advice of professional job evaluators and then practise pay transparency by carefully, and in a planned manner, making differences in wages visible to affected parties (Bosch & Barit, 2020). Employers should also familiarise themselves with the contents of discrimination laws, especially the justifications for pay differentiation in terms of Regulation 7. This will enable employers to properly weigh pay differences and address historical structural inequalities. Such inequalities can be identified through

audits of persistent patterns of differences between groups' pay (Bosch & Barit, 2020).

**The judiciary** also plays a key role in the eradication of pay discrimination. Considering the importance of judgements in a precedent system – whereby all other courts on the same and lower levels are bound to a judgement in similar cases until a higher court finds differently – the courts should be clear and provide guidance in their reasoning (Labuschagne, 2013). Here, codes of good practice can provide direction to the courts on matters such as work of equal value (Parliamentary Monitoring Group, 1998).

**Trade unions** should be trained in assisting members in such matters, to ensure that they are equipped with knowledge of the requirements that must be satisfied in a pay discrimination claim.

**Legal aid institutions** such as Legal Aid South Africa, university law clinics and non-governmental organisations serve the purpose of making legal services more accessible to indigent persons seeking access to justice (Mkhize, 2020). Legal Aid South Africa was established in terms of the *Legal Aid Act of 2014*, to give effect to the constitutional right to access to courts (see Section 34 of the South African Constitution) (*Constitution of the Republic of South Africa*, 1996). However, access to justice has been hampered by a lack of resources and the financial capacity of legal aid institutions (Greenbaum, 2020; Holness, 2021; Mkhize, 2020). Furthermore, the fact that the legal aid services offered to claimants are free of charge may potentially impact the quality of the legal services provided. Mkhize (2020) argues that Legal Aid South Africa has rejected numerous cases, especially civil matters, due to a lack of competent staff. Considering the complex nature of pay discrimination claims and the criteria that must be satisfied, it is important that legal practitioners that take on these cases are well versed in the requirements specified in pay discrimination law.

**Government** plays a key role in strengthening and supporting institutions such as Legal Aid. Government could improve access to justice by providing adequate funding to institutions that provide legal services to underprivileged individuals. In addition, government could introduce tax incentives to promote pay parity at all occupational levels (Adeleken & Bussin, 2020).

**Job evaluation experts and HR practitioners** could also partner with government in supporting education on remuneration and the determination of pay levels. The process of remuneration education should include employees, as this may lower the likelihood of discrimination and employees subsequently filing a suit.

## Recommendations for future research

This study points to a lack of understanding of the legal framework regarding pay discrimination. Future research should investigate additional facets of pay discrimination by analysing cases of indirect pay discrimination. Such studies should determine the conditions under which indirect discrimination occurs and provide recommendations on how organisations can mitigate it. The current study also highlighted the importance of objective job evaluation systems and tools in determining equal pay for work of equal value. Future research should explore the principles or factors that could supplement current job evaluation systems with the aim of strengthening pay equality when adhering to the South African constitutional framework.

## Conclusion

This study found that employees, their representatives and HR practitioners are not sufficiently informed regarding fair and unfair pay differentiation. The majority of the cases that were sampled in this study were rejected by the courts for reasons that included the claimants being unable to establish that the difference in pay amounted to unfair discrimination, claimants failing to identify an appropriate comparator, employers successfully justifying that they had a rational and fair reason for the pay differential, and the claimants being unable to prove to the court that the work they did was of equal value of that of the comparator.

The principle of equal pay relates to both morality and human rights and requires commitment from all the relevant actors to formulate policies and implement strategies aimed at addressing persistent pay inequalities experienced by the majority of employees in South Africa (Commission for Employment Equity 19th Annual Report, 2018). It is not sufficient to outlaw discrimination through legislation. A concerted effort by the various actors is required to eliminate discrimination, especially when considering the instrumental role that HR practitioners play in employer–employee relations in organisations.

A perception about unfair pay discrimination may lead to employees disengaging and distrusting employers (Juchnowicz et al., 2021). We thus further advise that employers adopt a more carefully planned and executed transparent stance with regard to remuneration, and that organisations' HR practitioners make a concerted effort to mediate in such cases, to avoid costly litigation and the destruction of the employer–employee relationship, coupled with the loss of the employee(s). Such proactive efforts will give effect to Objective 1.3 of the Code of Good Practice on Equal Pay/Remuneration for Work of Equal Value (Government Gazette No. 38837), which states that the Code:

> … [*A*]ims to encourage employers to manage their pay/remuneration policies, practices and proper consultation processes within a sound governance framework in order to drive and maximise on the principle of equal pay/remuneration for work of equal value that is fair, free from unfair discrimination and consistently applied. (p.8)

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## Authors' contributions

L.D. collected the data, conducted data analysis, wrote the initial draft and refined the draft. A.B. conceptualised the study, supervised the work, provided the resources and reworked the final manuscript.

## Ethical considerations

The study was declared exempt of ethical clearance by the ethics committee of Stellenbosch University (USB-2021-24297) (01 February 2022).


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## Data availability

The data that support the findings of this study are available from the corresponding author, A.B., upon reasonable request.

## Disclaimer

The views and opinions expressed in this article are those of the authors and are the product of professional research. It does not necessarily reflect the official policy or position of any affiliated institution, funder, agency, or that of the publisher. The authors are responsible for this article's results, findings, and content.

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