The Ambit of Terms and Conditions of Employment in Equal Pay Claims Under Section 6(4) of the EEA: Lessons from the United Kingdom Equal Pay Law*

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Online ISSN
1727-3781

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Date Submitted

31 July 2024

Date Revised

17 February 2026

Date Accepted

17 February 2026

Date Published

5 August 2026

Editor

Prof Wian Erlank

Journal Editor

Prof Wian Erlank

How to cite this contribution

Ebrahim S "The Ambit of Terms and Conditions of Employment in Equal Pay Claims Under Section 6(4) of the EEA: Lessons from the United Kingdom Equal Pay Law" *PER / PELJ* 2026(29) - DOI http://dx.doi.org/10.17159/1727-3781/2026/v29i0a19309

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DOI
http://dx.doi.org/10.17159/1727-3781/2026/v29i0a19309

Abstract

Section 6(4) of the *Employment Equity Act* 55 of 1998 (hereafter the *EEA*) deals with three equal pay causes of action. While there are various elements that an equal pay claimant must prove across the three equal pay causes of action, the only element dealt with in this article is "[a] difference in terms and conditions of employment". Neither the *EEA*, the *Employment Equity Regulations* or the *Code of Good Practice on Equal Pay/Remuneration for Work of Equal Value* provides a definition as to what would fall within the ambit of "terms and conditions of employment" as referred to in section 6(4) of the *EEA*. The importance of knowing what would fall within the ambit of terms and conditions of employment can be stated as follows: a failure by an equal pay claimant to prove that there is a difference in "terms and conditions of employment" will result in not proving one of the elements of the equal pay claim and result in the claim being a non-starter. An equal pay claim can be rebutted by an employer who is able to prove that the cause of the equal pay complaint does not fall within the ambit of the terms and conditions of employment. This article seeks to answer the question as to what falls within the ambit of the terms and conditions of employment for the purpose of equal pay claims as contemplated in section 6(4) of the *EEA* by having regard to domestic law and the United Kingdom equal pay law.

Keywords

Equal pay; equal terms and conditions of employment; *Employment Equity Act*; *Equal Pay Code*; *Employment Equity Regulations*; *Equality Act*; *Equal Pay Act*; terms of work.

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1 Introduction

Section 6(4) of the *Employment Equity Act*[1] (hereafter the *EEA*) provides the following:

> 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.

As such, section 6(4) of the *EEA* deals with three types of equal pay claims, which are: equal pay (terms and conditions) for the same work, equal pay (terms and conditions) for substantially the same work, and equal pay (terms and conditions) for work of equal value.

While there are various elements that an equal pay claimant must prove across the three equal pay causes of action,[2] the only element considered in this article is "[a] difference in terms and conditions of employment".

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* This article is based on part of my unpublished thesis, *A Comprehensive Analysis of the Law Regulating Equal Pay in South Africa* (LLD-thesis University of South Africa 2023). I should like to acknowledge the support provided to me by the University of South Africa in the form of the Academic Qualification Improvement Programme Grant, which allowed me to complete my doctorate. The opinions and conclusions expressed in this article should not be attributed to the University of South Africa; they are solely mine.

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1 *Employment Equity Act* 55 of 1998 (hereafter the *EEA*).

2 The three equal pay causes of action and their elements, having regard to s 6(4) of the *EEA* and reg 4(3) of the *Employment Equity Regulations* (GN 6125 in GG 52515 of 15 April 2025), are as follows: In an equal pay claim for the same work a claimant has to prove the following: (a) that the work performed by her is the same (identical or interchangeable); as (b) the work performed by another employee (comparator); of (c) the same employer; (d) but she is paid less (does not receive the same terms and conditions of employment) because the employer has unfairly discriminated against her within the meaning of s 6(1) of the *EEA* read with s 11 thereof. In an equal pay claim for substantially the same work a claimant has to prove the following: (a) that the work performed by her is substantially the same (the work performed by the employees are sufficiently similar that they can reasonably be considered to be performing the same job even though the work is not identical or interchangeable); as (b) the work performed by another employee (comparator); of (c) the same employer; (d) but she is paid less (does not receive the same terms and conditions of employment) because the employer has unfairly discriminated against her within the meaning of s 6(1) of the *EEA* read with s 11 thereof. In an equal pay for work of equal value claim a claimant has to prove the following: (a) that the work performed by her is of equal value (their respective occupations have to be accorded equal value in accordance with the factors for assessing equal value in regs 5-7); (b) to the work of another employee (comparator); (c) in a different job of the same employer; (d) but she is paid less (does not receive the same terms and conditions of employment) because the employer has unfairly discriminated against her within the meaning of s 6(1) of the *EEA* read with s 11 thereof."

Neither the *EEA*, the *Employment Equity Regulations*[3] (hereafter the *Employment Equity Regulations*) or the *Code of Good Practice on Equal Pay/Remuneration for Work of Equal Value*[4] (hereafter the *Equal Pay Code*) provides a definition as to what would fall within the ambit of "terms and conditions of employment" as referred to in section 6(4) of the *EEA*. The importance of knowing what would fall within the ambit of terms and conditions of employment can be stated as follows: a failure by an equal pay claimant to prove that there is a difference in "terms and conditions of employment" will result in not proving one of the elements of the equal pay claim and result in the claim being a non-starter. An equal pay claim can be defeated by an employer who is able to show that the cause of the equal pay complaint does not fall within the ambit of terms and conditions of employment. Consequently, ascertaining what falls within the ambit of "terms and condition of employment" is an aspect that affects both an employee and employer and is thus worthy of analysis.

Against this background, the purpose of this article is to answer the crisp question of what falls within the ambit of terms and conditions of employment for the purpose of equal pay claims as contemplated in section 6(4) of the *EEA*. This objective will be achieved by a comparative analysis of the issue against the United Kingdom's equal pay law. The reasons for using the equal pay law of the United Kingdom in order to analyse the same and draw guidance therefrom is dealt with below.

2 The meaning of terms and conditions of employment under South African equal pay law

The Labour Courts (including the erstwhile Industrial Court) provide limited guidance as to what can constitute an equal terms and conditions claim in terms of section 6(4) of the *EEA*, having largely only dealt with equal pay claims relating to remuneration-related complaints. It is prudent, however, to briefly discuss some of these cases in order to provide context to equal pay (terms and conditions) claims.

In *SA Chemical Workers Union v Sentrachem*[5] the applicants complained that the respondent committed an unfair labour practice against them under section 46(9) of the *Labour Relations* Act 28 of 1956 in that it discriminated against them on the ground of race by paying black employees less than white employees who were on the same grade and/or who were engaged in work that was the same.[6] The applicants sought an order to eliminate the

3 GN 6125 in GG 52515 of 15 April 2025 (hereafter the *Employment Equity Regulations*).

4 GN 448 in GG 38837 of 1 June 2015 (hereafter the *Equal Pay Code*).

5 *SA Chemical Workers Union v Sentrachem* 1988 9 ILJ 410 (IC) (hereafter *SA Chemical Workers Union*).

6 *SA Chemical Workers Union* 412F-412G.

wage discrimination. The Industrial Court noted that the respondent was of the view that a definition of the wage gap (wage discrimination) was needed before the wage discrimination could be addressed whereas the applicants were of the view that there was no need for such a definition. In essence the Court agreed with the applicants to the effect that there was no need for a definition of the wage gap (wage discrimination) also because the respondent had acknowledged the wage discrimination between its employees and proposed to remove it without there being a formal definition. The Court then held that wage discrimination based on race or any other difference other than skills and experience was an unfair labour practice and stated that the respondent should have taken greater efforts to remove the wage discrimination, which it acknowledged. It ordered that the wage discrimination which affected black employees be removed by a certain date.[7]

In *National Union of Mineworkers v Henry Gould (Pty) Ltd*[8] the union launched an unfair labour practice claim against the employer in terms of section 46(9) of the *Labour Relations Act* 28 of 1956, complaining that the employer committed an unfair labour practice against its members by refusing to implement wage increases in circumstances where it implemented the same for non-union members. The union alleged that the employer committed this unfair labour practice after the conclusion of the collective bargaining process when it refused to retrospectively implement the wage increase to union members. It was common cause that the employer had retrospectively implemented the wage increase to non-union employees and had also extended the outcome (fruits) of the collective bargaining process to the non-union employees. The union argued that the employer's refusal to retrospectively implement the wage increase to union members unfairly discriminated against them. The union further argued that the employer was in essence penalising the union members for engaging in the collective bargaining process. The Industrial Court stated that as an abstract principle it is self-evident that equals should be treated equally. It further stated that employees in the same job category having the same seniority should receive the same terms and conditions of employment

7 *SA Chemical Workers Union* 428E, 429A-B, 429C-E, 412H-I, 429F, 430D-E, 439G-H. Cohen 2000 *SA Merc LJ* 260 states that the principle of equal pay for equal (same/similar) work was established in this case. It should be noted that the Industrial Court decision in *SA Chemical Workers Union* was overturned in *Sentrachem Ltd v John* 1989 10 ILJ 249 (WLD) based on the High Court setting aside the wage discrimination finding by the Industrial Court for lack of an evidential basis to make such a finding. This, however, does not affect the statement of equal pay law as set out by the Industrial Court, which in essence relates to skills and experience being grounds of justification of equal pay claims.

8 *National Union of Mineworkers v Henry Gould (Pty) Ltd* 1988 9 ILJ 1149 (IC) (hereafter *National Union of Mineworkers*).

except if there are good and compelling reasons to differentiate between them.[9]

The Industrial Court held that despite the employer agreeing to the division of the labour unit into two subgroups (union and non-union members) it subsequently removed this distinction by according the non-union members the fruits of the collective bargaining process. It found that by doing this the employer had treated some members of the single labour unit differently from others. It had done so by affording the non-union members the fruits of the collective bargaining process but refusing to extend the fruits of the individual bargaining of the non-union members to the union members. The benefit of the individualised bargaining of the non-union members was the retrospective implementation of the wage increase. The Court held that the purpose of the differentiation was to discourage union members from participating in the collective bargaining process, which was unfair. It ordered the employer to pay the union members the wage increase during the period in which it unfairly held it from them.[10]

In *Mthembu v Claude Neon Lights*[11] the applicants launched an application in terms of section 46(9) of the Labour Relations Act 28 of 1956 before the Industrial Court complaining that their employer committed an unfair labour practice against them by unfairly discriminating against them by not granting them a merit increase. The employer gave annual increased wages in accordance with the Industrial Council increases but had decided in March 1989 to also grant an increase based on merit. The granting of the merit increase was negotiated with the representative union and agreed to. The employer then instructed its local management to evaluate every employee for the purpose of informing it as to which employees deserved the merit increase. After the completion of this process, management decided that the applicants were not deserving of a merit increase. The Industrial Court stated that differentiation does not automatically (necessarily) amount to discrimination. It further stated that it goes against the interest of the employer and its employees to order that an employer is not entitled to differentiate between its employees based on their productivity. The Industrial Court remarked that if this were the case then all the productivity schemes in the various workplaces would amount to unfair labour practices. It further remarked that this could not be the case because an employer is entitled to reward an employee for outstanding service as this increases productivity. The Industrial Court then held that the applicants had not succeeded in proving that the employer committed an unfair labour practice

9 *National Union of Mineworkers* 1150D-E, 1157E, 1157G-H, 1158A-B.
10 *National Union of Mineworkers* 1160D-G, 1160J, 1161H-I.
11 *Mthembu v Claude Neon Lights* 1992 13 ILJ 422 (IC).

by unfairly discriminating against them by not awarding them a merit increase.[12]

In *TGWU v Bayete Security Holdings*[13] the applicant was unaware of the nature of the work performed by his comparator including his educational qualifications and experience. The Labour Court stated that the applicant wanted it to deduce that he was discriminated against based on his race in that he earned R1 500 per month whereas his white comparator earned R4 500 per month. The Labour Court was of the view that the applicant had failed to prove that he had been discriminated against. It held that the mere difference in pay between employees does not on its own amount to discrimination. The Labour Court remarked that discrimination occurs when two similarly circumstanced employees are treated differently based on the prohibited grounds. It further remarked that responsibility, expertise, experience, skills and the like could justify pay differentials. The application was consequently dismissed.[14]

In *Louw v Golden Arrow Bus Services (Pty) Ltd*[15] the applicant, a black male, who was employed as a buyer, complained that the respondent committed direct unfair discrimination against him on the ground of race as it paid his comparator, who was a white male employed as a warehouse supervisor, a higher wage for work of equal value.[16] Alternatively the respondent had committed indirect discrimination against him in that the difference in the wages was due to race as a result of the respondent applying factors in its pay evaluation that had a disparate impact on black employees. These factors were performance, potential, responsibility, experience, education, attitude, skills, entry-level and market forces. The applicant sought compensation in the amount of the difference between his wage and that of his comparator. The respondent accepted the difference in salary between the applicant and the comparator but denied that this was due to discrimination and stated that it was attributable to non-discriminatory considerations.[17] The Labour Court held that the mere differential treatment of persons from different races was not on its own discriminatory on the ground of race except if the difference in race is the reason for the disparate treatment. There was at least one Peromnes grade difference between the size of the applicant's work (as a buyer) and that of the comparator (a warehouse supervisor) based on the Peromnes system, which had been used to determine the rate of remuneration. The Labour Court found that

12 *Mthembu v Claude Neon Lights* 1992 13 ILJ 422 (IC) 422I, 423A-C, 423F-G, 424G.
13 *TGWU v Bayete Security Holdings* 1999 4 BLLR 401 (LC).
14 *TGWU v Bayete Security Holdings* 1999 4 BLLR 401 (LC) paras 5, 4, 7, 10.
15 *Louw v Golden Arrows Bus Services (Pty) Ltd* 2000 21 ILJ 188 (LC) (hereafter *Louw*).
16 Pieterse 2001 *SALJ* 18 has stated that the principle of equal remuneration for work of equal value is a manifestation of the constitutional concept of substantive equality.
17 *Louw* paras 4-7, 59.

the applicant had not succeeded in proving that the two jobs, on an objective evaluation, were of equal value. The Labour Court remarked that this does not mean that the reason for the difference in wages was not as a result of racial discrimination but it simply meant that racial discrimination had not been proved.[18]

In *Heynsen v Armstrong Hydraulics (Pty) Ltd*[19] the applicant complained that he had been discriminated against due to his race because he earned less than his co-employees. His co-employees were part of the bargaining unit and were paid weekly whilst he did not belong to the bargaining unit and was paid monthly, but the work he performed was the same as that of his co-employees. The applicant sought an order instructing the respondent to pay him on the basis of equal pay for equal work. The Labour Court noted that there were differences in the terms and conditions of employment of weekly and monthly paid employees.[20] It further noted that monthly paid employees were entitled to certain benefits which hourly paid employees were not favoured with. The Labour Court held that it would be unfair if employees who were not part of the bargaining unit were to benefit from that unit while still enjoying benefits which were not shared by the bargaining unit. The Labour Court noted that collective bargaining is not a justification for pay discrimination according to the International Labour Organisation.[21] It cautioned that this rule was compelling in an ideal society but should not apply rigidly in South African labour relations since collective bargaining was a hard-fought right for employees. The Labour Court found that insofar as there might be discrimination it was not unfair, based on the facts. The application was consequently dismissed.[22]

In *Ntai v SA Breweries Ltd*[23] the applicants complained that their employer had committed unfair discrimination against them based on their race

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18 *Louw* paras 26, 105-106, 130, 133. Pieterse 2001 *SALJ* 17 has suggested that in order to prevent disadvantage from perpetuating, analytical job evaluation programmes should be prescribed. It is axiomatic that the analytical job evaluation programmes would of necessity have to contain factors which are objective in order to be fair.

19 *Heynsen v Armstrong Hydraulics (Pty) Ltd* 2000 12 BLLR 1444 (LC) (hereafter *Heynsen*).

20 *Heynsen* paras 1, 3-4, 6, 10-11.

21 *Heynsen* refers to s 111 of the Directions of the ILO. It is submitted that this should be read as referring to Art 2(e) of the *Discrimination (Employment and Occupation) Recommendation* 111 of 1958.

22 *Heynsen* paras 8, 12-13, 15, 17-18. Also see *Larbi Odam v Member of the Executive Council for Education (North-West Province)* 1997 12 BCLR 1655 (CC) para 28, wherein the Constitutional Court held that an agreed regulation which unfairly discriminates against a minority will not constitute a ground of justification; and *Jansen van Vuuren v South African Airways (Pty) Ltd* 2013 10 BLLR 1004 (LC) paras 48-50, wherein the Labour Court held that a collective agreement cannot justify unfair discrimination.

23 *Ntai v SA Breweries Ltd* 2001 22 ILJ 214 (LC).

because it paid them a lower wage than their white counterparts whereas all of them were engaged in the same work or work of equal value. The applicants sought an order directing their employer to pay them a wage equal to that of their white counterparts. The respondent accepted that there was a difference in the wages but denied that it was due to race. The respondent attributed the difference in pay to a series of performance-based pay increases, the greater experience of the comparators and their seniority. The Labour Court accepted that the applicants had made out a *prima facie* case but noted that they still bore the overall onus of proving that the difference in pay was based on race. It found that the applicants had not succeeded in proving on a balance of probabilities that the reason for the different salaries was based on race. The application was consequently dismissed.[24]

In *Co-operative Worker Association & Another v Petroleum Oil and Gas Co-operative of SA*[25] the second applicant complained that the respondent had committed unfair discrimination against him based on the absence of family responsibility because employees with family responsibility (dependent spouses and children) received a higher total guaranteed remuneration than employees who did not have family responsibility, and claimed that this violated the principle of the right to equal pay for equal work or work of equal value. The Labour Court noted that the international community accepted the fact that workers with family responsibilities constitute a vulnerable group and as a result thereof deserve protection. To this end additional remuneration for these employees was endorsed and encouraged by both national and international law.[26] The Labour Court agreed with the respondent's submission that the definition of family responsibility made it clear that only those employees with dependents may utilise section 6(1) of the *EEA* on the ground of family responsibility. The applicant could thus not claim unfair discrimination based on the absence of family responsibility, which is the corollary of the listed ground of family responsibility. The claim was consequently dismissed.[27]

In *Mutale v Lorcom Twenty Two CC*[28] the applicant complained that the respondent had committed an unfair labour practice by racially discriminating against her in the computation of her remuneration. The applicant stated that the respondent had informed her, with regard to an advertised position at the respondent, to only offer between R1 000 – R3 000 to black candidates but to agree to the amount requested by white

24 *Ntai v SA Breweries Ltd* 2001 22 ILJ 214 (LC) paras 2-3, 5, 25, 21, 57, 61, 90.
25 *Co-operative Worker Association v Petroleum Oil and Gas Co-operative of SA* 2007 1 BLLR 55 (LC) (hereafter *Co-operative Worker Association*).
26 *Co-operative Worker Association* paras 6, 8, 42, 51.
27 *Co-operative Worker Association* paras 47, 36, 60.
28 *Mutale v Lorcom Twenty Two CC* 2009 3 BLLR 217 (LC) (hereafter *Mutale*).

candidates. This caused the applicant to query the basis for the computation of her own salary. The respondent denied the racist employment practice. The Labour Court found that a comparison of the applicant's salary with her chosen comparator (a white female) was difficult because the applicant was employed as a bookkeeper whereas her comparator was employed as a sales manager. It held that it was not necessary for the applicant to compare her salary with that of a co-employee (comparator) because viewed on its own it was clearly based on race. It found that the respondent had used race as a benchmark to determine the salary to be offered to job applicants.[29] The Labour Court stated that had the applicant been white then she would have received her asking salary of R5 000 in terms of the respondent's employment practice. Based on this, it accordingly held that the difference between the amounts of R5 000 and R3 000 per month for the first year of employment constituted the compensation to which the applicant was entitled. The applicant was thus awarded an amount of R24 000 for the race discrimination in the computation of her salary.[30]

In *Mangena v Fila*[31] the applicant, a black male, complained that the respondent had discriminated against him based on his race because it paid his comparator, a white female, a higher wage notwithstanding that the work performed by both of them was the same or alternatively of equal value.[32] The Labour Court found that the applicant had failed to present evidence relating to the precise functions performed by the comparator and had an exaggerated view of the nature of the work performed by him. It rejected the applicant's evidence as to the nature of the work performed by both him and the comparator and accepted the respondent's version in this regard. It concluded that the factual foundation which was necessary to sustain an equal pay for equal work claim was non-existent as the applicant had failed to show that the work performed by him and the comparator was the same/similar.[33] The Labour Court then noted that the applicant had not pleaded a claim of equal pay for work of equal value. It remarked that there was no evidence before it to show the relative value that should be accorded to the work performed by the applicant and the comparator. The Labour Court remarked that to the extent that the issue of relative value was self-evident, as argued by the applicant, the work performed by the applicant was of considerably less value than that performed by the comparator taking into account, the demands made, levels of responsibility and skills in relation to both jobs.[34] It concluded that the basis for the applicant's claim of equal

29 *Mutale* paras 1, 4, 40, 2, 39.
30 *Mutale* paras 21, 40-41.
31 *Mangena v Fila South Africa (Pty) Ltd* 2009 12 BLLR 1224 (LC) (hereafter *Mangena*).
32 *Mangena* paras 2, 4, 5.
33 *Mangena* para 14.
34 *Mangena* para 15.

pay for work of equal value was non-existent. Both the claims of equal pay for equal work and work of equal value were consequently dismissed.[35]

In *Pioneer Foods (Pty) Ltd v Workers Against Regression*[36] the Labour Court heard an appeal against an arbitration award in which the Commissioner found that paying newly appointed drivers at an 80% rate for the first two years of employment as compared to the 100% rate paid to drivers who had worked for longer than two years in terms of a collective agreement amounted to unfair discrimination in pay. The Commission for Conciliation Mediation and Arbitration (hereafter the CCMA) regarded the factor of seniority as a ground of discrimination as opposed to a ground justifying pay differentiation.[37] The issue before the Labour Court was the interpretation to be accorded to section 6(4) of the *EEA*, more specifically, the issue of the factor of seniority operating as a ground of discrimination.[38] The Labour Court found that the equal pay legal framework considers the factor of seniority to be a ground which justifies pay differentiation and the Commissioner had misconceived the law by regarding it as a ground upon which *unfair* pay discrimination was committed.[39]

The Labour Court found that the Commissioner's approach was that it amounts to unfair discrimination for the appellant to pay a newly appointed employee, who had previously been employed by a labour broker, at a rate lower than that paid to existing long-service employees, irrespective of how short the period of previous employment with the labour broker was. The lower rate of pay for newly appointed employees as contained in the collective agreement between the Food and Allied Workers Union (FAWU) and the appellant came about as a result of FAWU persuading the appellant to reduce the extent to which it was utilising the services of various forms of precarious employees, including employees supplied by labour brokers. FAWU had also proposed the implementation of a scale which showed the difference between employees who newly started working and long-serving employees. The 80 per cent scale/rate was applied to all new employees from outside the company and it stopped operating after two years of service.[40] The Labour Court found that the differentiation complained of was

35 *Mangena* paras 15, 17; McGregor 2011 *SA Merc LJ* 503 states that *Mangena* is the *locus classicus* on equal remuneration claims and will retain such status, notwithstanding possible changes to the *EEA*. Meintjes-Van der Walt 1998 *ILJ* 26 states that the evaluation of job content is normally based on four criteria, namely skill, responsibility, physical and mental effort and the conditions under which the work is performed.

36 *Pioneer Foods (Pty) Ltd v Workers Against Regression (WAR)* 2016 9 BLLR 942 (LC) (hereafter *Pioneer Foods*).

37 *Pioneer Foods* paras 1, 3, 5.

38 *Pioneer Foods* paras 2, 3, 4.

39 *Pioneer Foods* paras 26-29, 19-25.

40 *Pioneer Foods* paras 44, 46-48.

not irrational and not based on an arbitrary unlisted ground and was not unfair. The appeal was thus upheld.[41]

2.1 Equal pay legislative framework

Having briefly dealt with the case law above, it is apposite to turn to the equal pay legislative framework in order to analyse the same and ultimately ascertain whether there is any guidance that can be drawn therefrom. It must be noted from the outset that neither the *EEA*, the *Employment Equity Regulations* or the *Equal Pay Code* provides a definition (a direct answer) as to what falls within the ambit of terms and conditions of employment for the purpose of equal pay claims as contemplated in section 6(4) of the *EEA*. The *Equal Pay Code*, item 2.1.2, does provide that the *Equal Pay Code* must be read in conjunction with that part of the *Code of Good Practice on the Integration of Employment Equity into Human Resources Policies and Practices*,[42] (hereafter the *Integration of Employment Equity Code*) that deals with terms and conditions of employment. Item 2.1.2 of the *Equal Pay Code* provides the following in this regard:

> 2.1. This Code is issued in terms of section 54 of the Employment Equity Act, 1998 (Act No. 55 of 1998) as amended, its regulations and other Codes issued in terms of the Act. In particular, this Code must be read in conjunction with -
> …
>
> 2.1.2. the Code of Good Practice on the Integration of Employment Equity into Human Resources Policies, Practices and Procedures (HR Code), in particular Part B dealing with Terms and Conditions of Employment.

This then means that the *Equal Pay Code* must be read with that part of the *Integration of Employment Equity Code* that deals with terms and conditions of employment which is item 11 thereof. Item 11.1 of the *Integration of Employment Equity Code*, in turn, includes the following under terms and conditions of employment: (a) working time and rest periods; (b) annual leave; (c) sick leave; (d) maternity leave; (e) family responsibility leave; (f) any other types of leave; (g) rates of pay; (h) overtime rates; (i) allowances; (j) retirement schemes; (k) medical aid; and (l) other benefits.[43] Item 2.6 of the *Equal Pay Code* provides the following: "2.6. The code provides guidance when interpreting the Employment Equity Act (the Act) and its regulations."

The above, read together, means that the *Equal Pay Code* read with item 11 of the *Integration of Employment Equity Code* provides guidance when interpreting the EEA, in particular, section 6(4) of the *EEA*, which prohibits unfair discrimination in terms and conditions of employment. It is submitted

41 *Pioneer Foods* para 76.
42 GN 1358 in GG 27866 of 4 August 2005 (hereafter the *Integration of Employment Equity Code*).
43 Item 11.1 of the *Integration of Employment Equity Code*.

that it must then follow that the above terms and conditions of employment mentioned under item 11.1 of the *Integration of Employment Equity Code* fall within the ambit of terms and conditions of employment in section 6(4) of the *EEA*. It is further submitted that the list of terms and conditions of employment contained in item 11.1 of the *Integration of Employment Equity Code* should specifically be mentioned in the *Equal Pay Code* in order to promote legal certainty. This will promote legal certainty in that one will not have to do the analysis as done here as it will be clear from the *Equal Pay Code* as to what the relevant terms and conditions of employment are.

It is axiomatic that pay/remuneration falls under terms and conditions of employment and this is supported by item 11.1 of the *Integration of Employment Equity Code,* which refers to rates of pay as a term and condition of employment as well as the equal pay case law discussed above which has dealt with equal pay complaints. This is also supported by the fact that equal terms and conditions claims are commonly referred to as equal pay claims.[44] It is then also important to explore which different aspects of pay can fall under remuneration which will then fall under terms and conditions of employment. This then brings into focus item 2.4 of the *Equal Pay Code,* which refers to the Schedule on the Calculation of Employee's Remuneration in terms of section 35(5) of the *Basic Conditions of Employment Act* 75 of 1997[45] (hereafter the *BCEA Schedule*) in a footnote, while referring to the definition of remuneration in the *Basic Conditions of Employment Act* 75 of 1997 in the text.[46] The *BCEA Schedule* lists the following payments that are included in an employee's remuneration for the purposes of calculating pay for annual leave, payment instead of notice and severance pay:

> (a) Housing or accommodation allowance or subsidy or housing or accommodation received as a benefit in kind;
>
> (b) Car allowance of[or] provision of a car, except to the extent that the car is provided to enable the employee to work;
>
> (c) Any cash payments made to an employee, except those listed as exclusions in terms of this schedule;
>
> (d) Any other payment in kind received by an employee, except those listed as exclusions in terms of this schedule;

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44 Oelz, Olney and Manuel *Equal Pay* 2 state the following: "Women and men have the right to receive equal remuneration for work of equal value (commonly referred to as 'equal pay'). Not only should men and women get equal pay for doing the same or a similar job, but also when they do work that is completely different but which, based on objective criteria, is of equal value. Equal pay is a recognized human right, to which all men and women are entitled."

45 GN 691 in GG 24889 of 23 May 2003 (hereafter the *BCEA Schedule*).

46 Footnote 3 under item 2.4 of the *Equal Pay Code*.

(e) Employer's contributions to medical aid, pension, provident fund or similar schemes;

(f) Employer's contributions to funeral or death benefit schemes.[47]

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

(a) Any cash payment or payment in kind provided to enable the employee to work (for example, an equipment, tool or similar allowance or the provision of transport or the payment of a transport allowance to enable the employee to travel to and from work);

(b) A relocation allowance;

(c) Gratuities (for example, tips received from customers) and gifts from the employer;

(d) Share incentive schemes;

(e) Discretionary payments not related to an employee's hours of work or performance (for example, a discretionary profit-sharing scheme);

(f) An entertainment allowance;

(g) An education or schooling allowance.[48]

Besides the *BCEA Schedule* being referred to in a footnote relating to the definition of remuneration in terms of the *BCEA*, the intended purpose of the *BCEA Schedule* in relation to the *Equal Pay Code* and precisely whether it can provide guidance for the phrase "terms and conditions of employment" as contained under section 6(4) of the *EEA* is not clear from the *Equal Pay Code*. This being the case, it is not proper without more, to suggest that the payments listed under the *BCEA Schedule* should fall under "terms and conditions of employment" in section 6(4) of the *EEA*. This suggestion would have been proper, without more, if *the Equal Pay Code* included an item specifically stating that the *Equal Pay Code* must be read in conjunction with the *BCEA Schedule* as is the case with item 2.1.2 of the *Equal Pay Code,* which requires it to be read together with item 11 of the *Integration of Employment Equity Code*. Notwithstanding this, an alternative argument can be made to the effect that the payments listed under the *BCEA Schedule* fall under the term remuneration and will therefore fall under terms and conditions of employment in terms of section 6(4) of the *EEA*. Nevertheless, it remains prudent to analyse the United Kingdom equal pay law in order to ascertain whether some or all of these payments are considered as falling under their equal pay causes of action in order to draw guidance for the research question posed above.

47 Item 1(a)-(f) of the *BCEA Schedule*.
48 Item 2(a)-(g) of the *BCEA Schedule*.

3 Reasons for using the United Kingdom equal pay law

Section 39(1)(c) of the *Constitution*[49] (hereafter the *Constitution*) states that the court may consider foreign law when interpreting the rights in the Bill of Rights.[50] The use of foreign law is thus directory and not peremptory.[51] The Constitutional Court in *S v Makwanyane*[52] has provided guidance as to the (value) level of persuasiveness to be attached to foreign law when it remarked that the foreign law in question was of value to the Court because it analysed the arguments for and against the death penalty and illustrated how the foreign courts have dealt with this complex issue.[53] In *Sanderson v Attorney-General, Eastern Cape*[54] Kriegler J stated that comparative research is generally valuable, but it is more valuable when dealing with novel problems in the South African jurisprudence which are well developed in mature constitutional democracies.[55] Whilst section 39(1)(c) of the *Constitution* and the case law referred to above refers to the use of foreign law when interpreting the rights in the Bill of Rights, it is submitted that foreign law should be used in order to interpret those portions of the *EEA* which refer to equal pay law as these portions give effect to section 9 of the *Constitution* and because the foreign equal pay law is better developed in the United Kingdom than the equal pay law in South Africa.

Kahn-Freund states that utilising comparative law only becomes an abuse where its use is informed by a legal spirit which disregards the context of the law.[56] Blanpain states that comparative law is an excellent tool of education which often leads one to discover, by analysing foreign systems, that a similar domestic problem is resolved in another country in a different way altogether, which enriches the analysis of the domestic problem.[57]

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49 *Constitution of the Republic of South Africa*, 1996 (hereafter the *Constitution*).

50 Section 39(1) of the *Constitution* provides the following: "(1) When interpreting the Bill of Rights, a court, tribunal or forum— (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom; (b) must consider international law; and (c) may consider foreign law."

51 Currie and De Waal *Bill of Rights Handbook* 160.

52 *S v Makwanyane* 1995 3 SA 391 (CC).

53 *S v Makwanyane* 1995 3 SA 391 (CC) para 34.

54 *Sanderson v Attorney-General, Eastern Cape* 1998 2 SA 38 (CC) (hereafter *Sanderson*).

55 *Sanderson* para 26.

56 Kahn-Freund 1974 *The MLR* 27. Kahn-Freund also, with regard to the use of comparative law, states: "All I have wanted to suggest is that its use requires a knowledge not only of the foreign law, but also of its social, and above all its political, context. The use of comparative law for practical purposes becomes an abuse only if it is informed by a legalistic spirit which ignores this context of the law."

57 Blanpain "Comparativism in Labour Law and Industrial Relations" 4. The learned author expresses this as follows: "Comparative law is undoubtedly an excellent tool of education. It has thereby often been stressed that the analysis of foreign systems entails the enormous benefit of putting one's own national experience into perspective; that when studying other systems one often experiences a (cultural) shock in discovering that a similar problem is resolved in another country in a

Hage states that a big motivation for engaging in comparative legal research is the goal of finding the best possible law.[58] He further states that whilst there are many ways to conduct proper comparative legal research, the method used will strongly depend on the purpose for which the comparative legal research is performed and on the research question one aims to answer.[59] In *Sanderson v Attorney-General Eastern Cape* Kriegler J stated that the use of foreign law requires caution and an appreciation that transplants require careful managing.[60] In *Bernstein v Bester*[61] Kriegler J stated that he wished to discourage the common and often superficial resort to foreign authorities.[62]

The crisp reasons for choosing and using the equal pay law of the United Kingdom are as follows: (a) The United Kingdom's *Equality Act* of 2010 has specific provisions relating to equal pay. It provides for three causes of action relating to equal pay as follows: equal pay for like work, equal pay for work rated as equivalent and equal pay for work of equal value.[63] The *Equality Act* furthermore contains a section dealing with the material factor defence to an equal pay claim and a section dealing with comparators.[64] In addition to the Act there is a large body of case law dealing with equal pay discrimination that has come before the tribunals and the courts;[65] and (b) The equal pay law in the United Kingdom has developed in accordance with the guidance given to the United Kingdom courts by the European Court of

completely different way, such that one cannot help but initiate the analysis and evaluation of one's own system again, but now from another angle, from an enriched point of view, from a new insight."

58 Hage "Comparative Law as Method" 47.

59 Hage "Comparative Law as Method" 52.

60 *Sanderson* para 26.

61 *Bernstein v Bester* 1996 2 SA 751 (CC).

62 *Bernstein v Bester* 1996 2 SA 751 (CC) para 133.

63 Section 65 of the *Equality Act* of 2010.

64 Sections 69 and 79 of the *Equality Act* of 2010.

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

Justice through its case law and when the courts have referred preliminary questions relating equal pay law to the European Court of Justice seeking guidance on a particular issue/s.[66]

Against this background, it is submitted that an analysis of the United Kingdom equal pay law is proper and could be used to provide guidance on the implementation of the South African equal pay legal framework insofar as it assists in answering the research question posed.

4 The meaning of terms and conditions of employment under the United Kingdom's equal pay law

Section 66 of the *Equality Act*[67] (hereafter the *Equality Act*), which refers to the sex equality clause, as read with section 65 of the *Equality Act,* which contains the equal pay causes of action, refer to "terms of work" but there is no definition as to what would constitute such terms of work.[68] The *Equality Act* does, however, state in section 80(2)(a) that the terms of a person's work are those terms that are contained in the person's employment contract.[69] While no definition is provided relating to the phrase

66 Romney *Equal Pay* 10 states the following regarding the influence of the European Court of Justice case law on the United Kingdom right to equal pay: "Many of the most significant steps in the expansion of the domestic right to equal pay progress emerge from the progressive jurisprudence of the CJEU, which has recognized that the right forms part of the foundation of the EU's social policy." Benson "European Union: Impact on UK Law" E8011-E8017 states the following in relation to Art 267 of the *Treaty on the Functioning of the European Union* (1957), which provided a court or tribunal with an option to refer a matter to the European Court of Justice to obtain clarification regarding a matter before it: "It is this provision which has allowed UK courts and tribunals in numerous cases to make references to the Court of Justice for guidance on issues related to UK legislation enacted in order to implement the UK's obligations under EU Directives." Bowers *Practical Approach to Employment Law* 116 states the following: "The English courts have on several occasions referred cases to the European Court of Justice for interpretation of the principle in the European legislation." The Equality and Human Rights Commission *Equal Pay Statutory Code of Practice* paras 23-24 states that equal pay law in the United Kingdom has also developed in accordance with its case law and the law and case law of the European Union.

67 *Equality Act* of 2010 (hereafter the *Equality Act*).

68 Romney *Equal Pay* 156 states the following with regard to common terms referred to in s 79(4)(b)-(c) of the *Equality Act*: "The purpose of the legislation is to ensure that men and women in the same employment are paid equal pay for equal work, and to construe the phrase 'common terms and conditions' too narrowly would defeat that purpose and fail to accord with Article 157."

69 Section 80(2)(a)-(b) of the *Equality Act* provides the following: "(2) The terms of a person's work are— (a) if the person is employed, the terms of the person's employment that are in the person's contract of employment, contract of apprenticeship or contract to do work personally; (b) if the person holds a personal or public office, the terms of the person's appointment to the office." McCrudden *Equality in Law* 37 states the following: "The following have, however, been held to be included as terms of a contract: basic pay, benefits in kind such as the use of a car, cash bonuses, and sickness benefits."

"contract of employment" in section 80(2)(a) of the *Equality Act*, it is commonplace that express and implied contractual terms are covered, on condition that their existence can be established. Furthermore, contractual terms may be written or oral, provided that their existence can be established, and that they include terms that have been incorporated by way of a collective agreement.[70]

The *Equal Pay Statutory Code of Practice to the Equality Act* of 2010[71] (hereafter the *Equal Pay Statutory Code of Practice*) provides guidance as to what falls within the sphere of the terms of a person's work for the purpose of the equal pay provisions by stating that the equal pay provisions apply to all contractual terms, which will include the following: (a) wages or salaries (b) overtime; (c) shift payments; (d) holiday pay; (e) sick payments;[72] (f) non-discretionary bonuses;[73] (g) occupational pension benefits; and (h) non-monetary terms such as leave entitlements, access to social benefits and sports.[74] The following further contractual terms can be added to this list: (i) an automatic increase in pay level, for example, a seniority increment;[75] and (j) a benefit in kind, such as the use of a car.[76] It should be noted that this is not a closed list (*numerus clausus*) of what may fall within the ambit of terms of work. This is so because the *Equal Pay Statutory Code of Practice* states that the equal pay provisions apply to all contractual terms which go beyond those directly linked to remuneration. This has the result that a woman who is engaged in equal work with a man in the same employment is entitled to receive equal pay and equality in other contractual terms, which should ensure that her pay and other contractual terms are no less favourable than the man's.[77] Napier states that because of the broad range of contractual matters that the *Equality Act* applies to, one should strictly speaking not refer to equality of term claims as equal pay claims since this would be a

70 Incomes Data Services *Equality Act 2010* 154.

71 Equality and Human Rights Commission *Equal Pay Statutory Code of Practice* (hereafter the *Equal Pay Statutory Code*).

72 McCrudden *Equality in Law* 37 states the following: "The following have, however, been held to be included as terms of a contract: … sickness benefits."

73 Duggan *Equal Pay* 59 states the following: "Payment of a bonus under the contract of employment is almost certainly pay as it relates to work that has been carried out." McCrudden *Equality in Law* 37 states the following: "The following have, however, been held to be included as terms of a contract: … cash bonuses ….".

74 *Equal Pay Statutory Code* para 31.

75 Duggan *Equal Pay* 60 states the following: "Where there are automatic increases in pay levels, based, for example, upon seniority, then the increases will constitute pay and will give rise to claims under the EqPA 1970 where there is a contractual right." McCrudden *Equality in Law* 37 states the following: "The following have, however, been held to be included as terms of a contract: basic pay ….".

76 McCrudden *Equality in Law* 37 states the following: "The following have, however, been held to be included as terms of a contract: … benefits in kind such as the use of a car ….".

77 *Equal Pay Statutory Code* paras 26, 28, 29.

slim description. Nevertheless, it is routine to refer to such claims as equal pay claims.[78]

4.1 Case law dealing with the interpretation of "terms of work"

It is important to note that the three equal pay causes of action as contained in section 65 of the *Equality Act*, as read with section 66 thereof, replicate the three equal pay causes of action that were set out in the repealed *Equal Pay Act,* with the result that the case law decided under the *Equal Pay Act*[79] (hereafter the *Equal Pay Act*) remains relevant to the three equal pay causes of action in the *Equality Act*.[80]

In *Hayward v Cammell Laird Shipbuilders Ltd*[81] the House of Lords stated that there was no definition of the word "term" in the *Equal Pay Act*. It held that the natural meaning of the word "term" in the context of the *Equal Pay Act* should be understood as follows:

> a distinct provision or part of the contract which has sufficient content to make it possible to compare it from the point of view of the benefits it confers with similar provision or part in another contract.[82]

The interpretation of the word "term" in the *Equal Pay Act* arose in circumstances where the appellant received less favourable basic pay than the relevant men as well as less favourable overtime rates than them. The Industrial Tribunal held that the appellant was not entitled to relief with regard to specific terms of her employment contract in circumstances where her contract taken as a whole was as favourable to the appellant as it was to the relevant men. The appellant then appealed to the Employment Appeal Tribunal where the appeal was dismissed and a further appeal to the Court of Appeal was dismissed. The matter then came before the House of Lords

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78 Napier "Equal Pay" para 35. Kelly *et al Business Law* 480 state the following relating to equal pay claims under the *Equality Act*: "A claim is not restricted to purely claims for pay, but applies to any terms in the applicant's contract that are less favourable than the comparator's. Each term must be considered individually, rather than as part of the remuneration package, as decided in *Hayward v Cammell Laird Shipbuilders Ltd* (1998)." Pitt *Employment Law* 179 states the following: "The right to equal pay-which actually means equal terms and conditions of employment, not just pay-is enshrined in the Equal Pay Act 1970 (in force December 29, 1975)."

79 *Equal Pay Act* of 1970 (hereafter the *Equal Pay Act*).

80 Incomes Data Services *Equality Act 2010* 151. Kelly *et al Business Law* 479 state that s 65 of the *Equality Act* relating to the three equal pay causes of action "contains several important concepts that have rolled over from the Equal Pay Act so previous case law is still relevant". Lockton *Employment Law* 165 states the following: "The Equality Act 2010 repealed the Equal Pay Act (EPA) 1970. In respect of the equal pay provisions, very little has changed, and thus it is likely that existing case law is applicable under the 2010 provisions." Lewis, Sargeant and Schwab *Employment Law* 130 state the following relating to the *Equal Pay Act*: "As with other discrimination claims … much of the case law under the previous statute is thought to be still relevant".

81 *Hayward v Cammell Laird Shipbuilders Ltd* 1988 IRLR 257 (HL) (hereafter *Hayward*).

82 *Hayward* para 9.

by way of a further appeal. The issue before the House of Lords was whether the *Equal Pay Act* makes allowance for a scenario where a female can point to a term of her employment contract that is less favourable than a term of a similar kind in the male's contract and then have that term of her employment contract made not less favourable, notwithstanding that she is treated as favourably as the male when consideration is had to the whole of her contract and his contract, or whether even though she can point to a less favourable term her claim would still fail if it can be shown that the terms of her employment contract taken as a whole are not less favourable than those of the male.[83]

The respondents argued that "term" in section 1(2) of the *Equal Pay Act* should be understood to mean that pay should be considered as constituting a single term and a comparison can be made only by taking all the contractual terms relating to pay into account. The House of Lords rejected this argument and held that the elimination of sex discrimination in relation to all aspects of remuneration requires each aspect of remuneration to be evaluated and where there is discrimination in relation to any aspect then such discrimination has to be eliminated notwithstanding any other aspects of remuneration. It held further that it is unnatural to rely on a position that if the remuneration as a whole as it related to both a male and female provides the same result then it means that it is irrelevant that some aspects of remuneration are discriminatory in favour of the female provided that there are also some aspects of remuneration that favour the male.[84] The House of Lords allowed the appeal and remitted the matter to the Industrial Tribunal to decide the appellant's case in line with its decision on the meaning of "term" in the *Equal Pay Act*.[85]

It is important to make reference to certain statements made by Lord Goff in *Hayward* in his separate concurring judgement.[86] Lord Goff stated that where a contract contains provisions which relate to basic pay, for example, the benefit of the use of a car, a cash bonus or sick benefits, it would not occur to him to lump them all together and consider them as one term of the employment contract because they are different terms. Lord Goff then went on to state that when dealing with the issue of "term" in an equal pay claim one has to look at the two contracts and ask the simple question as to whether there is a term of a similar kind in the claimant's employment contract and the comparator's employment contract, and if there is, then the two terms must be compared, and if the comparison shows that the term of the claimant's contract is less favourable than the term of the comparator's contract then the claimant's term is to be treated as modified so as to make

83 *Hayward* paras 3, 8.
84 *Hayward* paras 13, 20, 23.
85 *Hayward* paras 20, 26.
86 Lord Goff's separate concurring judgment starts at *Hayward* para 30.

it not less favourable.[87] Romney states that the effect of *Hayward* is that an employment contract must not be considered as a whole even if it has the consequence of an equal pay claimant being in a stronger financial position than her comparator.[88] She further states that it is crucial that terms are correctly separated out in order to ensure that there is a proper comparison.[89] Hardy states that an employer is not allowed to argue that less favourable treatment experienced concerning one term, for example, basic pay, can be offset by having regard to better treatment in another term, for example, holiday entitlement or sick leave.[90]

In *St Helens & Knowsley Hospitals NHS Trust v Brownbill*[91] female employees launched equal pay claims in terms of the *Equal Pay Act* on the grounds that the terms in their employment contracts concerning working unsocial hours were less favourable than the terms of a similar kind afforded to their male comparators. They launched equal pay claims in terms of the *Equal Pay Act* since their male counterparts received a higher rate of pay for working unsocial hours. It should be noted that the claimants received higher total earnings than their male comparators. The Employment Tribunal held that the term concerning unsocial hours is a term relevant to the basic pay of the claimants and the comparators and as such it is impermissible to give the claimants the same term relating to unsocial hours of the comparators as this would further increase the difference between the claimants pay and that of the comparators (the claimants pay would be more than the comparators). The Employment Tribunal thus made a finding in favour of the employer. The Employment Appeal Tribunal overturned this

87 *Hayward* paras 35, 37.

88 Romney *Equal Pay* 28. Romney further states the following: "The statutory language of the section refers to terms, not to contracts." (Romney *Equal Pay* 28). Romney *Equal Pay* 143-144 states the following: "A woman may be entitled to equal pay with her comparator but she is not entitled to more than her comparator, even where she is more senior to him, has more experience than him, or does work of more value that he does. Were it otherwise, there would not be equality between them and it would be the comparator who would then be able to bring a claim citing *her* as his comparator. In other words, the point of an equal pay claim is to provide equal pay, not equal pay with extra benefits."

89 Romney *Equal Pay* 123. Bowers *Practical Approach to Employment Law* 138-139 states the following: "Each aspect of remuneration must be compared separately in order to achieve genuine transparency in assessing equality of pay … Terms have to be modified for equal pay purposes on a term by term basis; if the comparator's contract contained a term which was beneficial and which had no equivalent in the applicant's contract, the applicant's contract was altered so as to include the beneficial term".

90 Hardy *Labour Law and Industrial Relations* 226 states the following: "An employer cannot argue that less favourable treatment in respect of one term, such as basic pay, is off-set by better treatment in respect of another term, such as holiday entitlement or sick leave, although it is possible that the defence of justification might apply."

91 *St Helens & Knowsley Hospitals NHS Trust v Brownbill* 2011 IRLR 815 (EWCA) (hereafter *Brownbill)*.

decision and held that the Employment Tribunal had committed an error in law by not comparing the term of the claimants' contracts concerning working unsocial hours with that of the comparators contracts when it found that there were terms capable of being compared. The Employment Appeal Tribunal was not concerned with the fact that allowing the comparison might have the result that there would be an increase in the women's ultimate pay which would exceed that of their male comparators. The Employment Appeal Tribunal allowed the appeal by the claimants.[92]

The matter then came before the Court of Appeal and it held that the decision of the Employment Appeal Tribunal was correct. The Court of Appeal stated the following regarding when terms of a contract can be compared for purposes of the *Equal Pay Act* as follows:

> Once the employment tribunal has correctly found that there were terms in the women's contracts and in the men's contracts that were susceptible to comparison and that each of the terms was a distinct provision with sufficient content to make it possible to compare them 'so that the benefits that are conferred by the provision can be contrasted' (paragraph 35), it ought to have proceeded to compare them in accordance with *Hayward*. … This analysis is required by *Hayward*.[93]

The Court of Appeal finally held that the emphasis in the equal pay law is on the equality of terms and not on the total pay actually received. It thus dismissed the appeal and remitted the matter to the Employment Tribunal.[94]

In *Evesham v North Hertfordshire Health Authority and Secretary of State for Health*[95] the Court of Appeal held that the employer must provide the claimant with treatment that is equal to that of the chosen comparator. It held that this equal treatment, in the case of the appellant, can be attained in one of two ways in section 1(2)(c) of the *Equal Pay Act*. The first way is to attain equal treatment by examining the employment contracts of both the claimant and the comparator term by term, and if there is a term in the claimant's employment contract that is less favourable than a similar term in the employment contract of the comparator then equal treatment is achieved by the less favourable term in the claimant's employment contract's being modified so as not to be less favourable. The second way is where the comparator has a beneficial term in his employment contract which the claimant does not have in her employment contract. Then equal

92 *Brownbill* paras 1, 17-19.
93 *Brownbill* paras 20-21.
94 *Brownbill* paras 25-26.
95 More fully reported as *Evesham v North Hertfordshire Health Authority and Secretary of State for Health*; *Enderby v Frenchay Health Authority and Secretary of State for Health*; *Hughes v West Berkshire Health Authority and Secretary of State for Health* 2000 IRLR 257 (CA) (hereafter *Evesham*).

treatment is achieved by including (amending) such a beneficial term in the claimant's contract.[96]

The Court of Appeal held that if there are terms in the claimant's employment contract that are more favourable than equivalent terms in the comparator's employment contract then the claimant simply keeps those terms and the focus shifts to the less favourable term in her employment contract to be modified (amended) so as to be equivalent to the term in the comparator's employment contract. It further held that this is the way the *Equal Pay Act* requires equality of treatment to be achieved. It stated that an employer is not permitted to state that it has not modified the less favourable clause in the claimant's employment contract because the claimant's employment contract overall is as favourable as the comparator's employment contract.[97]

In *Hartlepool Borough Council v Llewellyn*[98] the Employment Appeal Tribunal held that reference to "term" in section 1(2) of the *Equal Pay Act* should be interpreted as referring to the following: (a) an agreed term in the employment contract agreed to by the employee and employer; or (b) a term which is acknowledged by the employer; or (c) a term which has been ordered by a tribunal to be modified or inserted pursuant to an equal pay claim.[99]

In *Degnan v Redcar & Cleveland Borough Council*[100] the England and Wales Court of Appeal agreed with the Employment Appeal Tribunal's findings that basic hourly pay, a bonus and an attendance allowance relate to the same subject matter, and as such do not constitute distinct parts of the employment contract but are rather elements of a distinct part of the employment contract, which is the provision for monetary payment. The Court of Appeal also agreed with the rejection of a submission by the Employment Appeal Tribunal to the effect that any provision dealing with an element of pay should be viewed as a separate term for the purpose of an equal pay comparison. It further held that the Employment Appeal Tribunal had not engaged in an overall comparison relating to different terms but had

96 *Evesham* para 27.

97 *Evesham* para 27. Duggan *Equal Pay* 39-40 commenting on *Evesham* states the following: "However, the claimant must be careful about the comparator that is chosen since the Tribunal can only modify the term of the contract and award higher pay based upon the earnings of the comparator. … Thus, although the men earned more than the women in this case the women should have identified more experienced comparators who were higher on the pay scale. It should be noted that if there was not a senior comparator who worked for the particular health authority it may have been possible to identify one working for another authority on the basis of the EqPA 1970, s 1(6) or Art 141 …".

98 *Hartlepool Borough Council v Llewellyn* 2009 IRLR 796 (EAT).

99 *Hartlepool Borough Council v Llewellyn* 2009 IRLR 796 (EAT) para 34.

100 *Degnan v Redcar & Cleveland Borough Council* 2005 IRLR 615 (EWCA).

applied itself to the reality of the contractual provisions in the particular case. The Court of Appeal held that it did not understand Lord Goff in *Hayward* as saying that basic pay and cash bonuses are always different provisions. It then went on to find that this approach was in accordance with the principles set out in *Hayward*. The Court of Appeal then said that the Employment Appeal Tribunal's approach has the result of achieving equalisation, which was intended by the *Equal Pay Act,* as opposed to the increase of a woman's rate of pay to where it was higher than any comparator's.[101] Nag states that *Degnan* makes an important point in that the ambit of a term can be identified by having regard to the subject matter to which it relates, but further states that this is a question of fact in each case, as *Degnan* has not laid down a general rule with regard to all bonus schemes and attendance allowances.[102]

It is submitted that as, according to Nag, *Degnan* has not laid down a general rule that all bonus schemes, attendance allowances and basic pay constitute one term for the purposes of an equal pay comparison, the general rule laid down in *Hayward* should be followed. This is to the effect that the elimination of sex discrimination in relation to all aspects of remuneration requires each aspect of remuneration to be evaluated and where there is discrimination in relation to any aspect then it has to be eliminated notwithstanding any other aspects of remuneration.[103] It is also important to note that the decision in *Degnan* to lump basic hourly pay, a bonus and an attendance allowance together and to consider the same as one term is contrary to the separate concurring judgment of Lord Goff in *Hayward,* wherein he states that it would not occur to him to put basic pay, for example, the benefit of the use of a car, a cash bonus or sick benefits all together and consider them as one term of the employment contract because they are different terms.[104]

In *McNeil v Revenue and Customs Commissioners*[105] the Employment Appeal Tribunal held that a term-by-term analysis is required in an equal pay claim brought in terms of the *Equality Act*. It remarked that there is no definition of the word *term* in the *Equality Act*. The Appeal Tribunal further held that it agreed with the submission by the respondent that an employer is not allowed in terms of section 66 of the *Equality Act* to undertake an overall comparison of different terms or to lump these together, and a

101 *Degnan v Redcar & Cleveland Borough Council* 2005 IRLR 615 (EWCA) paras 10-12, 14.

102 Nag "Equality of Terms" E7020.

103 See the discussion of *Hayward* under para 4.1.

104 See the discussion of the separate concurring judgment of Lord Goff in *Hayward* under para 4.1.

105 *McNeil v Revenue and Customs Commissioners* 2018 IRLR 398 (EAT) (hereafter *McNeil*).

claimant is not allowed to subdivide a single term into more parts for the purpose of complaining about one part. It further stated that the reality of the contractual provisions in the case were indivisible (inseparable) and the only relevant consideration was the average total pay. The Employment Appeal Tribunal rejected the appellant's argument to the effect that basic pay can be subdivided into separate elements, especially where there is no evidence that such a distinction has been made in contract or practice and where the Employment Tribunal held that basic pay was not capable of being divided.[106] Smith and Baker state that while the term-by-term approach might appear counter-intuitive, a possible rationale for its use is the difficulty which an overall assessment of all the elements of the contract might present to a court (a tribunal).[107]

In *Lloyds Banking Group Pensions Trustees Ltd v Lloyds Banking Plc & Others*[108] the trustees of pension schemes were held to have a legal duty to adjust benefits to address the inequality between men and women as far as occupational pension schemes were concerned.[109] The representative beneficiaries (all females) argued that a term-by-term approach is required in order to equalise benefits in accordance with European Union and English law. They further argued that the term-by-term approach requires the identification of separate terms of the occupational pension scheme which produce inequality and once this is done, adjustments have to be made to each term so that it produces equality. The Banks and the Crown argued that European Union law and English law require the equalisation of the total benefits payable under the occupational pension schemes. The Court referred to European Union case law and held that the following guidance, *inter alia*, can be derived therefrom: (a) the general rule is to treat each element of remuneration independently when an equal pay comparison is made as this is the only proper manner to ensure equality; (b) in cases where the pay structure is complex to the extent that a comparison of the elements of remuneration is unprofitable, impossible, difficult or unrealistic, then the general rule will not apply; and (c) the general

106 *McNeil* paras 52-54. Connolly *Discrimination Law* 323 states the following: "This means that the comparison must be on a term-by-term basis. So, for example, basic pay, cash bonuses, perks (such as company car) and sickness benefits, are not lumped together, so as to compare the overall package each worker receives."

107 Smith and Baker *Smith & Wood's Employment Law* 327.

108 *Lloyds Banking Group Pensions Trustees Ltd v Lloyds Banking Plc* 2018 EWHC 2839 (Ch) (hereafter *Lloyds Banking Plc*).

109 This duty arises in respect only of GMPs (guaranteed minimum pensions) accrued since 17 May 1990. This is the date from which European law requires employment-based pension benefits to accrue on an equal basis for men and women (*Lloyds Banking Plc* paras 2, 4-5).

rule will also not apply where its application might lead to the other sex being discriminated against.[110]

The Court then referred to English law and derived the following guidance therefrom, *inter alia*: (a) the court is required to follow a term-by-term approach when undertaking a comparison in an equal pay case; (b) the terms that fall to be compared must be such that it is natural to compare them; (c) what should be compared is a common sense question; (d) the terms should be realistically classified; (e) there might be instances where it would be prudent to ask whether a term is itself a distinct part of the contract or whether it is an element of a distinct part of the contract; and (f) it is wrong to undertake an overall comparison of different terms and to subdivide one term into several parts for the purpose of complaining about one part. The Court held that all of this needs evaluation. The Court found that it would be unprofitable and unrealistic to compare individual calculation factors as opposed to comparing the overall result. It further found that the relevant term to be compared was the overall benefits (the total benefit) and not the individual calculation factors.[111]

5 Recommendations

Having anaylsed the domestic and United Kingdom equal pay law, what remains is to draw guidance therefrom in order to answer the research question posed, which is: What falls within the ambit of terms and conditions of employment for the purpose of equal pay claims as contemplated in section 6(4) of the *EEA*. Before doing so, one must acknowledge the role of foreign law and the reasons for using the equal pay law of the United Kingdom as discussed above. The nub of this is as follows. Foreign law is valuable where it contributes to addressing novel and complex problems. The goal of using foreign law is to find the best possible law. The context of the domestic law should not be disregarded and transplants should be carefully managed.[112] This means that the use of the equal pay law of the United Kingdom is proper where it assists in answering the research question, as this contributes to the goal of finding the best possible law. With this in mind, the following submissions are made:

(a) It is submitted that the list of terms and conditions of employment contained in item 11.1 of the *Integration of Employment Equity Code* should specifically be mentioned in the *Equal Pay Code* in order to promote legal certainty.[113]

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110 *Lloyds Banking Plc* paras 305, 307, 323, 472.
111 *Lloyds Banking Plc* paras 336, 338-339.
112 See para 3.
113 See para 2.1.

(b) The following payments listed under the United Kingdom equal pay law overlap with the payments listed in the *BCEA Schedule*: (a) wages or salaries;[114] (b) occupational pension benefits;[115] and (c) use of a car.[116] It is submitted that these payments should fall within the ambit of the phrase "terms and conditions of employment" in section 6(4) of the *EEA* as it finds support in the United Kingdom equal pay law. It is now proper to make the submission that these payments listed under the *BCEA Schedule* fall under "terms and conditions of employment" in section 6(4) of the *EEA*.

(c) It should be noted that while terms of work in the form of overtime pay, holiday pay, sick pay and leave entitlement (pay) as contained in the *Equal Pay Statutory Code of Practice* are not found in the *BCEA Schedule* lists of payments,[117] these terms of work are contained in the *Integration of Employment Equity Code*[118] as overtime rates, annual leave (including holiday pay and leave entitlement) and sick leave and thus the submission is made that these forms of terms and conditions of employment fall within the ambit of the phrase "terms and conditions of employment" in section 6(4) of the *EEA*.

(d) The following elements of what falls within terms of work under the United Kingdom law are not mentioned in the *BCEA Schedule* lists of payments or the list of terms and conditions of employment in the *Integration of Employment Equity Code*:[119] (i) shift payments; (ii) non-discretionary bonuses; (iii) access to social benefits and sports; and (iv) automatic increases in pay such as seniority increments.[120] This list of payments (working conditions) provides examples of what falls within the ambit of terms of work for the purposes of an equal pay (terms and conditions) claim under the United Kingdom equal pay law, and to this end, it is submitted that it should be listed as such in the *Equal Pay Code,* which can assist in deciding whether such pay (working conditions) falls within "terms and conditions of employment" under section 6(4) of the *EEA*.

(e) Each aspect of remuneration must be evaluated or compared and it is not natural to compare remuneration on the whole. It is incorrect to

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114 This payment is set out in item 1(c) of the *BCEA Schedule* under para 2.1 and also falls under terms of work as discussed under para 4.

115 This payment (benefit) is set out in item 1(e) of the *BCEA Schedule* under para 2.1 and also falls under terms of work as discussed under para 4.

116 This payment (benefit) is set out in item 1(b) read with item 2(a) of the *BCEA Schedule* under para 2.1 and also falls under terms of work as discussed under para 4.

117 As set out in para 2.1.

118 As set out in para 2.1.

119 As set out in para 2.1.

120 See para 4.

lump different terms together and consider them as one term for the purpose of comparison.[121] The result is that a term by term comparison is required in an equal pay claim as the focus of equal pay law is on the equality of terms and not on the total pay actually received.[122] Based on this, it is submitted that every aspect of remuneration will constitute a term and condition of employment under section 6(4) of the *EEA*. It is further submitted that section 6(4) of the *EEA* should be restricted to a term-by-term comparison in an equal pay claim. Therefore, it is proposed that this should be mentioned in the *Equal Pay Code*.

(f) An employer is not allowed to lump different terms together (for the purpose of preventing a term-by-term comparison) and a claimant is not allowed to subdivide a single term into more parts for the purpose of complaining about one part.[123] Accordingly, it is submitted that an employer faced with an equal pay claim in terms of section 6(4) of the *EEA* should not be allowed to defeat such a claim from the outset by arguing that the term to which the complaint relates should be lumped together with other terms in circumstances where the term is capable of being compared without being so lumped together, which then essentially prevents a term-by-term comparison from being carried out. It is further submitted that an equal pay claimant under section 6(4) of the *EEA* should, likewise, not be allowed to subdivide a single term into several parts and then launch a complaint against the one part, because this would amount to comparing an element of a term and what is required to be compared is a term and not an element thereof. This should be mentioned in the *Equal Pay Code*.

(g) It is submitted that the following guidance from the United Kingdom equal pay law will provide the South African Labour Courts (including the CCMA) with the necessary guidance in order to determine whether or not an employer faced with an equal pay claim is (impermissibly) lumping the term to which the equal pay complaint relates together with other terms in order to defeat such an equal pay claim from the outset, and whether or not an equal pay claimant is complaining about an element of a term and not the term itself, which is not allowed: (i) the terms that fall to be compared must be such that it is natural to compare them; (ii) what should be compared is a common sense question; (iii) the terms should be realistically classified; (iv) there might be instances where it would be prudent to ask whether a term is itself a term or whether it is an element of a term of the contract; and

121 See *Hayward* under para 4.1.
122 See *McNeil* and *Brownbill* discussed under para 4.1.
123 See *McNeil* discussed under para 4.1.

(v) it is impermissible to subdivide one term into several parts for the purpose of complaining about one part. This would require evaluation by the Court.[124] It is further submitted that this should be mentioned in the *Equal Pay Code*.

6 Conclusion

After a lengthy discussion of terms and conditions of employment in the context of equal pay law, it is hoped that this article has contributed to answering the research question posed. It is further hoped that the element regarding terms and conditions of employment under section 6(4) of the *EEA* is better understood and that the recommendations made assist in strengthening the South African equal pay legal framework.

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List of Abbreviations

BCEA	Basic Conditions of Employment Act 75 of 1997
CCMA	Commission for Conciliation Mediation and Arbitration
EEA	Employment Equity Act 55 of 1998
FAWU	Food and Allied Workers Union
ILJ	Industrial Law Journal
MLR	Modern Law Review
SALJ	South African Law Journal
SA Merc LJ	South African Mercantile Law Journal