Can a successor comparator be used in an equal pay claim under Section 6(4) of the EEA?*

1 Introduction

One of the purposes of the Employment Equity Act 55 of 1998 ('EEA') is to achieve equity in the workplace by promoting fair treatment and equal opportunity through eliminating unfair discrimination (section 2(a) of the EEA). Section 5 of the EEA obliges every employer to take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment practice or policy. Section 6(1) of the EEA then prohibits unfair discrimination against employees on a number of grounds which includes an arbitrary ground. Van Niekerk *et al* state that sections 5 and 6 of the EEA contain a generally expressed obligation to promote equality through the elimination of unfair discrimination as well as the prohibition of unfair discrimination on a list of specified and other grounds (Van Niekerk *et al Law@work* (2023) 131). Du Toit *et al* state that the EEA proscribes unfair discrimination as part of its wider purpose of promoting employment equity (Du Toit *et al Labour Relations Law: A Comprehensive Guide* (2023) 766).- please remove 'et al' and list all the authors.

Section 6(4) of the EEA specifically prohibits unfair discrimination in terms and conditions of employment (pay). Section 6(4) of the EEA sets out three equal pay causes of action as follows:

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

Section 6(4) of the EEA contemplates a comparison to be undertaken between the terms and conditions of both the equal pay claimant and that of the comparator. This is supported by the following. In *Mangena v Fila South Africa (Pty) Ltd* 2009 12 BLLR 1224 (LC), the Labour Court stated that a claimant must identify a comparator in an equal pay claim (para 6). In *Pioneer Foods (Pty) Ltd v Workers Against Regression* 2016 ZALCCT 14 the Labour Court stated that it is necessary for a claimant in an equal pay claim to show that the work performed by her is equal or of

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equal value as compared to that of a more highly remunerated comparator (para 19.1; See also para 62 of *UASA obo Maritz v Ekurhuleni Metropolitan Municipality* (JS 237/17; JS 238/17) 2022 ZALCJHB 285). Van Niekerk *et al* state that a claimant must identify a comparator in an equal pay claim (Van Niekerk *et al* (2023) 155). Du Toit *et al* similarly state, in the context of equal pay claims, that it is necessary to compare the position of the complainant with that of another employee (Du Toit *et al* (2023) 823).

It thus follows that the claimant will prove her equal pay claim by using a comparator. Whilst section 6(4) of the EEA contemplates the use of a comparator in an equal pay claim, it does not state whether the employees must be employed contemporaneously and neither does it exclude a successor comparator from its ambit. Neither the EEA, the Employment Equity Regulations (published in GG 37873 of 1 August 2014 'Employment Equity Regulations') or the Code of Good Practice on Equal Pay/Remuneration for Work of Equal Value (published in GG 38837 of 1 June 2015 'Equal Pay Code') deal with the choosing and suitability of the comparator contemplated under section 6(4) of the EEA nor does it allow or exclude the use of a successor comparator under section 6(4). The EEA, the Employment Equity Regulations and the Equal Pay Code are thus silent on the issue relating to the use of a successor comparator in an equal pay claim under section 6(4) of the EEA. It should be noted that the use of a successor comparator has not been dealt with in South African law. This note therefore deals with a novel issue in South African equal pay law.

The choosing of a comparator in an equal pay claim may give rise to several questions but this note only engages with the question as to whether an equal pay claimant can make use of a successor comparator in an equal pay claim under section 6(4) of the EEA. In order to properly answer this question, it is prudent and useful to analyse the United Kingdom equal pay law on this aspect. The United Kingdom's Equality Act of 2010 ('UK Equality Act') has specific provisions relating to equal pay. It provides for three causes of action relating to equal pay, namely, equal pay for like work, equal pay for work rated as equivalent, and equal pay for work of equal value (section 65 of the UK Equality Act). The UK Equality Act furthermore contains a section dealing with the material factor defence to an equal pay claim and a section dealing with comparators (sections 64, 69 and 79 of the Act). This is coupled with a large body of case law dealing with equal pay discrimination that have come before their tribunals and courts (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; and *Wilson v Health & Safety Executive* [2010] IRLR 59 EWCA). It is clear that there is much to learn for the South African equal pay legal framework from the United Kingdom's equal pay law.

2 Successor Comparator (United Kingdom Law)

Section 64(2) of the UK Equality Act states that the work done by an equal pay claimant and the comparator is not restricted to work which is done contemporaneously. Nag states that section 64(2) of the Act cannot be interpreted to allow a claimant to claim equal pay with a successor (Nag "Equality of Terms" in *Tolley's Employment Law Service* (loose-leaf) E7037). Duggan states that the comparator may be a predecessor in employment to the claimant but cannot be a successor (Duggan *Equal Pay – Law and Practice* (2009) 40, 42). The IDS Employment Guide, however, states that the wording of section 64(2) of the UK Equality Act is wide enough to allow for an equal pay comparison to be made with a successor comparator, but it is unlikely that the courts will find that section 64(2) is wide enough to include a comparison with a successor comparator due to the case law which prohibits it (IDS Employment Law Guide: The Equality Act 2010 (2010) 155).

In *Diocese of Hallam Trustee v Connaughton* 1996 ICR 860 (EAT) the respondent launched an equal pay claim before the Industrial Tribunal claiming equal pay with a male comparator who succeeded her in her position at the appellant. The appellant appealed to the Employment Appeal Tribunal on the ground, *inter alia*, that the Industrial Tribunal committed an error of law by allowing the respondent to compare her situation with that of a male comparator who had succeeded her in her position. The respondent was employed by the appellant in November 1987 and from 1 January 1990 her role was as Director of Music. The respondent then on 6 April 1994 gave notice of her intention to resign effective on 1 September 1994 and her salary was £11,138 per annum supplemented with benefits. In June 1994, the respondent's position was advertised with a salary of £13,434 per annum. The appellant then appointed a male at a salary of £20,000 per annum. The male comparator signed his contract on 26 October 1994 and commenced

employment on 1 January 1995. The respondent then launched her equal pay claim on 25 January 1995 before the Industrial Tribunal (861B-C, 861F-H).

Before the Industrial Tribunal, the appellant took a jurisdictional point relating to the respondent not being allowed to launch an equal pay claim with a male successor. The Industrial Tribunal found that the respondent had established a *prima facie* basis for her equal pay claim under Article 119 of the of the Consolidated versions of the Treaty on European Union and of the Treaty Establishing the European Community of 24 December 2002 ('EEC Treaty'). The Employment Appeal Tribunal remarked that if the equal pay claim with a male successor is solely decided by reference to the Equal Pay Act then the Industrial Tribunal would not have jurisdiction and if it had jurisdiction then such claim would fail for lack of evidence because an equal pay claimant/the respondent would not be able to put forth a comparison as required by the Act with male employees contemporaneously employed because there was no comparator. The Employment Appeal Tribunal referred to the European Court of Justice case of *Macarthys Ltd v Smith* 1980 ECR 1276 (ECJ) which held that the principle of equal pay was not confined to situations where men and women were contemporaneously engaged in equal work for the same employer and also applied to a situation where a woman received less pay than a man who was employed prior to the woman and who was engaged in equal work for the employer (an equal pay comparison with a predecessor). The appellant argued that *Macarthys* does not allow an equal pay comparison with a successor employee because there is no authority that expressly allows for the use of a male comparator who is a successor. The appellant further argued that equality of pay can only be achieved by a comparison with a male contemporaneously employed or a comparison with a predecessor (862A-B, 863B-C, 863E-F, 864C-D).

The respondent argued that Article 119 of the EEC Treaty has a purposive nature and requires that there should not be any obstacles to its application and if there is any doubt then the question as to whether a successor comparator can be used should be formulated by the Employment Appeal Tribunal and be referred to the European Court of Justice as was done in *Macarthys*. The Employment Appeal Tribunal stated that the respondent's use of a male successor in her equal pay claim is supported by the European Court of Justice because she is not able to use a contemporaneous male comparator or a preceding male comparator (predecessor) and this does not prevent her from requesting the Industrial Tribunal to adjudicate her equal pay claim by using a male successor as a notional rather than as an actual contemporaneous comparator. The Employment Appeal Tribunal did, however, state that the respondent's equal pay claim does pose evidential problems but this does not mean that it constitutes a form of stay. The Employment Appeal Tribunal held that Article 119 of the EEC Treaty is wide enough to permit the respondent to launch an equal pay claim comparing her situation to that of a male successor "to the effect that the male successor's contract

was so proximate to her own as to render him an effective comparator, as effective as if actual." The Employment Appeal Tribunal remarked that even though it finds that *Macarthys* is wide enough to allow an equal pay claim with a successor where there is no actual comparator, either contemporaneous or immediately preceding, proof of inequality of pay becomes more difficult not in principle but in practice and the employer's evidential burden may be easier to fulfil not in principle but in practice (865B, 866E-H, 867B).

The Employment Appeal Tribunal noted that the respondent argued that in her case there was clear *prima facie* evidence of pay discrimination. It remarked that once the facts are fully before the Industrial Tribunal it may be in a position to draw that inference but it commented that the facts will have to be more comprehensive than those known which readily raise inferences. The Employment Appeal Tribunal remarked that the Industrial Tribunal, when fully appraised by the facts, has to decide whether an equal pay claim can be sustained with reference to the male successor's contract and to decide the period over which any such equal pay comparison can be made. The Employment Appeal Tribunal then held that they are satisfied with regard to the scope of Article 119 of the EEC Treaty to the extent that no reference to the European Court of Justice is needed. It dismissed the appeal and remitted the matter to the Industrial Tribunal for a hearing on the merits (867B-F; Romney *Equal Pay: Law and Practice* (2018) states at 75 that an equal pay comparison with a successor is not allowed but the law (as set out in *Diocese*) did briefly allow for such a comparison).

In *Walton Centre for Neurology and Neurosurgery NHS Trust v Bewley* 2008 IRLR 588 (EAT) the crisp question was whether an equal pay claimant can compare herself with a successor in an equal pay claim. The Employment Tribunal held that an equal pay claimant could compare herself with a successor but it found this with reluctance as it found that it was bound by the principles set out by the Employment Appeal Tribunal in *Diocese of Hallam Trustee v Connaughton*. The question to be decided by the Employment Appeal Tribunal was whether the principles set out in *Diocese* were correct. The respondent equal pay claimant was employed by the appellant trust as a senior nursing assistant/health-care assistant. The respondent sought to compare her situation with three male comparators who were employed as a performance and governance assistant and IT helpdesk officers (her claim was thus equal pay for work of equal value). There was no dispute that a comparison could properly be made during the period when the respondent and the comparators were contemporaneously employed (paras 1-2, 5-6).

The Employment Appeal Tribunal stated that *Diocese* was the only Employment Appeal Tribunal decision which held that an equal pay claimant can compare her situation with a successor. It further stated that *Diocese* was decided *per incuriam* (Claassen *Claassen's Dictionary of Legal Words and Phrases* (last updated June 2023 – SI26) defines *per incuriam* as follows: "By mistake or carelessness, therefore not purposely

or intentionally. …") and as such it is not good authority which should be relied upon. The Employment Appeal Tribunal stated that the respondent accepted that section 1(2) of the Equal Pay Act cannot be accorded a natural meaning to include equal pay comparisons with a successor. It further stated that as the Equal Pay Act does not allow a comparison with a successor, such comparison, if allowed, can only find basis in European Union law. The Employment Appeal Tribunal referred to *Coloroll Pension Trustees Ltd v Russell* 1994 IRLR 586 (ECJ) which in essence stated that the equal pay principle requires a comparison with a comparator "'either now or in the past'" and this is further in accordance with the principle that the equal pay comparison must be undertaken on the basis of a concrete appraisal of the work actually performed. It stated that this formulation by *Coloroll* does not allow an equal pay comparison to be made with a successor (paras 10, 13, 17, 36-37; Romney (2018) states at 75 that *Walton* was cited with approval in *ASDA Stores v Brierley* 2017 IRLR 1058 (EAT)).

The IDS Employment Law Guide, however, argues that a claimant who is able to prove that a pay differential relating to her contractual pay is caused by direct discrimination will be able to found the remedy in section 71 of the Equality Act in circumstances where the claimant would not have been able to found a remedy under the equal pay legal framework for failing to meet its requirements. The Guide mentions a comparison with a successor, *inter alia*, as being an example thereof. It explains this as follows. The pay which is given to a successor might constitute evidence of direct discrimination against a claimant. This is so, because if an actual comparator can be dispensed with under certain circumstances then it is thus possible to rely on pay discrimination claims based on a successor comparator (IDS Employment Law Guide: The Equality Act 2010 (2010) 161-162). The Guide further explains this as follows:

> … a woman who leaves employment and discovers that her male replacement is paid £10,000 more for exactly the same work will have at least a prima facie case of sex discrimination, which S.71(2) will allow her to bring. Of course, there may well be good, non-discriminatory reasons for the increase in salary – it may be that the employer has recently discovered that the role was underpaid in accordance with the market rate, and so resolved to remedy the imbalance for the incoming employee, regardless of sex. However, these are potentially adequate explanations for apparent discrimination, which a fact-finding tribunal is well placed to consider in the context of a direct discrimination claim. (IDS Employment Law Guide: The Equality Act 2010 (2010) 162).

It is clear from the above discussion that the general rule in the United Kingdom equal pay law is that a comparison with a successor comparator is not permitted in an equal pay claim. The exception to this rule is the argument made in the IDS Employment Guide to the effect that a successor comparator can be used in circumstances where an equal pay claimant can prove that the pay given to the successor constitutes

evidence of direct discrimination contemplated in section 71 of the UK Equality Act.

3 Comment

The United Kingdom equal pay law on the use of a successor comparator in an equal pay claim provides valuable guidance to South African equal pay law which is silent on this issue. The United Kingdom equal pay law as a general rule does not allow for the use of a successor comparator in an equal pay claim, but it does provide for an exception to this rule, where a successor comparator can be used and this will be in a situation where an equal pay claimant can prove that the pay given to the successor constitutes evidence of direct discrimination contemplated in section 71 of the UK Equality Act. This exception allows an aggrieved female an avenue to seek redress where she has evidence of pay discrimination in circumstances where she would ordinarily not be able to use such evidence because of the nature of the comparator. It would thus seem that the aim of the exception to the general rule is to avoid a situation where the equal pay claimant is remediless because of the form of the comparator which renders the evidence of the pay discrimination sterile. The purpose of the exception is thus to provide an effective remedy to eliminate pay discrimination

Based on this, it is submitted that the use of a successor comparator should be allowed under section 6(4) of the EEA where a female claimant produces pay discrimination evidence in the form of comparing her pay situation to that of a successor comparator. Put differently, it is submitted that the phrase employees of the same employee in section 6(4) of the EEA should be interpreted to include the use of successor comparator in an equal pay claim. This interpretation of section 6(4) of the EEA argued for is based on the following. Section 3(a) of the EEA states that the Act must be interpreted in order to give effect to its purpose and one of its purposes is to eliminate unfair discrimination (s 2(a) of the EEA). This means that the interpretation of section 6(4) of the EEA to allow for the use of a successor comparator based on the United Kingdom equal pay law gives effect to one of the purposes of the EEA which is to eliminate unfair discrimination and such interpretation is approved in terms of section 3(a) read with section 2(a) of the EEA. Furthermore, it is axiomatic that the EEA gives effect to section 9 of the Constitution of the Republic of South Africa, 1996 ('Constitution') which is located in the Bill of Rights and section 3(a) of the EEA recognises this by stating that the EEA must be interpreted in compliance with the Constitution which includes section 9 thereof. This therefore means that an interpretation of the EEA encompasses a consideration of section 9 of the Constitution and to this end section 39(1)(c) of the Constitution states that when interpreting the Bill of Rights (of which section 9 forms part of) a court, tribunal or forum may consider foreign law. This lends support for the use of foreign law in the form of the United Kingdom equal pay law in providing guidance to the interpretation to be accorded to section 6(4) of

the EEA insofar as the use of a successor comparator is concerned *albeit* that section 6(4) is part of an Act that gives effect to the prohibition against unfair discrimination as contained in section 9(3)-(5) of the Constitution.

It is further submitted that the use of a successor comparator is not limited to a pay discrimination claim being brought on the grounds of sex and should apply to all the listed and unlisted (arbitrary) grounds of discrimination (it should be kept in mind that section 11 of the EEA provides for different onuses in relation to listed and arbitrary grounds). It should also be stated that an equal pay claimant who has left the employer's employ (including having been dismissed) will not be able to launch an equal pay claim using a successor comparator under section 6(4) of the EEA, in circumstances where the alleged unfair pay discrimination takes place after the termination of the employment relationship (see *Allpass v Mooikloof Estates (Pty) Ltd t/a Mooikloof Equestrian Centre* 2011 5 BLLR 462 (LC) para 66; Du Toit *et al Labour Law through the Cases* ((loose leaf) last updated April 2024 - SI 43) state the following at EEA-10 "Since the protection of section 6 is limited to employees, the Labour Court does not have jurisdiction to entertain a claim based on unfair discrimination that took place after termination of the employment relationship"). It is thus submitted that the use of a successor comparator in an equal pay claim under section 6(4) of the EEA is confined to the situation where the alleged unfair pay discrimination takes place during the employment relationship and not after its termination. This is an important qualification.

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