Equal Pay in Terms of the Employment Equity Act: The Role of Seniority, Collective Agreements and Good Industrial Relations: *Pioneer Foods (Pty) Ltd v Workers against Regression* 2016 ZALCCT 14

S Ebrahim*

P·E·R

Pioneer in peer-reviewed, open access online law publications

Author

Shamier Ebrahim

Affiliation

University of South Africa
South Africa

Email ebrahs1@unisa.ac.za

Date published

5 December 2017

Editor Prof AA du Plessis

How to cite this article

Ebrahim S " Equal Pay in Terms of the Employment Equity Act: The Role of Seniority, Collective Agreements and Good Industrial Relations: *Pioneer Foods (Pty) Ltd v Workers against Regression* 2016 ZALCCT 14" *PER / PELJ* 2017(20) - DOI http://dx.doi.org/10.17159/1727-3781/2017/v20i0a1524

DOI
http://dx.doi.org/10.17159/1727-3781/2017/v20i0a1524

Abstract

Equal pay for equal work and work of equal value is recognised as a human right in international law. South Africa has introduced a specific provision in the EEA in the form of section 6(4) which sets out the causes of action in respect of equal pay claims. The causes of action are: (a) equal pay for the same work; (b) equal pay for substantially the same work; and (c) equal pay for work of equal value. In addition to the introduction of section 6(4) to the EEA, the Minister of Labour has published the Employment Equity Regulations of 2014 and a Code of Good Practice on Equal Pay for work of Equal Value. This constitutes the equal pay legal framework in terms of the EEA.

The Regulations sets out the factors which should be used to evaluate whether two different jobs are of equal value. It further provides for the methodology which must be used to determine an equal pay dispute and it sets out factors which would justify a differentiation in pay. The Code provides practical guidance to both employers and employees regarding the application of the principle of equal pay for work of equal value in the workplace, *inter alia*.

Regulation 7 sets out factors which would justify pay differentiation. These factors are: (a) seniority (length of service); (b) qualifications, ability and competence; (c) performance (quality of work); (d) where an employee is demoted as a result of organisational restructuring (or any other legitimate reason) without a reduction in pay and his salary remains the same until the remuneration of his co-employees in the same job category reaches his level (red-circling); (e) where a person is employed temporarily for the purpose of gaining experience (training) and as a result thereof receives different remuneration; (f) skills scarcity; and (g) any other relevant factor. If a difference in pay is based on any one or more of the above factors then it is not unfair discrimination if it is fair and rational. This is spelt out in regulation 7(1).

In *Pioneer Foods (Pty) Ltd v Workers Against Regression* 2016 ZALCCT 14 the Seniority (length of service) factor was at the fore in the Labour Court. The Labour Court, on appeal, reversed 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 opposed to the 100% rate paid to drivers working longer than two years in terms of a collective agreement amounted to unfair discrimination in pay. The CCMA, in essence, regarded the factor of Seniority as a ground of discrimination as opposed to a ground justifying pay differentiation.

Pioneer Foods is noteworthy as it is one of the first reported cases from the Labour Court dealing with the relatively new equal pay legal framework. It raises the following important equal pay issues: (a) is seniority a ground of discrimination or a ground justifying pay differentiation? And (b) what is the role of a collective agreement and good industrial relations when determining an equal pay claim? The purpose of this note is to critically analyse these issues on the basis of international, foreign and South African law.

Keywords

Equal pay for equal work; equal pay for work of equal value; Employment Equity Act; Employment Equity Regulations.

.....

1 Introduction

Equal pay for equal work and work of equal value is recognised as a human right in international law.[1] South Africa has introduced a specific provision in the *Employment Equity Act*[2] in the form of section 6(4), which sets out the causes of action in respect of equal pay claims. The causes of action are: (a) equal pay for the same work; (b) equal pay for substantially the same work; and (c) equal pay for work of equal value. In addition to the introduction of section 6(4) to the EEA, the Minister of Labour has published the Employment Equity Regulations of 2014[3] and a Code of Good Practice on Equal Pay for work of Equal Value.[4] This constitutes the equal pay legal framework in terms of the EEA.

The Regulations sets out the factors which should be used to evaluate whether two different jobs are of equal value. It further provides for the methodology which must be used to determine an equal pay dispute and it sets out factors which would justify a differentiation in pay. The Code provides practical guidance to both employers and employees regarding the application of the principle of equal pay for work of equal value in the workplace, *inter alia*.

Regulation 7 sets out factors which would justify pay differentiation. These factors are: (a) seniority (length of service); (b) qualifications, ability and competence; (c) performance (quality of work); (d) where an employee is

* Shamier Ebrahim. LLB (NMMU); LLM Labour Law (*cum laude*) (UNISA). Senior Lecturer, Department of Mercantile Law, University of South Africa. Advocate of the High Court of South Africa. Associate Member of the Pretoria Society of Advocates (Pretoria Bar). E-mail: ebrahs1@unisa.ac.za.

1 Article 23(2) of the *United Nations Universal Declaration of Human Rights* (1948) provides that "[e]veryone, without any discrimination, has the right to equal pay for equal work". A 7(a)(i) of the *International Covenant on Economic, Social and Cultural Rights* (1966) provides for "[f]air wages and equal remuneration for work of equal value without distinction of any kind, in particular women being guaranteed conditions of work not inferior to those enjoyed by men, with equal pay for equal work". A 5(d)(i) of the *International Convention on the Elimination of All Forms of Racial Discrimination* (1969) includes, *inter alia*, the right to equal pay for equal work. A 11(1)(d) of the *Convention on the Elimination of All Forms of Discrimination against Women* (1979) states that women, without discrimination, have the right to equal remuneration for work of equal value. A 141 of the *Treaty Establishing the European Community* (1997) (previously A 119 of the *Treaty of Rome* (1957)) makes the application of the principle of equal pay for equal work and work of equal value compulsory in member states. It is apposite to note that the ILO has referred to equal remuneration as a human right to which all men and women are entitled in Oelz, Olney and Manuel *Equal Pay* 2.

2 *Employment Equity Act* 55 of 1998 ("the EEA").

3 GN 595 in GG 37873 of 1 August 2014 (Employment Equity Regulations) ("the Regulations").

4 GN 448 in GG 38837 of 1 June 2015 (Code of Good Practice on Equal Pay/Remuneration for Work of Equal Value) ("the Code").

demoted as a result of organisational restructuring (or any other legitimate reason) without a reduction in pay and his salary remains the same until the remuneration of his co-employees in the same job category reaches his level (red-circling); (e) where a person is employed temporarily for the purpose of gaining experience (training) and as a result thereof receives different remuneration; (f) skills scarcity; and (g) any other relevant factor.[5] If a difference in pay is based on any one or more of the above factors then it is not unfair discrimination if it is rational and fair. This is spelt out in regulation 7(1).

In *Pioneer Foods (Pty) Ltd v Workers Against Regression*[6] the seniority (length of service) factor was at the fore in the Labour Court. The Labour Court, on appeal, reversed 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 opposed to the 100% rate paid to drivers working longer than two years in terms of a collective agreement amounted to unfair discrimination in pay. The CCMA, in essence, regarded the factor of seniority as a ground of discrimination as opposed to a ground justifying pay differentiation.

Pioneer Foods is noteworthy as it is one of the first reported cases from the Labour Court dealing with the relatively new equal pay legal framework. It raises the following important equal pay issues: (a) is seniority a ground of discrimination or a ground justifying pay differentiation? And (b) what is the role of a collective agreement and good industrial relations when determining an equal pay claim? The purpose of this note is to critically analyse these issues and guidance will be sought from South African law, foreign law and relevant ILO materials in this regard.

2 Facts and judgment

The Labour Court heard an appeal in terms of section 10(8) of the EEA against an arbitration award of the CCMA in which the Commissioner found that paying newly appointed drivers at an 80% rate for the first two years of employment as opposed to the 100% rate paid to drivers working longer than two years in terms of a collective agreement amounted to unfair discrimination in pay. The CCMA in essence regarded the factor of

5 Regulation 7(1)(a)-(g) of the Regulations. This list of factors is repeated in item 7.3.1-7.3.7 of the Code.

6 *Pioneer Foods (Pty) Ltd v Workers Against Regression* 2016 ZALCCT 14 ("*Pioneer Foods*").

seniority as a ground of discrimination as opposed to a ground justifying pay differentiation.[7]

The issue before the court was the interpretation of section 6(4) of the EEA, and in particular the issue of the factor of seniority operating as a ground of discrimination. Workers against Regression ("union") brought a claim against the appellants on behalf of seven of their members. The union did not specifically refer to section 6(4) of the EEA in its request for arbitration, but it was clear that the dispute involved equal pay for their members. The union wanted their members to be remunerated at the same rate as those employees who had been working longer than two years at the appellant. They thus sought a 20% increase in their members' remuneration to bring it in line with the comparator employees' rate.[8]

The appellant, in accordance with a collective agreement concluded with the Food and Allied Workers Union ("FAWU"), pays newly appointed employees for the first two years of their employment at 80% of the rate paid to its longer serving employees, after which the rate would be increased to 100%. The Commissioner found that by applying this to its employees, the appellant had unfairly discriminated against them. He ordered that the rate of remuneration be changed to 100% for newly appointed employees and that damages be paid to the members of the union.[9]

The Commissioner found that the difference in pay was not fair and not based on rational grounds. He found that paying new entrants at an 80% rate in accordance with the collective agreement was in conflict with the principle of equal pay for the same work. The Commissioner's reasoning was that the employees had performed services as drivers to the appellant through a labour broker before they were employed by the appellant. He accepted that the dispute before him was not one in terms of section 198A of the LRA, but he nevertheless took this into account, which was incorrect in law as it was not applicable.[10]

It was common cause that the whole arbitration ran its course without the union specifying the ground upon which they were relying to prove the pay discrimination. The Commissioner was aware of this and requested the union to specify the ground in its heads of argument. This is a flagrant departure from the rules of arbitration, to say the least. The Labour Court set out the framework for determining an equal pay dispute and

7 *Pioneer Foods* paras 1, 3 and 5.
8 *Pioneer Foods* paras 2, 3 and 4.
9 *Pioneer Foods* para 5.
10 *Pioneer Foods* paras 14-16.

commented on the unlisted and arbitrary grounds of discrimination. The Labour Court found that the equal pay framework situated the factor of seniority as a ground which justifies pay differentiation, and the Commissioner had misconceived the law by regarding it as a ground upon which pay discrimination was committed. The Labour Court found that the Commissioner determined the arbitration unfairly and had made an award that was contrary to the case argued by the union.[11]

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 was previously employed by a labour broker at a lower rate than the rate paid to existing long-service employees, irrespective of how short the period of previous employment with the labour broker was. The lower rate of remuneration for newly appointed employees as contained in the collective agreement between FAWU and the appellant came about as a result of FAWU persuading the appellant to reduce the extent to which it was using the services of various forms of precarious employees, including employees supplied by labour brokers. FAWU also proposed the implementation of a scale that showed the difference between employees who had newly started working and long-serving employees. The 80% scale/rate was applied to all new employees from outside the company and it ceased to operate after two years of service.[12]

The Labour Court found that the differentiation complained of was not irrational and not based on an arbitrary unlisted ground and was not unfair. The appeal was thus upheld.[13]

3 Comments

3.1 Is seniority a ground of discrimination or a ground justifying pay differentiation?

Section 6(4) of the EEA sets out the equal pay provision 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.

The following causes of action are found in section 6(4) of the EEA: (a) equal pay for the same work; (b) equal pay for substantially the same work; and (c) equal pay for work of equal value. The meaning of these

11 *Pioneer Foods* paras 26-29, 19-25.
12 *Pioneer Foods* paras 44, 46-48.
13 *Pioneer Foods* para 76.

causes of action is set out in regulation 4(1)-(3) of the Regulations. Regulations 4(1)-(3) of the Regulations provide as follows:

> For the purposes of these Regulations, the work performed by an employee-
>
> (1) is the same as the work of another employee of the same employer, if their work is identical or interchangeable;
>
> (2) is substantially the same as the work of another employee employed by that employer, if the work performed by the employees is sufficiently similar that they can reasonably be considered to be performing the same job, even if their work is not identical or interchangeable;
>
> (3) is of the same value as the work of another employee of the same employer in a different job, if their respective occupations are accorded the same value in accordance with regulations 5 to 7.

Regulation 6 sets out the criteria for assessing whether work is of equal value. Regulation 6(1) states that the relevant jobs under consideration must be assessed objectively taking the following criteria into account:

> a) the responsibility demanded of the work, including responsibility for people, finances and material;
>
> b) the skills, qualifications, including prior learning and experience required to perform the work, whether formal or informal;
>
> c) physical, mental and emotional effort required to perform the work; and
>
> d) to the extent relevant, the conditions under which work is performed, including physical environment, psychological conditions, time when and geographic location where the work is performed.[14]

In *casu*, the Commissioner found that the ground of unfair discrimination was seniority in that it constituted unfair discrimination for the appellant to pay new employees less than longer-serving employees. This raises the question as to whether seniority is a ground of discrimination or a ground justifying a finding of pay differentiation. It is apposite to quote regulation 7(1)(a) of the Regulations:

> If employees perform work that is of equal value, a difference in terms and conditions of employment, including remuneration, is not unfair discrimination if the difference is fair and rational and is based on one or a combination of the following grounds:
>
> (a) the individuals' respective *seniority or length of service*.[15]

---

14 Regulation 6(1)(a)-(d) of the Regulations.

Item 7.3.1 of the Code, in similar terms, provides as follows:

> Regulation 7 of the Employment Equity Regulations lists a number of grounds which are commonly taken into account in determining pay/remuneration. Subject to what is stated below, it is not unfair discrimination if the difference is fair and rational and is based on any one or a combination of the following factors –
>
> 7.3.1 the individuals' respective *seniority or length of service*.[16]

Regulation 7(2) explains under which circumstances a differentiation in terms and conditions of employment qualifies as fair and rational as follows:

> A differentiation in terms and conditions of employment based on one or more grounds listed in sub-regulation (1) will be fair and rational if it is established, in accordance with section 11 of the Act, that –
>
> (a) Its application is not biased against an employee or group of employees based on race, gender or disability or any other ground listed in section 6(1) of the Act; and
>
> (b) It is applied in a proportionate manner.[17]

It is thus clear that the legislature regards the ground of seniority / length of service as a ground that justifies pay differentiation provided that it is fair and rational. In *casu*, the Labour Court held that even if a newly recruited employee has the same level of experience and expertise as the employer's existing long-serving employees, this does not mean that applying a differential rate for all new employees constitutes differentiation on an arbitrary ground, nor does it constitute unfair discrimination. It further remarked that there is no legal obligation to make an exception in every instance where the newly employed employee has experience which is comparable to that of the employer's long-serving employees.

It is apposite to analyse the case law which has dealt with this issue. In *SA Chemical Workers Union v Sentrachem Ltd*[18] one of the unfair labour

---

15 Emphasis added. Regulation 7(1)(a)-(g) of the Regulations sets out factors which would justify pay differentiation. These factors are: (a) seniority (length of service); (b) qualifications, ability and competence; (c) performance (quality of work); (d) where an employee is demoted as a result of organisational restructuring (or any other legitimate reason) without a reduction in pay and his salary remains the same until the remuneration of his co-employees in the same job category reaches his level (red-circling); (e) where a person is employed temporarily for the purpose of gaining experience (training) and as a result thereof receives different remuneration; (f) skills scarcity; and (g) any other relevant factor.[15]

16 Emphasis added.

17 Regulation 7(2)(a)-(b) of the Regulations.

practices alleged by the applicants was that the respondent discriminated between its black and white employees by paying its black employees less than their white counterparts who were employed on the same grade or engaged in the same work. The Industrial Court held that there is no doubt that wage discrimination based on race or any difference other than *skills* and *experience*[19] was an unfair labour practice. The respondent acknowledged the wage discrimination as alleged and committed itself to remove it. As a result thereof, the Industrial Court ordered the respondent to remove the wage discrimination based on race within a period of six months.[20] This case makes it clear that *skills* and *experience* are objective and fair factors which would justify pay differentiation.[21]

In *National Union of Mineworkers v Henry Gould (Pty) Ltd*[22] the applicant alleged that the refusal by the respondent to implement wage increases retrospectively to union members constituted an unfair labour practice. The Industrial Court stated that it is self-evident that as an abstract principle, equals should be treated equally. It remarked that employees with the same seniority and in the same job category should receive the same terms and conditions of employment unless there are good and compelling reasons to differentiate between them. It ordered the respondent to pay the union members the relevant amount of wages.[23] It regarded *seniority* as a fair and objective factor to pay different wages.[24]

In *Ntai v SA Breweries Ltd*[25] the applicants, black people, alleged unfair discrimination based on race against their employer, who was paying them a lower salary than their white counterparts whilst they all were engaged in the same work or work of equal value. The applicants sought an order that their employer pay them a salary equal to that of their white counterparts. The respondent admitted the difference in the salaries but denied that the

---

18 *SA Chemical Workers Union v Sentrachem Ltd* 1988 9 ILJ 410 (IC). This case was heard in terms of s 46(9) of the *Labour Relations Act* 28 of 1956, which has been repealed.

19 Emphasis added. The Industrial Court in its order *SA Chemical Workers Union v Sentrachem Ltd* 1988 9 ILJ 410 (IC) 439H also referred to length of service in the job as a fair criterion for paying black employees less than their white counterparts.

20 *SA Chemical Workers Union v Sentrachem Ltd* 1988 9 ILJ 410 (IC) 412F, 429F, 430E-F, 439H.

21 Emphasis added.

22 *National Union of Mineworkers v Henry Gould (Pty) Ltd* 1988 9 ILJ 1149 (IC). This case was heard in terms of s 46(9) of the *Labour Relations Act* 28 of 1956, which has been repealed.

23 *National Union of Mineworkers v Henry Gould (Pty) Ltd* 1988 9 ILJ 1149 (IC) 1150E, 1158A-B, 1161I.

24 Emphasis added.

25 *Ntai v SA Breweries Ltd* 2001 22 ILJ 214 (LC). This matter came before the Labour Court in terms of item 2(1)(a) of Schedule 7 of the *Labour Relations Act* 66 of 1995, which has since been repealed.

cause was based on race. The respondent attributed the difference to a series of performance-based pay increments, 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. The Court 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.[26] The Labour Court remarked that indirect discrimination exists when an ostensibly neutral requirement adversely affects a disproportionate number of people from a protected group and it may also arise in the case of equal pay for work of equal value.[27] It noted that the use of ostensibly neutral requirements such as *seniority* and *experience* in the computation of pay could have an adverse impact on employees from the protected group if it could be proved that such factors affected the employees as a group disproportionately when compared with their white counterparts who perform the same work.[28]

Landman has stated that claiming that pay differentials re based on seniority is a recognised defence, but this may perpetrate inequity where a certain section of the workforce has not had fair access to jobs and thus was unable to accumulate years of service.[29] Meintjes-Van Der Walt has stated that a *bona fide* seniority system is an acceptable ground of justification to pay differentials. She has further stated that a system is *bona fide* provided it is an established seniority system that is consistently applied and adopted without a discriminatory purpose.[30]

The United Kingdom gives effect to the principle of equal pay as set out in the *Equal Remuneration Convention*[31] in its *Equality Act*.[32] The *Equality Act* contains the following causes of action relating to equal pay: (a) equal pay for the same/similar work; (b) equal pay for work rated as equivalent; and (c) equal pay for work of equal value.[33] The meaning of these causes of action is set out in section 65 of the *Equality Act* as follows:

> (2) A's work is like B's work if—
> (a) A's work and B's work are the same or broadly similar, and

26 *Ntai v SA Breweries Ltd* 2001 22 ILJ 214 (LC) paras 2-3, 5, 25, 21, 57, 61, 90.
27 *Ntai v SA Breweries Ltd* 2001 22 ILJ 214 (LC) paras 85-86.
28 *Ntai v SA Breweries Ltd* 2001 22 ILJ 214 (LC) paras 79-80.
29 Landman 2002 *SA Merc LJ* 354.
30 Meintjes-Van Der Walt 1998 *ILJ* 30.
31 *Equal Remuneration Convention No 100* (1951). The United Kingdom ratified the *Equal Remuneration Convention* on 15 June 1971.
32 *Equality Act* of 2010 ("*Equality Act*").
33 Sections 65(1), (2)(a)-(b), (4)(a)-(b) and (6)(a)-(b) of the *Equality Act.*

(b) such differences as there are between their work are not of practical importance in relation to the terms of their work. …
(4) A's work is rated as equivalent to B's work if a job evaluation study—
(a) gives an equal value to A's job and B's job in terms of the demands made on a worker, or
(b) would give an equal value to A's job and B's job in those terms were the evaluation not made on a sex-specific system. …
(6) A's work is of equal value to B's work if it is—
(a) neither like B's work nor rated as equivalent to B's work, but
(b) nevertheless equal to B's work in terms of the demands made on A by reference to factors such as effort, skill and decision-making.[34]

Section 69 of the *Equality Act* sets out the genuine material factor defence which can be raised as a defence to an equal pay claim in terms of section 65. Section 69 of the EEA reads as follows:

(1) The sex equality clause in A's terms has no effect in relation to a difference between A's terms and B's terms if the responsible person shows that the difference is because of a material factor reliance on which-
(a) does not involve treating A less favourably because of A's sex than the responsible person treats B, and
(b) if the factor is within subsection (2), is a proportionate means of achieving a legitimate aim.
(2) A factor is within this subsection if A shows that, as a result of the factor, A and persons of the same sex doing work equal to A's are put at a particular disadvantage when compared with persons of the opposite sex doing work equal to A's.[35]

It is clear from section 69(1)(a) that if the reason for treating the complainant (employee) and the comparator differently in relation to their terms of employment is not based on sex, then this is a complete defence to an equal pay claim. This must be read with the Equal Pay Statutory Code of Practice to the *Equality Act* of 2010 which states that pay systems may be open to challenge on other protected characteristics under the *Equality Act* (item 11). It is apposite to analyse case law which has dealt with seniority in relation to equal pay claims.

In *Secretary of State for Justice v Bowling*[36] the respondent was employed by the Prison Service as a service desk user support team customer service adviser. In the Employment Tribunal the respondent claimed that she was doing like work to that of her chosen male comparator, but was being paid less than him. The male comparator held the same post as the respondent but had started on a salary of £15, 567 as opposed to the respondent who had started on £14, 762. The difference between the starting salaries was due to the comparator's being appointed on spinal

34 Sections 65(2), (4) and (6) of the *Equality Act*.
35 Section 69(1)-(2) of the *Equality Act.*
36 *Secretary of State for Justice v Bowling* 2012 IRLR 382 EAT.

point 3 in terms of the appellant's salary scale and the respondent's being appointed on spinal point 1. The appellant argued that this difference was due to the fact that the comparator had more background and experience than the respondent. The Employment Tribunal accepted this explanation in respect of the difference in pay that existed at the time of appointment. It held, however, that this explanation could not apply to the period where the respondent and the comparator had achieved the same appraisal rating, because at that stage the reason of skill and experience had ceased to be a material factor which could be relied on for paying different wages for like work. It thus allowed the respondent's claim in part.[37] The Employment Appeal Tribunal, on appeal, accepted the appellant's argument that "it is in the nature of an incremental scale that where an employee starts on the scale will impact on his pay, relative to his colleagues', in each subsequent year until they reach the top". The Employment Appeal Tribunal accepted that a differential was built into the pay of the respondent once the comparator had been appointed two points above the respondent in terms of the salary scale, and if the original differential was free from sex discrimination then it followed that the differentials in later years too were free from sex discrimination. The appeal was thus allowed.[38] Where two employees doing like work are appointed on different levels of a salary scale due to skill and experience which is free from unfair discrimination, then the pay differentials in later years will not amount to unfair discrimination.

In *Wilson v Health and Safety Executive*[39] the England and Wales Court of Appeal had before it the following questions relating to a service-related criterion which determined pay: "Does the employer have to provide objective justification for the way he uses such a criterion, and, if so, in what circumstances?" The Court noted that the use of service-related pay scales were common and as a general rule an employer does not have to justify its decision to adopt it because the law acknowledges that experience allows an employee to produce better work. It held that an employer will have to justify the use of a service-related criterion in detail in the event that the employee has furnished evidence which gives rise to serious doubts as to whether the use of the service-related criterion is appropriate to attain the criterion objective, which is the rendering of better work performance by employees with more years of service. In this situation an employer will have to justify the use of the service-related criterion by proving the general rule that an employee with experience produces better work and this exists in its workplace.[40] The use of a

37 *Secretary of State for Justice v Bowling* 2012 IRLR 382 EAT paras 1, 2.1-2.3, 5.
38 *Secretary of State for Justice v Bowling* 2012 IRLR 382 EAT paras 6-7, 11.
39 *Wilson v Health and Safety Executive* 2010 IRLR 59 EWCA.
40 *Wilson v Health and Safety Executive* 2010 IRLR 59 EWCA paras 1 and 16.

service-related pay criterion is as a general rule legitimate and will be a complete defence to an equal pay claim.

In *Cadman v Health and Safety Executive*[41] the Court of Justice of the European Communities held the following:

> Although the legitimacy of the criterion of seniority is not questioned as such, the question does arise as to the extent to which the employer's economic interests have to accommodate the employees' interest in the equal-pay principle being respected. Indeed, although it is legitimate for employers to remunerate length of service and/or loyalty, it cannot be denied that there are situations where a pay system, though neutral in its conception, works to the disadvantage of women. In such cases, Article 2(2) of Directive 97/80 subjects the criterion used in a pay system disadvantaging women to a proportionality test in which it must be shown that the criterion is based on legitimate aims and is proportionate for the purpose of achieving the aims pursued.[42]

3.2 What is the role of a collective agreement and good industrial relations when determining an equal pay claim?

In *Pioneer Foods* the Labour Court stated that new employees were being paid at the 80% rate for the first two years was as a result of FAWU's convincing the appellant to reduce the number of its precarious employees, including those supplied by labour brokers. The Labour Court held that the Commissioner's award was wrong as it had the implication that the EEA does not allow a South African employer to give effect to a collective agreement which sets out different rates of pay for employees with different periods of service. The Court remarked that a collective agreement that sets out different pay levels for employees with different periods of service does not amount to arbitrary differentiation, neither is seniority/length of service (being a new employee) an unlisted ground which meets the test of unfair discrimination. The Labour Court stated that according to the authorities, where unfair discrimination is proved, the mere fact that it is sanctioned in terms of a collective agreement does not disclose a defence. The Court stated, however, that this principle should be applied within its context and not strained beyond it proper application. It held that in determining the existence of unfair discrimination, the fact that the conduct complained of was the product of a collective agreement negotiated with a representative trade union was relevant in the determination.

It held further that this becomes more relevant where the reasons for reaching consensus on the relevant points had been disclosed, were not illegitimate and where, but for the term objected to (the 80% rate for two

41 *Cadman v Health and Safety Executive* 2006 IRLR 969 CJEC.
42 *Cadman v Health and Safety Executive* 2006 IRLR 969 CJEC para 52.

years for new employees), it was doubtful that the jobs concerned would ever have been created. The Labour Court remarked that the collective agreement was intended to convince the appellant to create additional permanent jobs and reduce the number of precarious employees. It stated that in the absence of the agreement on the 80% rate for the first two years for new employees, there was no reason to assume that the jobs would have been created at all. The Court held that the very existence of the jobs of the new employees must weigh in the fairness scale. The appellant had also acted transparently in that it had informed applicants for new positons regarding the 80% rate for the first two years. Two issues stand out from the above remarks by the Labour Court: the role of collective bargaining (collective agreements) in deciding an equal pay claim and the role of good industrial relations in deciding the same. These issues will be addressed hereunder by analysing relevant case law which has dealt with the same.

Before turning to deal with the case law, it is important to quote article 2(e) of the *Discrimination (Employment and Occupation) Recommendation* of the ILO[43] with regards to collective negotiations, industrial relations and collective agreements. Article 2(e) of the Recommendation provides as follows:

> Each Member should formulate a national policy for the prevention of discrimination in employment and occupation. This policy should be applied by means of legislative measures, collective agreements between representative employers' and workers' organisations or in any other manner consistent with national conditions and practice, and should have regard to the following principles: …
>
> (e) in collective negotiations and industrial relations the parties should respect the principle of equality of opportunity and treatment in employment and occupation, and should ensure that collective agreements contain no provisions of a discriminatory character in respect of access to, training for, advancement in or retention of employment or in respect of the terms and conditions of employment…

In *Heynsen v Armstrong Hydraulics (Pty) Ltd*[44] the applicant alleged that he was being discriminated against on the basis of race in that he was earning less than his co-employees who were part of the bargaining unit and who were weekly paid. The applicant did not belong to the bargaining unit and was monthly paid, but the work that he performed was the same as that of his co-employees. The applicant sought an order that the respondent remunerate him on an equal pay for equal work basis. The Labour Court observed that there were differences in the terms and

43 *Discrimination (Employment and Occupation) Recommendation No 111* (1958).
44 *Heynsen v Armstrong Hydraulics (Pty) Ltd* 2000 12 BLLR 1444 (LC).

conditions of employment with regard to weekly paid and monthly paid employees.[45] It noted that monthly paid employees were entitled to certain benefits which hourly paid employees were not entitled to. 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 whilst still enjoying benefits which were not shared by members of the bargaining unit. The Labour Court noted that according to the ILO, collective bargaining was not a justification for pay discrimination.[46] It warned that this rule was compelling in an ideal society but should not apply rigidly in South African labour relations due to the fact that employees had fought hard for collective bargaining rights. It found that insofar as there might be discrimination, the discrimination was not unfair based on the facts. The application was thus dismissed.[47] It is clear that the Labour Court regarded *collective bargaining* as a possible fair and objective factor for paying different wages.[48]

In *Jansen van Vuuren v South African Airways (Pty) Ltd*[49] the employer attempted to justify the discrimination against the applicant on the ground that it was the product of a collective agreement and for that reason it was fair. The Labour Court referred to *Larbi-Odam v Member of the Executive Council for Education (North-West Province)*[50] and stated that this judgment is clear authority for the proposition that justification cannot be founded on a collective agreement or any other agreement. It further remarked that a collective agreement is subject to the Constitution[51] as well as the EEA and parties thereto may not contract out of the rights in the Bill of Rights.[52] It is clear that the Labour Court did not accept a collective agreement as a ground of justification.

---

45 *Heynsen v Armstrong Hydraulics (Pty) Ltd* 2000 12 BLLR 1444 (LC) paras 1, 3-4, 6, 10-11.

46 *Heynsen* refers to s 111 of the Directions of the ILO in this regard. It is submitted that this should be read as referring to a 2(e) of the *Discrimination (Employment and Occupation) Recommendation No 111* (1958).

47 *Heynsen v Armstrong Hydraulics (Pty) Ltd* 2000 12 BLLR 1444 (LC) paras 8, 12-13, 15, 17-18.

48 Emphasis added. Also see *Larbi Ordam v Member of the Executive Council for Education (North-West Province)* 1998 1 SA 745 (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.

49 *Jansen van Vuuren v South African Airways (Pty) Ltd* 2013 10 BLLR 1004 (LC).

50 *Larbi Ordam v Member of the Executive Council for Education (North-West Province)* 1998 1 SA 745 (CC).

51 *Constitution of the Republic of South Africa*, 1996.

52 *Jansen van Vuuren v South African Airways (Pty) Ltd* 2013 10 BLLR 1004 (LC) paras 47-49, 55.

Grogan asserts that collective bargaining agreements with different unions which result in pay differentials are permissible.[53] Landman asserts that an employer can attempt to rely on a collective agreement that provides for discriminatory wages as a ground of justification for pay differentials, but this reliance is unlikely to succeed.[54] Landman's view is supported.

In *Redcar and Cleveland Borough Council v Bainbridge (No 2)*[55] the England and Wales Court of Appeal heard three consolidated appeals concerning questions of law relating to equal pay claims and the scope of the defences. Only the law relating to the scope of collective agreements as a defence to equal pay claims will be dealt with. The Court held that the fact that different jobs have been subject to separate collective bargaining processes can be a complete defence to an equal pay claim. It qualified this by stating that collective bargaining can be a defence only where the reason for the pay differential is the separate collective bargaining process and not a difference of gender. It held that where separate collective bargaining processes have the effect that one gender group of similar proportions earns less than another gender group of similar proportions, this could constitute a complete defence to an equal pay claim which is not gender-tainted. It further held that this would not apply where there is a marked difference between the two groups, because the difference would constitute evidence from which a Tribunal could infer that the process of the separate bargaining was tainted by gender, unless the employer furnishes a different explanation. It concluded by stating that "the fact of separate collective bargaining would not, of itself, be likely to disprove the possibility of sex discrimination".[56] Where separate collective bargaining is raised by the employer as a justification to pay differentials between the genders, the employer has to show that it was not gender-tainted. This applies to a scenario where there is a marked difference in the gender of the groups, because a Tribunal will be entitled to infer that the process was gender-tainted. It is also clear from this case that where the pay differentials apply to two different groups of similar proportions then then

53 Grogan *Employment Rights* 230.

54 Landman 2002 *SA Merc LJ* 351.

55 *Redcar and Cleveland Borough Council v Bainbridge (No 2)* 2008 IRLR 776 EWCA.

56 *Redcar and Cleveland Borough Council v Bainbridge (No 2)* 2008 IRLR 776 EWCA paras 2-3, 181, 198. In *British Road Services Ltd v Loughran* 1997 IRLR 92 NICA, the Northern Ireland Court of Appeal held that if one of the groups subject to separate collective bargaining is made up of predominantly females then a Tribunal should ascertain the reason for the wage difference; in particular whether it is due to gender discrimination (para 76). In a dissenting judgment, McCollum J held that "[i]n my view, in the circumstances of this case, the separate pay structures were capable of amounting to a material factor free of the taint of sex discrimination, as the percentage of women in the less well paid group was not so high as to lead inevitably to a finding of indirect discrimination" (para 44).

there is no inference to be drawn that the process was or is gender-tainted.

In *Enderby v Frenchay Health Authority*[57] the Court of Justice held that separate collective bargaining agreements, one for a group of predominantly men and the other for a group of predominantly women with lower pay rates, did not without more provide a justification for the difference in pay between the two jobs.[58] In *Specialarbejderforbyndet i Danmark v Dansk Industri*, *acting for Royal Copenhagen*[59] the European Court of Justice held that a national court can take into account as a factor in its assessment of whether differences between the average pay of two groups of workers are due to objective factors unrelated to any discrimination on grounds of gender the fact that rates of pay have been determined by collective bargaining or by negotiation at local level.[60]

In *Kenny v Minister for Justice, Equality and Law Reform*[61] the Court of Justice held that the national court may take the interests of good industrial relations into account, *inter alia* in its assessment of whether differences between the pay of two groups of workers are due to objective factors unrelated to any discrimination on grounds of gender and are compatible with the principle of proportionality. The Court stated that like collective agreements, good industrial relations are subject to the principle of non-discrimination in pay between male and female workers. The Court held that the interests of good industrial relations cannot on its own constitute the only basis for justifying discrimination.[62] Napier states that good industrial relations may have discriminatory connotations, and the wording of the general material factor provision in the United Kingdom's *Equality Act* of 2010 does not allow an employer to rely on a collective agreement that is gender-discriminatory and neither does it allow an employer to rely on a union's resistance to the removal of discriminatory pay.[63]

4 Conclusion

Regulation 7(1) states in clear terms that a difference in pay based on seniority is not unfair discrimination. It qualifies this, however, by requiring

57 *Enderby v Frenchay Health Authority* Case C-127/92 1993 IRLR 439.
58 *Enderby v Frenchay Health Authority* Case C-127/92 1993 IRLR 439 para 23.
59 *Specialarbejderforbyndet i Danmark v Dansk Industri, acting for Royal Copenhagen* 1995 IRLR 648 ECJ.
60 *Specialarbejderforbyndet i Danmark v Dansk Industri, acting for Royal Copenhagen* 1995 IRLR 648 ECJ para 46.
61 *Kenny v Minister for Justice, Equality and Law Reform* 2013 IRLR 463 CJEU.
62 *Kenny v Minister for Justice, Equality and Law Reform* 2013 IRLR 463 CJEU paras 47-48, 50, 52.
63 Napier 2014 *Equal Opportunities Review* 10 as quoted in Hepple *Equality* 131.

the difference in pay based on seniority to be fair and rational. The South African case law as well as the foreign case law recognises the factor of seniority as a ground which justifies pay differentiation. The case law and academic contributions also recognise the possibility that the factor might have an adverse impact on employees from protected groups. This, however, does not alter the applicability of the seniority factor as a ground justifying pay differentiation where it is applied fairly and rationally; in other words, where it is applied free from unfair discrimination. It is thus submitted that the seniority factor is a ground which justifies pay differentiation and is a complete defence to an equal pay claim unless the factor is applied in an unfair and irrational manner as proscribed in regulation 7.

The authorities are clear on the issue that collective bargaining and good industrial relations cannot be a complete defence/justification to pay differentials. This does not mean, however, that collective bargaining agreements and good industrial relations are irrelevant in determining whether unfair discrimination in pay exists. A collective agreement which contains pay differentials should be considered where an equal pay claim is made. The reason/s for the pay differentials in the collective agreement should also be considered, and this consideration will be informative to the extent of understanding why the pay differentials were introduced. Good industrial relations, similarly, are relevant in an equal pay claim where they are connected to the pay differentials. They provide invaluable information as to how the pay differentials came about. The information which can be derived from collective agreements and good industrial relations should not be over-stated, as they cannot operate as complete defences/justifications for pay differentials, but at the same time their importance cannot be under-stated, as they provide invaluable information which assists in coming to a finding as to whether the pay differentials constitutes unfair discrimination or not.

Bibliography

Literature

Grogan *Employment Rights*
Grogan J *Employment Rights* (Juta Claremont 2010)

Landman 2002 *SA Merc LJ*
Landman A "The Anatomy of Disputes about Equal Pay for Equal Work" 2002 *SA Merc LJ* 341-356

Meintjes-Van der Walt 1998 *ILJ*
Meintjes-Van der Walt L "Levelling the 'Paying Fields'" 1998 (19) *ILJ* 22-33

Napier 2014 *Equal Opportunities Review*
Napier B "Equal Pay in 2013" 2014 *Equal Opportunities Review* 8-?

Hepple *Equality*
Hepple B *Equality: The Legal Framework* 2nd ed (Oxford Hart 2014)

Oelz, Olney and Manuel *Equal Pay*
Oelz M, Olney S and Manuel T *Equal Pay: An Introductory Guide* (International Labour Office Geneva 2013)

Case law

British Road Services Ltd v Loughran 1997 IRLR 92 NICA

Cadman v Health and Safety Executive 2006 IRLR 969 CJEC

Enderby v Frenchay Health Authority Case C-127/92 1993 IRLR 439

Heynsen v Armstrong Hydraulics (Pty) Ltd 2000 12 BLLR 1444 (LC)

Jansen van Vuuren v South African Airways (Pty) Ltd 2013 10 BLLR 1004 (LC)

Kenny v Minister for Justice, Equality and Law Reform 2013 IRLR 463 CJEU

Larbi Ordam v Member of the Executive Council for Education (North-West Province) 1998 1 SA 745 (CC)

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

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

Pioneer Foods (Pty) Ltd v Workers Against Regression 2016 ZALCCT 14

Redcar and Cleveland Borough Council v Bainbridge (No 2) 2008 IRLR 776 EWCA

SA Chemical Workers Union v Sentrachem Ltd 1988 9 ILJ 410 (IC)

Secretary of State for Justice v Bowling 2012 IRLR 382 EAT

Specialarbejderforbyndet i Danmark v Dansk Industri, *acting for Royal Copenhagen* 1995 IRLR 648 ECJ

Wilson v Health and Safety Executive 2010 IRLR 59 EWCA

Legislation

Constitution of the Republic of South Africa, 1996

Employment Equity Act 55 of 1998

Equality Act of 2010 (United Kingdom)

Labour Relations Act 28 of 1956

Labour Relations Act 66 of 1995

Government publications

GN 448 in GG 38837 of 1 June 2015 (Code of Good Practice on Equal Pay/Remuneration for Work of Equal Value)

GN 595 in GG 37873 of 1 August 2014 (Employment Equity Regulations)

Equal Pay Statutory Code of Practice to the Equality Act of 2010

International instruments

Convention on the Elimination of All Forms of Discrimination against Women (1979)

Discrimination (Employment and Occupation) Recommendation No 111 (1958)

Equal Remuneration Convention No 100 (1951)

International Covenant on Economic, Social and Cultural Rights (1966)

International Convention on the Elimination of All Forms of Racial Discrimination (1969)

Treaty Establishing the European Community (1997)

Treaty of Rome (1957)

United Nations Universal Declaration of Human Rights (1948)

List of Abbreviations

CCMA	Commission for Conciliation, Mediation and Arbitration
EEA	Employment Equity Act 55 of 1998

FAWU	Food and Allied Workers Union
ILJ	Industrial Law Journal
ILO	International Labour Organisation
SA Merc LJ	South African Mercantile Law Journal