

Bridge the

Disability

Pay Gap

You can forget equal pay – if you are a person with a disability; in fact, you should be grateful that you have a job at all. That remains the core message to persons with disabilities, not only in South Africa but globally.

What does the law say in South Africa about equal pay?

We know that the Employment Equity Act, 1998, as amended, prohibits unfair discrimination in the workplace. According to section 6(1), “an employer is not allowed to unfairly discriminate, directly or indirectly, against an applicant for employment or a current employee in any employment policy or practice on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, and birth or on any other arbitrary ground”.

Section 6(4) then provides that “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 sub-section (1), is unfair discrimination.” The latter provision was introduced in August 2015 and is supported by a Code of Good Practice, as well as the Employment Equity Regulations thereof.

The three key issues that require scrutiny are:

- > Are jobs objectively compared to ascertain whether they are the same, substantially the same and/or are of equal value?
- > Is there a difference between the terms and conditions of employment, taking into account the remuneration of employees for which the comparison is being made?
- > If there are differences in the terms and conditions of employment, can these be justified on fair and rational grounds?

Pay differentials can be justified, amongst other factors, on different levels of responsibility, expertise, experience and skills, length of service as well as performance and seniority.

From international and local case law, a few common trends are apparent:

- > Employers should have a proper job evaluation and grading system in place to determine the value of work, which must be consistently applied;
- > One cannot justify continued discrimination solely based on the cost of equalisation to the employer;
- > An employer cannot avoid its obligations by saying “I paid him more because he asked for more”;
- > Performance can be used to differentiate, providing the employees are equally subject to the employer’s performance evaluation system and that the system is consistently applied.
- > There may be circumstances whereby an employer may need to pay a premium for scarce skills or experience that justifies such a differentiation. Yet this must be based on ‘credible sources’ and updated market information;



- > Some opinions indicate that it could potentially be indirectly discriminatory if differences are based on tenure or years of service. The latter negatively impacts women who interrupted careers to raise children or ‘Black’ People and persons with disabilities who entered the work market late due to a previous lack of education opportunities or past discriminatory practices.

In South Africa, however, the opposite seems to apply as there is a rising market premium for new appointees based on the designated status of a person, like being a woman, a ‘Black’ Person or a person with a disability.

Various risks factors arise if an employer does not adhere to fair pay practices. These include an aggrieved, unproductive or disengaged workforce. There is a real risk of becoming embroiled in unfair discrimination litigation with its resultant costs, inconvenience and further risks, or even becoming involved in possible class actions - an example of this is where a union acts on behalf of its members. Another consequence includes having an employer’s social reputation tarnished, resulting in their inability to attract the right talent.

What are the latest changes introduced to the Income Differential Report?

Employers in South Africa must report on the remuneration and benefits received by employees at each occupational level of their workforce, which is set out in what is known as the EEA4 – Income Differential Report. Where disproportionate income differentials are identified, an employer is obliged to take steps to reduce these differentials progressively.

New Employment Equity Regulations specific to the EEA4, which became effective 1st September 2019, have brought about changes in how Designated Employers will report going forward. In addition to the tables recording the number of employees and income differentials of each occupational level in terms of race and gender, Designated Employers must now indicate the following:

- 1 The average annual remuneration of the top 10% of their top earners; and
- 2 The average annual remuneration of the bottom 10% of their bottom earners; and
- 3 The median earners' remuneration in the organisation.

The wage gap analysis aims to determine whether there is inequality within an organisation's remuneration structure. A variety of methods can be used to interpret this. The Gini Co-efficient, for example, can be calculated using a scale of 0 to 1, where a score of 0 equals full equality and a score of 1 total inequality. The Palma Ratio focuses on differences between top and bottom income brackets. It highlights the income share of the top 10% to that of the bottom 40%. One can further compare executive level remuneration against the lowest paid as well as the average employee. A detailed race and gender-based fair pay analysis is necessary in accordance with the EEA4. Disability, however, is glaringly absent from this analysis! One cannot help but ask why a detailed analysis of wage inequities linked, amongst others, to race and gender is conducted, but the disability pay gap is ignored. According to the Employment Equity Commission Report, employers in 2001 reported that persons with disabilities represented 1% of their total workforce. In 2017, that figure was 1.3%.

It is evident that very little progress has been made over 16 years to increase the employment opportunities of this Designated Group. Employers need to compare their workplace representativity with that of the Economically Active Population (EAP) to set numerical targets and goals based on race and gender. No such EAP exists for persons with disabilities.

The Census 2011 data revealed the following general income trends for persons with disabilities:

- > Persons without disabilities on average earn more than persons with disabilities;
- > The severity and type of disability play a role in income whereby persons with sight disabilities earn more when compared to those with other types of disabilities;
- > Male persons with disabilities earn on average more than their female counterparts. Women with disabilities are again prejudiced, both from a disability status and gender perspective;
- > Race and gender play a role when analysing the income of persons with disabilities; and
- > Massive disparities exist by geographical location - urban versus rural.

Current specifics are not available on the disability wage gap in South Africa for the same or similar jobs or jobs of equal value. The impact of the introduction of the national minimum wage remains to be seen.



Dr Laurentia Truter
Specialises in non-discrimination law

Dr Laurentia Truter specialises in non-discrimination law. Her doctoral dissertation is titled: 'Disability, discrimination and equal opportunities – A comparative legal study'. On a local and multinational platform, she represents both the private and public sectors on matters such as employment contracts, human resource policies and procedures, employee relations procedures, as well as dispute resolution. She conducts disability awareness workshops and develops disability strategies, as well as policy frameworks.



How do persons with disabilities fare outside our borders?

In the United Kingdom (UK), in 2017 the Equality and Human Rights Commission uncovered a disability pay gap of 13.6% - the difference between what persons with and without disabilities were earning. In 2018 this figure rose to 15%, the highest reported since 2012. Persons with disabilities in the UK remain more likely to be unemployed, lose their job or to occupy a low-waged job than those without disabilities. Graduates with a work-limiting disability are more likely not to have a job than an unqualified person with no disability. Statistics reveal that persons with disabilities who have a degree earn less than their non-disabled counterparts. Less than one in 10 managers and directors have a disability. The ratio increases to one in seven for elementary type positions – thus the lowest-paid jobs.

As in South Africa, employers in the UK are not obligated to publish their disability pay gap - unlike that of the gender pay gap. Women with disabilities are hardest hit, as they earn 22.1% less on average than their non-disabled male peers. It is evident that the disability pay gap in the UK is a real and rising issue. However, this trend is partially due to the high number of persons with disabilities who are employed in part-time jobs, where remuneration could be at a lower average hourly rate than that of full-time jobs.

In the United States of America (US) men and women with disabilities still struggle to find work, notwithstanding the progressive legislation that has been in place for several years. Only 18% of persons with disabilities are employed, compared with 65% of persons without disabilities. In 2016, it was revealed that persons with disabilities earn 68 cents for every dollar earned by persons without disabilities.

Women with disabilities are exposed to a striking wage gap, as they earn 72 cents for every dollar earned by men with disabilities. Employers in the US can apply for special permission from the Government to pay sub-minimum wages. Upon approval, this allows employers to pay persons with disabilities around 22 cents an hour, which is usually the case in what they call 'sheltered workshops'. Census figures published in March 2019 expose that, overall, workers with disabilities earn less than their co-workers without disabilities. Persons with disabilities are less likely to be employed on a full-time basis earning a full-time wage. Persons with disabilities remain in low-earning jobs, with the most common occupations being that of a janitor and building cleaner.

What conclusions can be made?

Employers in South Africa report on race and gender in their EEA4. No income differential is completed to compare employees with and without disabilities per occupational level, which would establish what the disability pay gap is. There are no other formal reporting obligations existing that gather disability pay data. However, one can only surmise that similar trends exist in South Africa as they do in the UK and US. To date, little has been done to report and publish findings that address the disability pay gap, which in itself would allow for remedial action.

Based on the information within – should persons with a disability be grateful to have a job?

I think it is fair to surmise that persons with disabilities continue to be marginalised as employees and continue to strive for true equality and equity. In reality, persons with disabilities should not be grateful to have a job, as they have the right to work and be self-sustainable. They further have an inherent right to be fairly and equitably remunerated in line with their non-disabled counterparts. It goes without saying that the disability pay gap needs some serious attention.

I implore each person that represents the South African workforce to take the lead in changing this discriminatory practice. Interrogate your organisation's pay practices, analyse the remuneration and benefits of persons with and without disabilities, even if the law does not obligate you to do this.

Employers must put processes in place so that the disability pay gap can be addressed and, where necessary, implement remedial action. Equal value for equal work, as well as inclusion, must be promoted and supported.

Source of Reference

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