

SABPP FACT SHEET

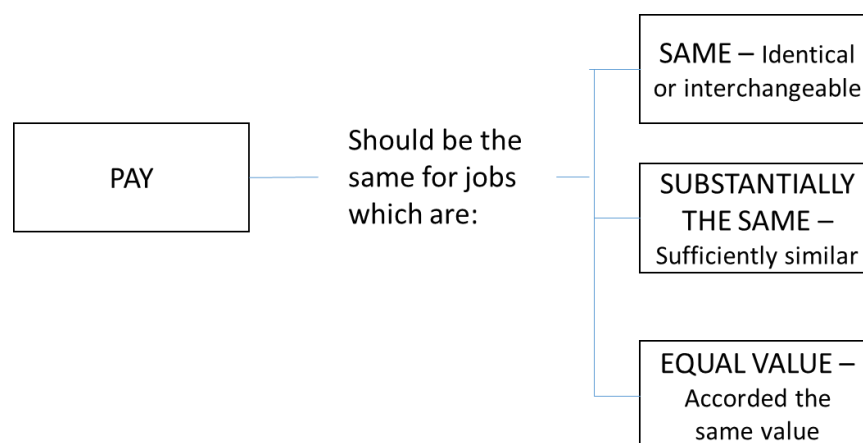
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EQUAL PAY AUDITS

Introduction

South Africa now has firmly in place legislation and regulations to entrench the concept of equal pay for work of equal value. Provisions of the 1998 Employment Equity Act prohibited unfair discrimination in any employment policy or practice and employers have been required since then to submit declarations of earnings by employee grouping. Case law since then has confirmed that unfair discrimination in pay is prohibited. However, the general prohibition proved to be insufficient to reduce pay inequalities and therefore the 1998 Act was amended in 2013 to specifically include the concept of equal pay for work of equal value.

This concept is a refinement of the principle of equal work for equal pay, as shown below:



On 1st June 2015, the Department of Labour issued the Code of Good Practice on Equal Pay/Remuneration for Work of Equal Value to give practical guidance to employers and employees on how to apply the

principles in the workplace, and the Department has commenced with audits of employers on equal pay. Findings of non-compliance can result in compliance orders being issued that can be very costly to employers and can only be challenged by recourse to the Labour Court.

It is therefore very important that HR practitioners, if they have not already done so, conduct internal audits of their pay practices to ensure compliance.

This Fact Sheet looks at the requirements of the Code of Good Practice and provides some additional practical guidelines.

The Code of Good Practice

Section 6(4) of the Act 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 the Act or on any other arbitrary ground, is unfair discrimination.

Regulation 7 of the Code lists a number of grounds which can justify difference in pay:

- Seniority or length of service;
- Qualifications, ability, competence or potential above the minimum acceptable levels required for the performance of the job;
- Performance, quantity or quality of work, provided that the performance evaluation system is equally and consistently applied;
- Demotions from organisational restructuring or any other legitimate reason which fix pay until the structure catches up;
- Temporary employment for giving experience or training;
- Shortage of relevant skills in a particular job classification;
- Any other relevant factors.

However, any of these factors may not be used in a way which results in discrimination on a listed or arbitrary ground.

(Our comment: It should be noted that the grounds listed above include all the grounds an employer would normally use to justify differences between individuals' pay.)

Job evaluation is recommended as an objective assessment for determining work of equal value, but the Code cautions that employers must ensure that the grading factors used in the job evaluation method do not cause a systematic bias against women (or any other previously disadvantaged group). The Code indicates as best practice that a job evaluation method should look at:

- The responsibility demanded of the work, including responsibility for people, finances and material;
- The skills, qualifications, including prior learning and experience required to perform the work, whether formal or informal;
- Physical, mental and emotional effort required to perform the work;

- The assessment of working conditions may include an assessment of the physical environment, psychological conditions, time when and geographic location where the work is performed.

These factors may be weighted depending on sector, employer and the job concerned.

The Code sets out the following steps for ensuring equal pay for work of equal value:

- a) Utilise a job evaluation system that is fair and transparent and does not result in discrimination;
- b) Ensure that job profiles/descriptions exist and are current before evaluating jobs;
- c) Conduct an audit:
 - i. Determine the scope of the audit;
 - ii. Identify jobs that would be subjected to the audit;
 - iii. Choose the jobs to be compared, ensuring that jobs where gender or other discriminatory grounds may have resulted in differences in pay;
 - iv. Choose the method for comparing pay – whether average, median or other means;
 - v. Where difference are found, identify the reasons for differences;
 - vi. If the differences are not justifiable on the grounds listed above, determine how to address the inequalities;
 - vii. Monitor and review the process annually.

Practical guidelines for the audit

Mrs Italia Bonninelli, Executive Vice-President: People and Organization Development of Anglo-Gold Ashanti, wrote the chapter on conducting pay audits for the 2015 SABPP Women’s Report. (The chapter was written in the context of comparing male and female pay, but the same considerations apply for comparing pay between any groups of employees.) She says “A simplistic analysis that relies on comparing the average pay of women and men within a band may produce the conclusion that there is a clear gap. However, this argument may be countered with the response that every pay decision is the specific outcome of that role and that individual, conveniently deflecting attention away from the structural issues underlying potential pay discrimination. It is thus important to clarify a set of guidelines within which the pay audit is conducted.” She then sets out a framework for conducting the audit:

Get the base for comparison right:

1. First of all, the data needs to be accurate- up to date and using the same point in time.
2. Look at basic pay, total pay (basic plus benefits) and total package (total pay plus incentives) as a different picture might emerge at different levels, if, for example, women are not typically members of the medical aid scheme and receive no compensation for the employer contribution as compared to men.
3. Ensure that sufficient biographical data is included in the audit date to allow for analysis of justifiable grounds for differences, for example, length of service with organisation, length of service in current role, geographical location, qualifications and special skills required for the role and possessed by the individual, history of performance ratings, source of recruitment into the role

(internal or external), potential ratings, type of contract and hours worked. Biographical data will also need to include the potential discriminatory grounds including gender, race and disability status.

4. Review whether jobs gradings are up to date and accurate. Has grade creep occurred over the years without correction? Review whether jobs with the same title or coding are actually the same.
5. Review whether pay scales have been recently checked against the relevant market.

Analyse the data intelligently:

1. Look at the data by grade/band and then by occupation as different occupations within a grade may carry different market rates due to skills shortages.
2. By occupation and within that, by grade, check differences in averages between employee groupings. Pay attention to differences even if as low as 5%.
3. Identify any 'out of grade'/'red flagged' pay points (above and below the pay scale) and check the justification for this.
4. Look at the distribution of pay points within the grade – for example, are people from previously disadvantaged groups clustered around the mid-point and White men clustered from mid-point upwards.

Consider your findings

Can any differences you have identified be justified on any of the permitted grounds? Some further investigation might be needed to do this. Not all pay differences are bad – in fact, justifiable pay differences form part of good remuneration practice.

Remedial action

The chapter in the Women's Report goes into some detail on practical steps to remedy any unjustified pay differences uncovered by the audit. Remedies then need to be costed and submitted to governance structures for approval. The role of the Employment Equity Committee should be taken into account in reporting on the results of the audit and remedial action agreed. Communication with employees and managers needs to be carefully planned and, finally, an after action review should be conducted to identify lessons learned and how to feed back those lessons into policies, procedures and practices.

Some interesting experiences from the UK

Legislation on equal pay for equal work was introduced in the UK in 1981 and case law in the area is fairly mature. Such case law tends to be concentrated on gender pay inequalities, but the same principles apply to other grounds for possible discrimination.

In a PWC 2014 blog “Equal pay for equal work is introduced in South Africa: Lessons from the UK experience”, by Tilly Harries and Natalie Dye, Employment Lawyers, some case studies are given.¹

“In one of the earliest cases in the UK, a cook successfully claimed that her job was of equal value to a joiner and a carpenter in a shipyard. Since then the courts have decided that working in a school canteen is of equal value to sweeping roads, caring for the old and disabled is of equal value to working in a cemetery and being a classroom assistant is of equal value to being a refuse collector. Employers must therefore come to terms with the fact that roles, which on paper look extremely different, may be considered to be of equal value when assessed against the criteria in the new Act and those performing them will therefore be legally entitled to the same pay.

Employers in the UK have often pointed to market forces to justify female employees receiving lower pay. They have argued that external benchmarking demonstrates that in order to attract talent for the roles traditionally performed by men, pay had to be set at the higher level. The market forces defence is also available to South African employers under the new Act.

The difficulty with this argument is that the market itself is sex-tainted in producing lower pay for women than for men in that it invariably reflects the inherent biases of society. The UK courts have been quick to dismiss the market forces defence in some sectors. Where the courts have found that pay rates for certain jobs taken mainly by women (for example catering) are depressed because of a conscious or subconscious perception that they are “women’s work”, the market forces defence has been rejected. If the South African courts adopt the same approach, the ability of employers to rely on market forces to justify female employees receiving lower pay will be severely limited.”

Conclusion

Pay gaps continue to exist globally and in South Africa. Research findings of Professor Mark Bussin are that the gender pay gap in South Africa is about 15%, like job for like job, as at 2015. Data from the Department of Labour’s Employment Equity data collection on racial wage gaps is not available as yet, but Statistics SA earnings reports consistently show gaps across racial and gender lines. The existence of pay gaps for people with disabilities has never been investigated, but there most probably is one.

Pay gaps arise over time for a variety of reasons, see both the SABPP Fact Sheet 8 of 2013 on Pay Equity² and Chapter 1 of the 2015 Women’s Report. HR practitioners need to be alert to the structural reasons for pay gaps emerging and they need to be competent in monitoring the state of their remuneration practices through pay audits. While structural inequalities exist in South Africa, we strongly advise employers to actively pursue strategies to eliminate gaps to move towards equal pay for work of equal value.

¹ http://pwc.blogs.com/africa_upfront/2014/09/equal-pay-for-equal-work-is-introduced-in-south-africa-lessons-from-uk.html

² Available as a free download from <http://sabpp.co.za/category/fact-sheet/>

This Fact Sheet has been prepared by Penny Abbott, Head of Research at the SABPP, and draws from the 2015 Women's Report of the SABPP and University of Johannesburg. For a fuller treatment of the topic, download the Report from <http://sabpp.co.za/research/womens-reports/>