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THE LAW AND GENDER-BASED DISCRIMINATION IN THE SOUTH AFRICAN WORKPLACE: A COMPARISON OF SOUTH AFRICAN AND CANADIAN LAW.

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Submitted in partial fulfilment of the requirements for the degree of
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at the University of the Witwatersrand, Johannesburg

01 October 2024

DECLARATION

I, student number 2343484, declare that this Research Report is my own unaided work. It is submitted in partial fulfilment of the requirements for the degree of Master of Laws (by Coursework and Research Report) at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in this or any other university.

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Abstract

Despite the global shift towards democratic principles grounded in equality, progress in eradicating gender-based discrimination in the workplace remains slow. Studies consistently show significant disparities in remuneration and career advancement between women and men, with women frequently earning less than their male counterparts for performing equivalent tasks. In response, various countries have enacted and continue to refine legislation and policies aimed at combating gender discrimination in the workplace. This research undertakes a comparative analysis of the legal frameworks in South Africa and Canada, focusing on how each system addresses gender equality in the workplace. The research examines the influence of international and regional instruments on domestic legislation in both jurisdictions, assessing the effectiveness of their respective legal measures in combating gender-based discrimination in the workplace. The research concludes by offering recommendations to improve the efficacy of existing laws, thereby strengthening efforts to eliminate gender discrimination in the workplace.

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THE LAW AND GENDER-BASED DISCRIMINATION IN THE SOUTH AFRICAN WORKPLACE: A COMPARISON OF SOUTH AFRICAN AND CANADIAN LAW.

I INTRODUCTION

Gender inequality in the workplace persists in many countries, even in the twenty-first century. This research will compare and evaluate the legal systems and gender-based discrimination in the workplace in South Africa and Canada. The rationale for this comparison lies in the influence that Canada has shown on the South African approach to employment equity. Both countries have expressly intended to eliminate discrimination in the workplace.[1]

The Constitution of the Republic of South Africa, 1996 ('the Constitution') is the normative framework through which the South African legal system and societal terrain are understood. This framework requires gender equality across all spheres. In particular, section 9 of the Constitution states unequivocally that no one may be discriminated against based on their gender.[2] Section 9 of the Constitution seeks and aspires to bring about redress and reform in response to the historical and persisting gender discrimination in the workplace. The apartheid[3] regime distinguished between Black, White, Indian, and Coloured persons.[4]

During the apartheid era in South Africa, the government allocated economic and other advantages based on race. This discriminatory system extended beyond just racial divisions, as the apartheid regime also treated men and women within these racial groups differently. This had a particularly detrimental impact on Black women, who found themselves positioned at the lowest rung of the social hierarchy.

Even after the enactment of the South African Constitution, which aimed to dismantle the legacy of apartheid, many vestiges of the old dispensation remain. One such area is the ongoing discrimination of women in the workplace. Despite the legal and constitutional protections in place, women in South Africa, particularly those from historically disadvantaged backgrounds, continue to face significant challenges in achieving true equality and equity in employment.

This persistent discrimination against women, rooted in the intersectional nature of the apartheid system, continues to hinder the social and economic progress of South African society. Addressing these deeply entrenched biases and inequalities will require sustained

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[1] Kholeka Mputa *Evaluating the implementation of Employment Equity in a Pharmaceutical Company: A Case Study* (unpublished LLM thesis, Stellenbosch University, 2016) 12.
[2] The Constitution of the Republic of South Africa, 1996 s 9(3).
[3] D.N. Dhanagare 'Apartheid – its Theory and Practice in South Africa' *India Quarterly* 23, no. 4 (1967): 338–61 available at *http://www.jstor.org/stable/45071222*, accessed on 14 July 2024.
[4] Population Registration Act 30 of 1950 s 5.

efforts from the government, civil society, and the private sector to fully realize the promise of a post-apartheid, equitable South Africa. This discrimination is evident in women's exclusion from certain positions, lack of promotions, and unequal pay compared to their male counterparts.[5]

The main purpose of the Constitution is plainly described in its preamble.[6] The preamble summarily expresses a vision of a South Africa in which the past injustices are recognised and society ensures every person enjoys equal protection through the law.[7] Again, it sets the lofty aspiration of a society in which every person's potential is freed. This is what it means to bring alive social justice and realise human rights for all. Having understood both the context and the vision of the Constitution, it is prudent to look toward the substantive provisions to achieve the vision of equality.

Canada, similarly, has enacted many laws and policies that seek to promote and uplift gender equality as a method to prevent gender-based discrimination in the workplace. Gender equality is founded under the Canadian Human Rights Act and the Canadian Charter of Rights and Freedoms ('the Canadian Charter').[8] Canadians working for the government, or private companies regulated by the federal government, enjoy protection against gender-based discrimination.[9] The Canadian Charter also provides that every person is equal before and under the law and shall enjoy protection against discrimination based on their sex (gender).[10] The Canadian Charter provides that the rights guaranteed in the Canadian Charter, including section 15, apply to both men and women.[11] Despite these legal protections, gender inequality in the workplace remains a significant issue in Canada.

In comparing and evaluating these two jurisdictions, this writing is structured in three chapters. Chapter One discusses how the South African legal system promotes gender equality and prevents gender-based discrimination in the workplace. Chapter Two compares the Canadian legal system and analyses the extent to which its legal system protects women from

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[5] Chulumanco Mahamba 'Disappointing gender pay gap persists in SA as men still earn more than their women counterparts'*IOL* 9 March 2022, available at *https://www.iol.co.za/the-star/news/disappointing-gender-pay-gap-persists-in-sa-as-men-still-earn-more-than-their-women-counterparts-bf04366a-f7b0-4603-8a61-22c2cf9ec606*, accessed on 14 July 2024.

[6] Op cit note 2, the Preamble.

[7] Ibid.

[8] 'Canadian Charter of Rights and Freedoms' available at *https://www.canada.ca/content/dam/pch/documents/services/download-order-charter-bill/canadian-charter-rights-freedoms-eng.pdf*, accessed on 25 August 2024.

[9] 'Federal gender equality laws in Canada' available at *https://www.international.gc.ca/trade-commerce/gender_equality-egalite_genres/lois_can_gen_eq_laws.aspx?lang=eng*, accessed on 14 July 2024.

[10] Op cit note 8 s 15.

[11] Ibid.

gender discrimination in the workplace. Lastly, in chapter Three, this paper offers recommendations to enhance the protections against gender discrimination suffered by women in the workplace. This paper limits the scope of analysis to discrimination in the hiring, promotion, and remuneration practices for women. The analysis is conducted with due sensitivity to the varied identities within womanhood, femaleness, and accompanying self-identifiers within the spectrum of gender identity. For the purposes of this paper, the word 'gender' encompasses both male and female but is not exclusively limited to men and women.

CHAPTER ONE

II INTERNATIONAL AND REGIONAL LAW NORMATIVE FRAMEWORK RELEVANT TO GENDER INEQUALITY IN SOUTH AFRICA

(a) Universal Declaration of Human Rights 1948

In terms of section 39 of the Constitution, the courts and tribunals, are compelled to promote the right to equality when interpreting the Bill of Rights.[12] It is also peremptory for the courts to consider international law and to take into account foreign law.[13] For years, South African courts have referred to international law as a guideline for interpreting domestic legislation and the Constitution.[14] South Africa is a signatory to the Universal Declaration of Human Rights ('the Declaration).[15] In addition, Article 23 of the Declaration provides that every person has the right to equal pay for equal work without any form of discrimination.[16]

Notably, unlike Section 9 of the Constitution which distinguishes between fair and unfair discrimination upon qualification of justified discrimination based on gender,[17] Article 23 of the Declaration does not distinguish between fair and unfair discrimination, it simply prohibits any form of discrimination and imposes the right to equal pay for equal work.[18] It is argued that Article 23 of the Declaration provides a more direct prohibition of discrimination in that it does not distinguish between fair and unfair discrimination, compared to section 9 of the Constitution which distinguishes between fair and unfair discrimination. Section 9 of the Constitution does this solely by limiting its application to protect the public interest and the rights of other

[12] Op cit note 2 s 39.
[13] Ibid s 39.
[14] Clarence Tshoose 'Appraisal of Selected Themes on the Impact of International Standards on Labour and Social Security Law in South Africa' (2022) 25 *PER/PELJ* 26.
[15] *Mahlangu and Another v Minister of Labour and Others* 2021 (1) BCLR 1 (CC).
[16] Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A (III).
[17] Op cit note 2 s 9(5).
[18] Op cit note 16 art 23.

individuals.[19] However, the limitation of section 9 of the Constitution does not affect the protection of the rights set out in the Declaration.[20]

(b) Equal Remuneration Convention 1951

On 30 March 2000, South Africa ratified the Equal Remuneration Convention, 1951 No. 100 ('the ER Convention').[21] In terms of Article 2 of the ER Convention, member countries must adopt measures that provide equal remuneration for equal work for men and women employees. In implementing the ER Convention, South Africa can achieve its obligation by (i) adopting national legislation, and policy that determines uniform remuneration rates and (ii) encouraging a collective agreement between employers and employees.[22]

Article 1 of the ER Convention defines people who must be afforded protection based on their sex as opposed to their gender. However, this study argues that when member countries drafted the ER Convention, they intended to eliminate remuneration discrimination based on gender too.[23]

The International Labour Organisation ('the ILO') has emphasised that countries must ensure that they adopt legislation that is consistent with the ER Convention.[24] However, South African law did not meet the requirements of the ER Convention until 2014. In *Mangena and Others v Fila South Africa (Pty) Ltd and Other ('Mangena'),* [25] the applicant filed a claim for equal pay against the respondent. The applicant contended that he and McMullin (a co-worker) performed the same work of equal value.[26] However, McMullin is paid a higher salary due to her race, and the applicant was paid a lower salary because he is African. The court had to decide whether, in South Africa, an employee is afforded a remedy to claim equal pay. The court noted that the Employment Equity Act 55 of 1998 ('the EEA') does not provide the said remedy. The court held that the ER Convention provides for a mechanism wherein the differentiation in terms

[19] IM Rautenbach & EFJ Malherbe *Constitutional law* 4 ed (2004) 315.
[20] Felix Dube 'Neither Adopted nor Borrowed: A Critique of the Conception of the South African Bill of Rights' (2020) 23 *PER / PELJ* 19.
[21]'International Labour Organisation (ILO) Conventions ratified by South Africa' available at *chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://static.pmg.org.za/docs/120515ilo-edit.pdf*, accessed on 07 March 2023.
[22]Equal Remuneration Convention, 1951, No. 100 (adopted 29 June 1951, entered into force 23 May 1953) Geneva GBILO, 34th ILC, art 2.
[23]Amarildo Laci, Armela Maxhelaku & Ilir Rusi 'Equality at work and discrimination in employment and occupation' (2017) 7 *JESR* 67 at 71.
[24] Shamier Ebrahim *A Critical Analysis of Equal Remuneration Claims in South African Law* (unpublished LLM thesis, University of South Africa, 2014) 3.
[25] *Mangena and Others v Fila South Africa (Pty) Ltd and Others* 2010 (31) ILJ 662 (LC) para 5.
[26] Ibid.

of remuneration is based on sex. The court interpreted the EEA to comply with South Africa's public international law obligation.[27]

The *Mangena* case was decided based on the old EEA which did not provide for equal pay. The EEA was then amended and came into effect on 1 August 2014 to create measures that deal with equal pay. [28] The amended EEA was further strengthened and complimented by the issuing of a Code of Good Practice on Equal Pay/Remuneration for Work of Equal Value ('the code') on 1 June 2015. [29] The EEA amendment and the Code came into effect as a result of the criticism made against South Africa by the ILO for its failure to provide a mechanism to deal with equal pay claims.[30] Notably, *Mangena* was decided almost two decades after the enactment of the Constitution, which shows the discrepancy and slow approach in South African law relating to gender inequality.

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

South Africa has ratified the Convention on the Elimination of All Forms of Discrimination Against Women ('the CEDAW').[31] The CEDAW came into force in 1981, on its heading and preamble, the CEDAW was adopted to protect women against any form of discrimination based on their sex and to ensure that men and women are equal in substance and form. [32] In addition, Article 11 of the CEDAW compels South Africa as a member state to take all possible measures to eradicate any form of discrimination against women in the workplace by ensuring that men and women are treated equally. It also requires that women's rights to equal remuneration and treatment are respected.[33] This paper argues that presently South Africa has complied with the obligation imposed against it by Article 11 of the CEDAW, in that the Constitution in terms of section 9 prohibits unfair discrimination against women or female people based on their gender.

(d) African Charter on Human and Peoples` Rights 1981

South Africa is a signatory to the African Charter on Human and Peoples' Rights ('the African Charter').[34] The African Charter entitles every African citizen to enjoy all rights and freedom that are guaranteed in the African Charter without any form of discrimination based on

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[27] Ibid.
[28]Employment Equity Act 55 of 1998.
[29] Code of Good Practice on Equal Pay/ Remuneration for Work of Equal Value in GN 448 *GG* 38837 of 01 June 2015.
[30] Shamier Ebrahim 'Equal pay for work of equal value in terms of the Employment Equity Act 55 of 1998: Lessons from the international labour organisation and the United Kingdom' (2016) 19 *PER / PELJ* 1.
[31]*Mahlangu and Another* supra note 15 para 43.
[32] Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) UNGA Res 34/108.
[33] Ibid art 11.
[34] *Mahlangu and Another* supra note 15 para 46.

race, ethnic group, colour, sex, language, religion, politics, opinion, national and social origin, fortune, birth or any status.[35]

Moreover, Article 15 of the African Charter provides that employees have the right to receive equal remuneration for equal work and an equitable employment environment, free from discrimination.[36] Therefore, regardless of gender, employees performing equivalent work must receive an equal salary and may not be discriminated against in the workplace. South Africa as a signatory to the African Charter is obliged to implement the provisions of Article 15 in its domestic legislation to promote gender equality in the workplace.

(e) Southern African Development Community

South Africa is part of the Southern African Development Community ('the SADC'). Article II of the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa ('the PACHPRRWA'), a treaty that was adopted by SADC in 2003, provides that state parties must adopt a mechanism to eliminate or fight any form of discrimination against women by way of adopting legislation or any other measures.[37] In addition, state parties, unless they have done so already, must adopt and include in their country's national constitution and legislation provisions for equality between men and women.[38] Moreover, Article XIII of the PACHPRRWA provides that member states must adopt legislation and other mechanisms that provide women with means of assurance of equality to men in the workplace.[39] Lastly, member states must advance and encourage the right to equal remuneration to both men and women for doing equal work.[40]

Therefore, South Africa is duty-bound to prevent any form of discrimination based on gender in the workplace and must develop its domestic legislation to implement the provisions of these instruments so far as preventing gender-based discrimination in the workplace is concerned. It will be discussed below that South Africa has discharged its obligation to enact legislation and code that prohibits gender-based discrimination in the workplace. However, South Africa is slow in implementing its legislation to eliminate discrimination in the workplace.

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[35] African Charter on Human and Peoples` Rights (adopted 01 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58) art 2.
[36] Ibid art 15.
[37] The Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (adopted 11 July 2003, entered into force 25 November 2005, AHG/Res.240 (XXXI) art II.
[38] Ibid.
[39] Ibid art XIII.
[40] Ibid.

III THE SOUTH AFRICAN LEGISLATIVE FRAMEWORK

(a) Discrimination in the Workplace

To discharge its international obligation to eliminate gender-based discrimination in the workplace, South Africa has enacted several laws and codes that promote equality in the workplace. The most important of these laws apart from the Constitution is the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.[41] ('the PEPUDA') which defines discrimination as:

> 'any act or omission, including a policy, law, rule, practice, condition or situation which directly or indirectly—
>
> (a) imposes burdens, obligations or disadvantage on; or
>
> (b) withholds benefits, opportunities, or advantages from, any person on one or more of the prohibited grounds.'[42]

A working paper published by the South African Human Rights Commission ('the SAHRC') in 2016[43] found that, despite South Africa's progressive Constitution and egalitarian legislation, significant challenges with workplace discrimination persist.[44] The research conducted by the South African Reserve Bank found that women found it harder than men to be hired in the workplace.[45]

Furthermore, the report highlighted stark differences in pay for men and women, revealing that women are paid 77% less than their male counterparts in South Africa.[46] This points to what legal scholar, *Morve Roshan* calls the gender wage gap. The gender wage gap is a form of unfair discrimination that occurs when employers pay employees who perform the same work and occupy the same position in the workplace different salaries based solely on their gender.[47] While it is undesirable to have discrimination in the workplace, there are times when it is justifiable based on skills, expertise, and experience.[48] In many cases, gender wage gap

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[41] Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 s 2.
[42] Ibid s 1.
[43] National Hearing on Unfair Discrimination in the Workplace *National Hearing on Unfair Discrimination in the Workplace* (2016).
[44] Ibid.
[45] South African Reserve Bank Working Paper Series WP/21/09 *Addressing low labour utilisation in South Africa* (2021) 12.
[46] Ibid at 3.
[47] Morve Roshan 'The challenges of gender wage gap: a study of post – apartheid South Africa' available at *https://www.researchgate.net/publication/307205590_the_challenges_of_gender_wage_gap_s_study_of_post_-_apartheid_South_Africa*, accessed on 06 May 2023.
[48] M McGregor, AH Dekker & M Budeli et al *Labour Law Rules* 2 ed (2014) 68.

discrimination is perpetrated against female employees by employers who argue that male employees` work production is higher than that of their female counterparts.[49]

IV LEGAL PROTECTION AGAINST DISCRIMINATION BASED ON GENDER IN SOUTH AFRICA

(a) Constitution of The Republic of South Africa, 1996

In South Africa, during the apartheid era, black women experienced discrimination across multiple axes. This layered a disproportionate burden upon them as a class of persons. Black women were not allowed to work. If they were employed, they were paid significantly less than their black male colleagues and female colleagues of other races.[50] With its enactment, the Constitution in its preamble unequivocally provided that it sought to address the injustices of the past, inequalities, and social issues.[51] The Constitution as the supreme law of the country, prohibits any form of unfair discrimination, including pay gap discrimination based on gender differences.[52] Moreover, South Africa, since the beginning of the Constitutional dispensation, has continued to adopt and apply policies that fight against gender-based discrimination in the workplace.[53]

Owing to the Constitution as the supreme law of the South African territory which invalidates any law, conduct, or policy contrary to the Constitution from being effective; everyone has a constitutional obligation to uphold the Constitution.[54] The Constitution protects employees against any form of unfair labour practice.[55] It, thus, can be argued that any form of discrimination and unfair labour practice in the workplace is unconstitutional.[56]

The Constitution has imposed the constitutional duty on the employer to treat employees equally and to further provide them with equal opportunities.[57] the Constitution requires that everyone be provided with equal protection before the law and no person shall be directly or

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[49] Debra Shepherd 'Post-Apartheid Trends in Gender Discrimination in South Africa: Analysis through Decomposition Techniques' available at *https://resep.sun.ac.za/wp-content/uploads/2017/10/wp-06-2008.pdf,* accessed on 27 January 2024.
[50] Motlhatlego Dennis & Kolawole Olusola 'Untangling discrimination in the private sector workplace in South Africa: Paving the way for Black African women progression to managerial positions' (2021) 21 *IJDL* 48 at 49.
[51] Op cit note 2, the Preamble.
[52] Op cit note 2 s 2 read with s 9(4).
[53]B Fisher, M Biyase. & F Kirsten et al 'Gender wage discrimination in South Africa within the affirmative action framework' (2020) 1 *EDWRG Working Paper* 3.
[54] Op cit note 2 s 2.
[55] Op cit note 2 s 23.
[56] *Maroveke v Talane N.O. and Others* 2021 (10) BCLR 1120 (CC).
[57] Edward Tafirenyika *Decent work: The promotion of equal treatment and opportunity in the South African workforce with regards to gender* (unpublished LLM thesis, North-West University, 2016) 24.

indirectly discriminated against on the grounds of gender.[58] The legislature must enact national legislation that prevents any form of discrimination against any person.[59] Any discrimination based on gender is prohibited unless such discrimination is proven to be fair discrimination.[60]

In this regard, the Constitution does condone treating people differently except for when such discrimination is unfair. *Renier Steyn* and *Leon Jackson* argue that whilst the Constitution prohibits discrimination, it is evident that discrimination in the workplace persists and the victims of discrimination are largely female employees.[61] Moreover, women are still disproportionately discriminated against insofar as hiring, promotions, and remuneration are concerned.[62] This paper aligns itself with *Renier Steyn* and *Leon Jackson's* argument on the basis that whilst the Constitution's main objective is to address the discriminatory practices of the pre-democratic dispensation, it has not fully achieved the aim of protecting women from discrimination in the workplace. This indicates an ongoing challenge.

(b) Employment Equity Act 55 of 1998

The Legislature in purporting to eradicate discrimination in the workplace and give full effect to section 9 of the Constitution enacted the EEA.[63] The EEA was enacted with the main objective of providing employees with equal opportunities, and equal treatment and prohibiting unfair discrimination against employees in the workplace.[64] The EEA recognised the need for equal representation of female employees in the workplace.[65]

Additionally, section 6 of the EEA prohibits any form of direct and indirect discrimination against employees in the workplace based on gender, sex, or marital status. However, section 6 of the EEA allows the employer to make fair discrimination as long as it is consistent with the provisions of the EEA.[66] In the event the female employee believes she was discriminated against and that the discrimination was unfair, the EEA provides a remedy to female employees to complain of unfair discrimination based on gender with the Commission for Conciliation, Mediation, and Arbitration ('the CCMA') within six months from the date of the discriminatory omission or conduct.[67] However, where the employee fails to bring the

[58] Op cit note 2 s 9.
[59] Ibid.
[60] Ibid.
[61] Renier Steyn & Leon Jackson 'Gender-based discrimination during appointments, promotions and remuneration: Views of South African managers' (2014) 38 *SAJLR* 49.
[62] Ibid at 55.
[63] Op cit note 28 s 3.
[64] Divane Nzima & Vusumzi Duma 'The Employment Equity Act (EEA) as an instrument for employment equity in the South African labor market' (2014) 9 *MJSS* 578 at 580.
[65] Ibid.
[66] Op cit note 28 s 6.
[67] Ibid s 10.

application within six months, he or she must make an application for condonation for the late referral of the complaint. Where either party who is part of the proceedings is not satisfied with the outcome of the CCMA, a party may refer the dispute to the labour court within fourteen days of the CCMA award.[68]

For employees to succeed, the employee must prove that the action complained of is irrational and amounts to discrimination based on gender.[69] Whereas, on the other hand, the employer has the onus to prove that remuneration discrimination based on gender is fair.[70] One of the leading cases in respect of the foregoing is *Mdunjeni-Ncula v MEC, Department of Health, and Another*,[71] wherein the applicant, a female applicant, contended that she was discriminated against based on gender in that she was being paid less than her male colleague, (Ngozi), who was employed in a similar position, performing the same work as she did. The court noted that the applicant was comparing her salary with that of Ngozi who had been employed by the department for over thirteen years and the applicant was newly appointed in her position with the department. The court held that Ngozi's thirteen years of experience within the department simply meant that his salary had accumulated over the years during his employment. Therefore, the difference between Ngozi's salary and that of the applicant was justified and rational based on Ngozi's period of service.

Thus, the conclusion reached by the court confirms that more factors, other than just that they are performing the same tasks, must be considered when determining whether the discrimination is fair. At a practical level, an individual who has accumulated experience and additional skills brings more expertise, efficiency, and output to their employer. It is then warranted for them to be paid in proportion to this. Comparatively, depending on the nature of the employment, entry-level employees regardless of their gender would not have access to the benefit of higher income as they do not possess the same expertise as those of experienced employees. Therefore, it is not unfair discrimination to employ and pay different salaries to employees if they acquire different seniority or skills.[72]

Notwithstanding the laudable aims of the EEA, it appears that there are unintended gaps which employers exploit. For example, the EEA does not provide female victims with cost-effective mechanisms for challenging discriminatory policies. All the power is left to the

[68] Ibid.
[69] *Mogopodi v Departmental of Agriculture, Rural Development, Land and Environmental Affairs* 2022 ZALCJHB (52) para 26.
[70] Op cit note 28 s 11.
[71] *Mdunjeni-Ncula v MEC, Department of Health and Another* 2021 (42) ILJ 2393 (LAC).
[72] John Grogan *Workplace Law* 13 ed (2020) 86.

employer to take the initiative to eliminate any form of discriminatory policy and practices based on gender in the workplace.[73] With this as the prerogative step, the EEA does not prescribe direct sanctions that the employer may face if they fail to address any workplace policy or practice that discriminates against female employees.[74] In addition, the EEA does not specifically deal with the provisions that capture equal pay in the workplace. [75]

It is further submitted that it is clear that the EEA leaves the employers with free reign. This is particularly because some jobs are still gendered in that employers still perceive certain categories of jobs as exclusively belonging to males and some to females. It is with this in mind that some employers tend to discriminate against women when recruiting employees.[76] As a result, gender-based discrimination in hiring processes is linked to women's exclusion from promotions and appropriate pay.[77]

The EEA itself does not directly prohibit employers from discriminating against women in the hiring process and promotional opportunities to ascend to top managerial positions.[78] The inability of the EEA to expressly address discrimination against women in the workplace persists at a high level in the private sector where men are still preferred for managerial positions. However, in the public sector, there is a considerable improvement. Women are being promoted to managerial positions at better rates than in the private sector.[79] It is argued that against this backdrop, the EEA has not done enough to address gender-based discrimination in the workplace for as long as the private sector still acts with impunity.

(c) Code of Good Practice on Equal Pay/ Remuneration for Work of Equal Value

In 2015, the South African government issued a Code to guide employers and employees on the practicalities of applying equal pay for equal work in the workplace.[80] Item 2.5 of the Code imposed a mandatory duty on the employer to ensure that all their policies relating to pay or remuneration are in accordance with the principle of equal pay for equal work of the same value.[81] In addition, Item 4.1 of the Code provides that employers must ensure that the terms and conditions of the remuneration in the employment agreement are identical concerning

[73] Op cit note 28 s 5 read with s 6.
[74] Ibid s 60.
[75] Nomagugu Hlongwane 'Commentary on South Africa`s position regarding equal pay for work of equal value' (2007) 11 *AJOL* 72.
[76] Renier Steyn & Leon Jackson op cit note 61 at 54.
[77] Ibid.
[78] Op cit note 28.
[79]Motlhatlego Matotoka & Kolawole Odeku 'Mainstreaming Black Women into Managerial Positions in the South African Corporate Sector in the Era of the Fourth Industrial Revolution (4IR)' (2021) 24 *PER / PELJ* 7.
[80] Op cit note 29 item 2.
[81] Ibid item 2.5.

employees who perform the same work of equal value.[82] However, like the Constitution and the EEA, the Code allows the employer to discriminate against the employees as long as the employer has decided in terms of which he or she is satisfied that having regard to the nature of the work, the qualifications, and skills of each employee that such discrimination is justified.[83]

It follows that employees who are performing the same job and who possess different experience and qualifications are distinguishable in terms of the remuneration they are eligible for. In *Louw v Golden Arrow Bus Service (Pty) Ltd*,[84] the applicant (the employee) approached the Labour Court on the basis that he was being paid less than his colleague. While the court did not make a finding on whether the applicant had been discriminated against, the court focused its assessment on the nature of the work performed by the applicant and the respondent (his college). It also compared their job titles as well as the day-to-day work they performed to ascertain what informed the decision to pay different salaries. The court found that the applicant had failed to prove that he was performing a similar job to the respondent. It further ordered that the applicant should pay the costs of the respondent.[85]

However, the court, respectfully, exceeded the bounds of the extent of being unreasonable. This is in so far as it ordered the employee to pay the employer's costs. It is submitted that a costs order of this nature tends to discourage employees from approaching courts if or when they have a discrimination-based grievance. This limits the right to access courts envisaged in section 34 of the Constitution unduly.[86] The Constitutional Court has stated in *Biowatch* that it is undesirable to mulct a party in a costs order when vindicating a bona fide constitutional right.[87] This is because it discourages genuine litigants from approaching the court purely out of fear of the financial implications. It becomes more pronounced in the context of an employer-employee relationship which is inherently unequal both in terms of bargaining power and financial resources.

It is evident from the Code that employers must ensure that unfair remuneration discrimination based on gender does not find space in the workplace. In this regard, the Code simply complements the EEA.[88] Therefore, where the EEA failed to address gender

[82] Ibid item 4.1.
[83] Ibid item 4.4.
[84] *Louw v Golden Arrow Bus Service (Pty) Ltd* 1999 ZALC.
[85] Ibid para 106.
[86] Op cit note 2 s 34.
[87] *Biowatch Trust v Registrar Genetic Resources and Others* 2009 ZACC 14 para 54 to 60.
[88] Mabathoana *A comparative study on the principles of equal pay for equal work in South Africa in the context of gender discrimination* (unpublished LLM thesis, North West University) available at *https://dspace.nwu.ac.za/bitstream/handle/10394/34121/29711355%20Mabathoana%20MGM.pdf?sequence=1&isAllowed=y*, accessed on 01 February 2024.

discrimination in the workplace, the Code cannot be expected to do so. The Code does not add much to what is provided in the EEA.[89]

CHAPTER TWO

V CANADIAN INTERNATIONAL LAW OBLIGATIONS

Canadian legislation and policies that purport to eliminate gender-based discrimination:

> 'Are consistent with Canada's international obligations under ILO Convention 100 on Equal Remuneration, the ILO Discrimination (Employment and Occupation) Convention 111, the International Convention on the Elimination of All Forms of Racial Discrimination, the U.N. CEDAW, and the recent Beijing Declaration of the Fourth World U.N. Conference on Women.'[90]

Article 7 of the Declaration guarantees everyone the right to be treated equally without any form of discrimination.[91] This study applies a contextual and purposive interpretation of Article 7 of the declaration to extend its protection to female employees in the workplace to be treated equally without any form of discrimination based on gender in hiring, promotion, and remuneration.

Article 23 of the Declaration obligates Canada to ensure that all employees in Canada are enjoying, without any unfair discrimination and their right to be paid equal remuneration for equal work.[92] Moreover, the government of Canada ratified the CEWAD in 1981 to eliminate gender inequality in the workplace.[93] In compliance with the obligations that are imposed on Canada by CEDAW, Canada reports every four years to the United Nations Committee on the Elimination of Gender-based Discrimination against Women in the Workplace ('the UN Committee'), and among others, in 2016 the Canadian government reported to the UN Committee its priority plan to implement federal pay equity legislation.[94] In June 2022, the Canadian government made its 10th report to the UN Committee, and in that report, the Canadian government reported that after the 2016 report, the Canadian government

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[89] A van Niekerk, N Smit & MA Christianson et al *Law@work* 5 ed (2019) 150.
[90] Mary Cornish 'Employment and Pay Equity in Canada--Success Brings Both Attacks and New Initiatives' (1996) 22 *CUSLJ* 265 at 267.
[91] Op cit note 16 art 7.
[92] Ibid art 23.
[93] Mary Cornish op cit note 90 at 268.
[94] 'Federal gender equality laws in Canada' available at *https://www.international.gc.ca/trade-commerce/gender_equality-egalite_genres/lois_can_gen_eq_laws.aspx?lang=eng*, accessed on 18 August 2024.

enacted the federal Pay Equity Act, which came into force in August 2021; as a stepping stone towards addressing the gender pay gap.[95]

In 1991 the Canadian government regionally ratified the Inter-American Convention on the Granting of Civil Rights to Women, and the Inter-American Convention on the Granting of Political Rights to Women; [96]apart from guaranteeing the right to equality between men and women, these treaties do not deal with the elimination of gender-based discrimination in the workplace. However, Canada does not limit itself to applying international law and regional law within its jurisdiction. The Canadian appeal court has found that the Canadian courts should always take into account the binding international law instruments that Canada had ratified in interpreting its legislation and its Charters and where the international instruments that are ratified by Canada do not provide the answer, the courts should not limit themselves they should apply the international instruments that Canada has not ratified as a persuasive method of interpretation and apply such none ratified international instrument.[97]

This study argues that the Canadian government has an established international law obligation to prohibit gender-based discrimination in the workplace. However, it will be discussed below that just like South Africa, Canada has not reached its aim of eliminating discrimination against women.

VI LEGAL PROTECTION AGAINST DISCRIMINATION BASED ON GENDER IN THE WORKPLACE UNDER CANADIAN LAW

Women in Canada continue to experience discrimination through gendered wage gaps, and lack of access to promotions and employment benefits.[98] Similar to South Africa, Canada has enacted policies and legislation aimed at addressing discrimination against women by calling the employers and trade unions to join forces in eliminating discrimination against women in respect of hiring, remuneration, and promotion.[99] For comparative purposes, it is important to critically analyse Canadian law and its impact on fighting systematic discrimination against women particularly on the pay gap.

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[95]'Tenth periodic report submitted by Canada under article 18 of the Convention, due in 2020' available at *https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CEDAW%2FC%2FCAN%2F10&Lang=en*, accessed on 18 August 2024.

[96] 'Human rights treaties' available at *https://www.canada.ca/en/canadian-heritage/services/canada-united-nations-system/treaties.html*, accessed on 18 August 2024.

[97] *Quebec (A.G.) V. 9147-0732 Québec Inc* 2020 (3) S.C.R.

[98] Parveen Nangia & Twinkle Arora 'Discrimination in the Workplace in Canada: An Intersectional Approach' (2021) 46 *CJS* 147 at 147.

[99] Mary Cornish op cit note 90 at 267.

(a) The Canadian Constitution of 1867 with Amendments through 2011

As a starting point, the study analyses the constitutional rights of workers under the Canadian Constitution. The Canadian Constitution of 1867 with Amendments through 2011, ('the Canadian Constitution') declares that the Constitution of Canada is the supreme law of the country, and any other law that is contrary to the provisions of the Canadian Constitution is invalid and void.[100] Notably, unlike the Constitution which went a step further and declared conduct that is contrary to the provisions of the Constitution to be invalid,[101] the Canadian Constitution does not do so.[102] Regard being had to section 15(1) of the Canadian Constitution which provides that:

> 'Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.'[103]

It is noteworthy, contrary to section 9(3) of the Constitution which in its prohibition of unfair discrimination, expressly mentions gender,[104] section 15(1) of the Canadian Constitution does not specifically use the word gender when it prohibits discrimination but mentions sex.[105] However, section 28 of the Canadian Constitution, which is titled 'Rights guaranteed equally to both sexes'[106], provides that all the rights and freedoms granted in the Canadian Constitution are guaranteed to both males and females equally.[107] The Canadian legislature enacted further legislation and policies to implement the protection against gender-based discrimination in the workplace. The said legislations are discussed below in detail. It is almost universally accepted that gender is no justification for discrimination. Moreover, section 15 of the Canadian Constitution is often used to provide solutions where there is an employment dispute in general between employer and employee.[108]

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[100] Canadian Constitution of 1867 with Amendments through 2011 s 52.
[101] Op cit note 2 s 2.
[102] Op cit note 100 s 51.
[103] Ibid s 15(1).
[104] Op cit note 2 s 9 (3).
[105] Op cit note 100 s 15.
[106] Ibid s 28.
[107] Ibid.
[108] Thobeka Dube *A critical analysis of the 'equal pay for equal work or work of equal value' provision as it relates to the South African labour market* (Unpublished LMM thesis, University of KwaZulu-Natal, 2017) 34.

(b) Canadian Human Rights Act R.S., 1985, c. H-6

This section analyses the legislation that prohibits discrimination in Canada. Much like the Canadian Constitution, section 3 of the Canadian Human Rights Act, R.S., 1985, c. H-6 ('the Canadian Human Rights Act') prohibits discrimination based on gender. The Canadian Human Rights Act states that discrimination based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability, and conviction for which a pardon has been granted is prohibited.[109] Section 10 of the Canadian Human Rights Act further prohibits discrimination by the employer when hiring and promoting employees.[110] Moreover, section 11(1) of the Canadian Human Rights Act provides that it is an act of discrimination if the employer decides to have a policy of wage differentiation between female and male employees who are employed in the same work environment and performing work of equal value.[111]

The Canadian Human Rights Act gives the employer the power to assess the equal value of work performed by the employees in the workplace, and in assessing, the employer is compelled to consider the skills, effort, and responsibility required in the pursuit of the work and the conditions under which the employment is performed.[112]

Furthermore, section 11(4) of the Canadian Human Rights Act, allows the discriminatory practice of paying different salaries to male and female employees, provided that such discrimination complies with the requirements issued by the Canadian Human Rights Commission ('the Commission'). This is in terms of section 27(2) of the Canadian Human Rights Act which determines reasonable factors that justify a difference in pay.[113] The Commission may on application or *mero motu* issue a guideline stating the manner in which according to the Commission's opinion the provisions of the Human Rights Act apply in the circumstances.[114]

In 1986, in discharging its obligation in terms of section 27(2) of the Canadian Human Rights Act, the Commission issued equal wage guidelines ('the Guidelines') outlining factors that justify different wages between employees for work of equal value.[115] In terms of section 16 of the Guidelines, an employer may differentiate the wages of male and female employees. However, the Employer may do so only after assessing performance rating, seniority,

[109] The Canadian Human Rights Act, R.S., 1985, c. H-6 s3.
[110] Ibid s 10.
[111] Ibid s 11 (1).
[112] Ibid s 11 (2).
[113] Ibid s 11(4).
[114] Ibid s 27(2).
[115] Equal Wages Guidelines of 1986 (SOR/86-1082) current to June 19, 2024.

downgrading of the position of the employee; rehabilitation assignment (where the employer previously paid more remuneration than the work performed when the employee could not work because she was recovering from injuries or sickness); where the employee was demoted because she could not perform in terms of her employment contract due to factors beyond her powers (e.g. sickness). The employer may pay an employee who is deployed or employed in a temporary training program a different salary than that of the employee who is employed in that position permanently. [116]

This paper argues that the Guidelines outlined by the Commission are too wide and open for abuse by the employer. They allow the employer flexibility to assess whether to discriminate against employees or not. The Guidelines` exemptions set out above should be narrowed to provide the effectiveness of the Canadian Human Rights Act in that 'their application must be gender-neutral as well as 'logical, justifiable and suitable in the context of their management of compensation under normal conditions'.[117]

Despite the enactment of the Canadian Human Rights Act and its intended change, gender discrimination in the workplace is still evident and progress is fairly slow.[118] Due to this slow progress of the change sought by the enactment of the Canadian Human Rights Act, a Pay Equity Task Force (' Task Force') was established in 1999, the purpose of the Task Force was to review section 11 of the Canadian Human Rights Act. In its report, the Task Force concluded that section 11 of the Canadian Human Rights Act was ineffective in meeting its intended purpose of ensuring that women are remunerated the same as men for similar work.[119] The Task Force report also found that the process of submitting the complaint and hearing is prolonged, often expensive, and emotionally draining for the same employees whose remuneration is at issue.[120] The Task Force further found that history has shown that equal remuneration legislation could not rely on the belief that the majority of employers would voluntarily implement and take steps to achieve equal remuneration and as a result, the current system has not been effective in ensuring that employers implement equal remuneration in the workplace.[121]

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[116] Ibid s 16.
[117] Revital Goldhar *Restructuring Pay Equity in the Era of the New Economy* (unpublished LLM thesis, University of Toronto, 2004) 128.
[118] Alisha Karim 'Moving Towards Pay Equity in Canada' (2018) 5 *CPPP* 26.
[119] 'Pay Equity Task Force Final Report 2004' available at *https://publications.gc.ca/collections/Collection/J2-191-2003E.pdf*, accessed on 20 August 2024, at 97.
[120] Ibid at 100.
[121] Ibid at 108.

Provisions of section 11 of the Canadian Human Rights Act, though intended to advance equal remuneration, have not provided an actionable mechanism to achieve its purpose.[122] The 2017 pay gap discrimination statistics showed evidence that women who work the same job for the same amount of hours including overtime are still paid less than USD 0.74 for every 1 USD compared to their male counterparts.[123] In most cases, women tend to work overtime so that they cover the salary deficit.[124] Moreover, according to *Kate McInturff*, irrespective of the nature of the employment, women are being paid less compared to men across all occupations.[125]

(c) Canada Labour Code R.S.C., 1985, c. L-2

The relationship between the employee and employer in Canada is regulated by the Canada Labour Code, R.S.C., 1985, c. L-2 ('the Canadian Code').[126] In terms of section 182(1) of the Canadian Code, in determining whether the equal wage discrimination that is prohibited in terms of section 11 of the Canadian Human Rights Act has taken place, sections 249, 250, 252, 253, 254, 255 and 264 of the Canadian Code are applied, and paying attention to prevailing circumstances and the fact that employer must refrain from discriminating against employees.[127]

It is necessary to analyse the procedure that is followed by the Canadian government in terms of section 182 of the Canadian Code in determining whether remuneration discrimination has taken place in the workplace. Firstly, section 249 of the Canadian Code provides that subject to the direction indicated by the Minister, the Head of Compliance and Enforcement (' the Head') may delegate to any qualified person, the functionaries that the Head is empowered to exercise, to inspect the payroll, and books of the employers that relate to the employee's wages and may request the employer to provide record either in writing or orally to inspect the wages paid to the employee.[128]

Secondly, in terms of section 250 of the Canadian Code, the Head may obtain all the information required for inspection under oath.[129] Thirdly, section 252 of the Canadian Code

[122] Alisha Karim op cit note 118 at 26.
[123] Ibid.
[124] Melissa Moyser 'Women and Paid Work' available at *https://www150.statcan.gc.ca/n1/en/pub/89-503-x/2015001/article/14694-eng.pdf?st=NuNGilGu,* accessed on 28 January 2024.
[125] Kate McInturff 'Women's work: what's it worth to you?' available at, *https://policyalternatives.ca/publications/monitor/women%E2%80%99s-work-what%E2%80%99s-it-worth-you*, accessed on 30 January 2024.
[126] Canada Labour Code, R.S.C., 1985, c. L-2.
[127] Ibid s 182(1).
[128] Ibid s 249.
[129] Ibid s 250.

compels the employer to hand to the Head any information that relates to the wages and hours worked by the employees when the Head requests the information.[130] Fourthly, section 153 of the Canadian Code, provides that when an employer is required to provide the information to the Head, such employer must serve the information by way of personal service or registered mail or by any other method so prescribed.[131]

Further, section 254 of the Canadian Code, provides that except where the order or the Minister exempts the employer when an employer makes payment to the employee, the employer must provide the employee with a written payment statement, stating the number of hours worked, the amount paid, the period for which payment was made, rate, deductions made, and the sum paid to the employee.[132]

Furthermore, section 255 of the Canadian Code provides that where the Minister finds that two or more employers, with common control or direction, are conducting associated or related federal works, undertakings, and businesses; the Minister may issue an order declaring the employers to be the single employer and the federal works, undertakings and businesses to be single federal work, undertaking, business, and further order the employers become jointly liable to the salary of the employees employed in the federal works, undertakings, and businesses.[133]

Lastly, section 264 of the Canadian Code provides that the governor in council may make regulations that compel the employers to always have with them the records of the wages paid to the employees.[134] Therefore, unlike South Africa, Canada through the Canadian Code provides a proper mechanism that could be used to detect and prohibit any possible wage discrimination based on the fact that the government also takes charge of inspecting any possible wage discrimination in the workplace. Moreover, unlike South Africa, section 256 of the Canadian Code provides the penalties that may be imposed against the employer who contravenes the Canadian Code by discriminating against female employees by paying them less than what they deserve.[135]

VII EMPLOYMENT EQUITY ACT S.C. 1995, c. 44

Unlike South Africa, Canada did not experience apartheid, and its gender equality mandate was already on the agenda in 1956 when it enacted the Female Employees Equal Pay Act, S.C.

[130] Ibid s 252.
[131] Ibid s 253.
[132] Ibid s 254.
[133] Ibid s 55.
[134] Ibid s 264.
[135] Ibid s 256.

1956 ('the Female Equal Pay Act').[136] The Female Equal Pay Act had the objective of prohibiting employers from employing female employees at a lower wage rate compared to that of their male colleagues.[137]

The Canadian government after mounting pressure from the female group of employees who were subjected to an extensive gender pay gap later introduced the Employment Equity Act S.C. 1995, c. 44,[138] ('the Canadian Employment Equity Act') with the supplementary purpose of ensuring that all employees are provided equal opportunities and treated equally.[139] Notably, the Canadian Employment Equity Act compels the employer to conduct investigations in the workplace to determine any discriminatory employment conditions against vulnerable employees. Once the employee has determined that there are discriminatory employment conditions, the employer must develop an employment equity plan that consists of polices-practices, and measures that will be enforced to address all the unfavourable conditions and discriminatory practices.[140]

Once the employer has developed the employment equity plan, the employer is obligated to implement the employment equity plan.[141] Where the employer is not implementing the employment equity plan, the Commission has the power to direct the employer to implement the equity plan.[142] *Kim England* and *Gunter Gad* argued that there is a limited noticeable success that the Canadian Employment Equity Act has achieved and it is difficult to single out its impact in the workplace.[143] This argument was endorsed by *Joanne Leck* who argued that the Canadian Employment Equity Act was introduced to eliminate the discrimination of the gender pay gap, but it has not been successful in doing so, its mechanism is not effective.[144]

Moreover, there are three main challenges facing the success of the Canadian Employment Equity Act and those are: traditional male employers who do not believe in equality are resting equality practices in the workplace;[145] the employers have criticised the mechanism of the implementation of the provisions of the Canadian Employment Equity Act

[136] Marie Drolet & Karen Mumford 'The Gender Pay Gap for Private Sector Employees in Canada and Britain, IZA Discussion Papers, No. 3957, Institute for the Study of Labor (IZA), Bonn' available at *https://www.econstor.eu/bitstream/10419/35600/1/591245167.pdf*, accessed on 11 September 2024.
[137] Ibid.
[138] Kim England & Gunter Gad 'Social policy at work? Equality and equity in women's paid employment in Canada' (2002) 56 *GeoJournal* 281 at 286.
[139] Employment Equity Act S.C. 1995, c. 44 s2.
[140] Ibid s 9 read with s 10.
[141] Ibid s 12.
[142] Ibid s 26.
[143] Kim England & Gunter Gad op cit note 138 at 286.
[144] Joanne Leck 'Making Employment Equity Programs Work for Women' (2002) 28 *JSTOR* 86 at 92.
[145] Ibid at 92.

on the basis that is costly to implement it;[146] Lastly, employers perceive female employees hired under the auspices of employment equity requirements to be less competent and less productive compared to male employees.[147]

Nevertheless, in 2020, the Canadian government announced the funding of a program that will review the Canadian Employment Equity Act to address the barriers that are still faced by marginalised female employees in the workplace.[148] The President of the Treasury Board supported this sentiment in her 29th annual report to the parliament in 2022.[149]

In addition to the above, with all the legislation and the fact that unlike South Africa which has a younger Constitution, Canada in 2020 was ranked number eight in unequal pay based on gender discrimination 'out of 43 Organization for Economic Cooperation and Development'.[150]

(a) Canadian Landmark Case and the Pay Equity Act S.Q.2009

In discussing equal pay in the Canadian context, the case of *Quebec (A.G.) v. Apts*[151] is instructive for its implications on the Pay Equity Act. In this matter, the supreme court of appeal in 2018, for the first time had to decide on the constitutionality of the Act to amend the Pay Equity Act, S.Q. 2009 ('Act to amend the Pay Act'); and women of the 2018 generation won their first-ever gender and sex pay gap discrimination case. Per Abella J writing for the majority, the court noted that the impugned Pay Act emanates from 1996 when Quebec, a Canadian province, decided to adopt the 1996 Pay Equity Act ('the Pay Act'), which intended to provide protective measures against remuneration discrimination against women.[152]

The majority court noted that the Pay Act imposed the duty on the employer to provide employees with equal pay of equal value of work. However, ten years following the enactment of the Pay Act, the Canadian government through the Quebec Province found that enforcement of the Pay Act has not met its expectations, in that 47% of employers had not established the pay equity mechanism and 38% of employers had not even initiated the commencement of the pay equity plan. For this reason, the government decided to reduce the obligation of the

[146] Ibid at 93.
[147] Ibid at 94.
[148] 'Employment Equity in the Public Service of Canada 2020 –2021' (published in ISSN: 1926-2485 of 01 December 2023) available at *https://www.canada.ca/en/government/publicservice/wellness-inclusion-diversity-public-service/diversity-inclusion-public-service/employment-equity-annual-reports/employment-equity-public-service-canada-2020-2021.html*, accessed on 11 September 2024.
[149] Ibid.
[150] Mostafa Shayangogani *Gender-Based Pay Inequality in the Canadian Insurance Companies (*unpublished LLD dissertation, Walden University, 2023) 1.
[151] *Quebec (A.G.) vs Apts* 2018 (1) S.C.R.
[152] Ibid para 11.

employer to maintain pay equity with the hope that it would improve compliance with the Pay Act by adopting the Act to amend the Pay Act.[153]

The majority court noted that the adoption of the Act to amend the Pay Act replaced the continuous duty imposed on the employer to maintain pay equity with the mandatory obligation to subject itself to payment audits every five years.[154] According to the Act to amend the Pay Act, in circumstances where the employer comes to realise that the audit shows the failure to maintain pay equity on his end, the employer is expected to rectify the wages indifference in the future, except in a situation where the employer has not acted in good faith then the employer was not obligated to compensate employees for wages injustices that prevailed between the audits.[155]

The constitutionality of the amendment of the Pay Act was challenged on the basis that the amendment violates the right to equality in terms of section 15 of the Canadian Charter.[156] Thus, the crucial issue was whether the intended amendment of the Pay Act was unconstitutional against section 15 of the Canadian Charter. The court noted further that although the amendment was intended to address the discrimination suffered by women, it however, denies women the benefits that are enjoyed by men, in that men receive compensation by being men, whilst women under the same amendment have to wait for five years periods of pay inequality and only receive equal compensation when their employer voluntarily decide to pay them equal to men. [157]

The majority judgment held that the amendments breached section 15 of the Canadian Charter and as such they are invalid on the basis that the employer`s obligation to compensate employees for wage inequities that prevailed between the audits perpetuated pay inequality against women and led women to financial losses.[158]

According to *Fay Faraday*, the majority judgement presents two steps backward because it ought to have provided guidelines for dealing with discrimination in the future, and the Canadian government's persistent resistance to the majority judgement presents its reticence to ensure that women are equal to men and can access justice. For as long as the Canadian government rejects the legal position of the majority judgement there will never be any success

[153] Ibid para 16.
[154] Ibid para 18.
[155] Ibid para 19.
[156] Ibid para 20.
[157] Ibid para 38.
[158] Ibid paras 22 read with 23.

in achieving equality.[159] This paper welcomes the decision reached by the majority judgement in that the court recognised that women continue to suffer wage discrimination at the hands of their employers.

CHAPTER THREE

VIII FINDINGS AND RECOMMENDATIONS

The writing concludes that the South African Constitution and its legislations are much younger than those of Canada; however, South Africa has advanced beyond Canada. This is particularly evident in the public sector. It is not recommended that South Africa should slow its pace of eliminating gender discrimination in the workplace.

The SAHRC in its 2016 report recommended that employers in South Africa should have internal complaint mechanisms that employees may follow to report any unfair discrimination.[160] It is argued that this remedy is not effective because the perpetrator of gender-based discrimination is the employer. Therefore, it will not be effective for the employee to report the employer to the same employer who is the perpetrator. This simply means that the employer would be a referee and a player in the same game. The EEA already provides the employees with the mechanism to complain to the CCMA about any suspected gender-based discrimination in the workplace.[161] Thus, it is recommended that instead of the employee lodging a complaint with the employers, employers should encourage the employees to lodge a claim with the CCMA if they suspect gender-based discrimination in the workplace.

In ensuring the enforcement of the EEA, the EEA grants labour inspectors the powers to investigate any contravention of the EEA and to issue a compliance order against the employer who contravenes the EEA.[162] However, the labour inspector does not categorically deal with the complaints of gender-based discrimination.[163] The study argues that the EEA must be amended to provide the labour inspector the power to inspect any possibility of gender-based discrimination in the workplace and to further issue the order that compels the employer to rectify any discrimination conduct. This amendment would lead to less cost-effectiveness for the employees, as employees would not have to be out of pocket in litigating against the employers.

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[159] Fay Faraday 'One Step Forward, Two Steps Back? Substantive Equality, One Step Forward, Two Steps Back? Substantive Equality, Systemic Discrimination and Pay Equity at the Supreme Court of Systemic Discrimination and Pay Equity at the Supreme Court of Canada Canada' (2020) 94 *SCLR* 34.
[160] Op cit note 43 at 91.
[161] Op cit note 28 s 10.
[162] Op cit note 28.
[163] Op cit note 43 at 91.

The South African government should take charge of implementing the EEA to eliminate gender-based discrimination in the workplace.[164] Moreover, the EEA must be amended to provide provisions that deal with the stronger sanction that would be imposed on the employer who contravenes the EEA by discriminating the women; this will ensure accountability for the employer to implement the Act.[165]

In 2023, the Democratic Alliance, ('the DA') a political party in South Africa, called upon the South African ruling party, the African National Congress ('the ANC') to amend the South African Companies Act to include provisions that make it a mandatory for employers to disclose any pay gap between employees of different genders in their companies. According to the DA, this would guarantee transparency in the workplace.[166] However, the ANC has not engaged with this call. Instead, the ANC argued that the amendment of the Companies Act would be debated in the parliament at a later stage.[167] It is submitted that the course of action the DA proposed could potentially be more effective. The cause of action is commendable in that it will ensure transparency in the pay gap, promotion, and employment. In this way, the employees will also be able to detect any gender-based discrimination in the workplace.

Moreover, legislation must be enacted to compel companies to disclose separately the issue of the pay gender gap and the pay audit during collective bargaining as this would put the trade unions and employees in an advantageous position to detect any discrimination in the workplace; and the employer that is found to be discriminating against women should be punished by imposing levies against that employer. [168]

In Canada, strong implementation of the law is recommended to improve the legal protection against gender discrimination in the workplace. Moreover, the Canadian government has recognised the need to eliminate gender-based discrimination and it is striving to find legal protective measures to prohibit discrimination in the workplace.[169] However, the current Canadian legislation and Guidelines are far from addressing the pay gap discrimination based on gender in Canada.[170]

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[164] Wandile Thabethe *An investigation of the implementation of the Employment Equity Act (No. 55 of 1998) of South Africa by organisations in Cape Town in the Western Cape* (unpublished Masters of Social Science, University of Cape Town, 2020) 69.
[165] Ibid.
[166] Dean Macpherson 'ANC rejects opportunity to address gender pay gap – Dean Macpherson' *Politics web* 15 November 2023, Available at *https://www.politicsweb.co.za/politics/anc-rejects-opportunity-to-address-gender-pay-gap*, accessed on 05 February 2024.
[167] Ibid.
[168] Anita Bosch & Shimon Barit 'Gender pay transparency mechanisms: Future directions for South Africa' available at *https://doi.org/10.17159/ sajs.2020/6772*, accessed on 05 February 2023.
[169] Mary Cornish op cit note 90 at 274.
[170]Marie Drolet & Karen Mumford op cit note 136 at 20.

It is recommended that the synergistic relationship between the employers and the Canadian government be improved because when these stakeholders work together, they can eliminate the wage gap and gender-based discrimination in the workplace.[171] Secondly, sharing power between the employee and the employer will create a healthy working environment, eliminate discrimination, and accommodate diversity. [172] Thirdly, trade unions should continue to use their bargaining power to fight for women employees who are faced with discrimination based on their gender as they have done so before.[173] Fourthly, the study recommends that the Canadian government adopt protective measures similar to the ones that the South African government adopted when it amended the EEA which was followed by the issuing of the Code that provides the provision that compels employers to have employment contracts that provide identical terms and conditions of equal pay for equal work irrespective of the gender.[174]

As discussed above, the Canadian government uses a proactive method in enforcing compliance with its laws in that the government is active in enforcing its laws, whilst South Africa uses a complaint-based method in which employees are expected to complain of any discrimination in the workplace with the CCMA and thereafter with the labour court, and of which it has high legal costs implications. It is suggested that both countries can learn from each other by implementing the government's proactive approach and complaint-based approach in their jurisdiction.[175]

Lastly, as discussed above both systems are founded on the rule of law, Constitutional sovereignty, and right to equality. These systems allow fair employment discrimination under certain limitations. Under the South African system, fair discrimination is narrowed upon the application of section 9 of the Constitution and its limitations in terms of section 36 of the Constitution, those limitations include possession of different seniority and skills by the employees.[176] In Canada, fair discriminations are determined by the Guidelines; however, the exemptions provided to the employer in the Guidelines are too broad.[177] It is recommended that the Guidelines be narrowed to allow strictly fair discrimination.[178] In this way, fair discrimination in Canada should be limited to seniority, experience, and skills.

[171] Mary Cornish op cit note 90 at 276.
[172] Ibid.
[173] Ibid.
[174] Op cit note 28 s 6.
[175] Thobeka Dube op cit note 108 at 37.
[176] Op cit note 2 s36.
[177] Revital Goldhar op cit note 117 at 128.
[178] Ibid.

IX CONCLUSION

Both South Africa and Canada recognised the need to eliminate gender-based discrimination in the workplace, and in doing so they enacted legislation that will see women not being discriminated against in hiring, promotion, and remuneration. Whilst the laws in these countries are in operation, discrimination against women is still at large in the workplace. It is clear that the problem is not the lack of enactment of the comprehensive law in these countries but the implementation of the law. Both countries leave the implementation of the laws to the employers instead of taking charge and implementing their laws. The effect of this is that both of these countries have not fully discharged their international law obligations to eliminate gender-based discrimination in the workplace. Therefore, it is concluded that, while both countries have identified the issue of gender-based discrimination in the workplace, and enacted laws and policies to address this problem, they still need to address the enforceability of these legislations and policies to ensure that their intended purpose is achieved, and males and females are treated and remunerated the same in their workplaces.

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