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The Vertical Effect of Section 27 of the Employment Equity Act

Dr Ruediger Helm

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THE VERTICAL EFFECT OF SECTION 27 OF THE EMPLOYMENT EQUITY ACT

Dr Ruediger Helm

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Contents

Abstract

As a legacy of Nelson Mandela's presidency, South African law includes a provision calling for the elimination of disproportionate vertical income differentials. The provision - section 27 of the Employment Equity Act (EEA) —is part of the affirmative action chapter of the EEA and addresses vertical income inequality. This law, however, seems to be invisible in the everyday reality of South Africa. According to the *Global Wage Report 2014/2015* of the International Labour Organization (ILO), South Africa is, in fact, one of the most unequal societies in the world. The provision to correct this is in place. All that is now required are the necessary steps to put it into practice.

Vertical pay discrimination means 'disproportionate income differentials' between the occupational levels. The principles for equality are embedded in ILO Conventions 111 and 100. The South African approach was to provide a provision addressing vertical pay discrimination as part of its affirmative action legislation. The provision provides the necessary guidelines to indicate how legal tools should be used to close the gap. Disproportionate income differentials have to be reduced progressively, resulting in a proportionate wage structure from top to bottom. These tools include collective bargaining, the implementation of norms and benchmarks set by the Employment Conditions Commission (ECC), or other effective instruments which may be combined with occupational training.

This monograph describes in detail the legislation process for this provision and demonstrates that s 27 of the EEA takes a vertical approach. The provision addresses vertical income differentials. This original purpose was not changed in the 2013 amendment of s 27 of the EEA.

Preface

Nothing happens by itself and very few things are permanent.[1]

Why is there so much legislation and so little outcome? Guy Ryder, Director-General of the ILO, recently reflected on this question:

> [W]hat we want to do is to answer the question which we all need to ask: Why after decades of legislation decades of advocacy for equal pay and against gender discrimination the gender pay gap worldwide is still around 20 percent and shows no signs of closing and why women's participations rights in our labour forces are about 25 percentage points below those of man. What do we need to do, more of the same or something different? Help us to answer that question![2]

Equal pay legislation is mostly designed to address wage discrimination on a horizontal level. Equal pay for equal work — or work of equal value — is a common feature in the equality laws of countries around the world. A second common feature is the creation of rights upon which individuals may directly rely before the courts by virtue of national law. Both tools are limited in their application. The concept of 'work of equal value' requires proof: but how can work of equal value be proven?[3] Equal value would mean that both the claimant and a comparator work on the same level. It requires consensus about the number and design of the wage levels. The individual approach requires a claimant, and is unable to address discrimination as a system, for it is designed to remedy an individual wrong.

> [W]age gaps between men and women, and between nationals and migrants, remain significant and are only partly explained by differences in experience, education, occupation and other labour market characteristics. Implementing effective anti-discrimination policies, alongside other policies that address the underlying causes of these wage gaps, is a concrete way to progress toward greater social justice and fewer inequalities.[4]

As Guy Ryder mentioned at the Uni Global Congress of December 2014, the world has had laws to reduce the gender wage gap for more than forty years and yet the wage gap has not been closed. The ILO developed 'Centenary Initiatives' with which it hopes to generate answers and ideas up till 2019 (the 100th year of its existence). One of these, 'The ILO Women at Work Centenary Initiative'[5] ,asks why the legal methods developed to date to reduce the gender wage gap have not been effective enough.

This monograph discusses an innovative provision of the South African equality law that was designed to address systemic discrimination. Section 27 of the Employment Equity Act (EEA) overcomes the difficulties faced by an individual entitlement and aims to address directly systemic vertical income inequality. This concept does not need a claimant, proof or a comparator to demonstrate inequality. It has the potential to serve, globally, as a model for the reduction of systemic imbalance wherever it appears.

This text also provides some insight into South African legislation and linked international legal provisions addressing vertical inequality in the workplace. It outlines the scope of these provisions and uses this as a basis to propose further scientific, political, legal and social debate, as well as the need for further developments toward both a South African and an international approach.

1. What the numbers tell us

1.1 Persistent inequality

South Africa is one of the world's most unequal societies with a Gini coefficient about 0.7.[6] A Gini index of 0 represents perfect equality; an index of 1, total inequality. Total inequality would mean that all income goes to one person and none to the rest. In comparison with the South African coefficient of about 0.7, Denmark has a Gini coefficient of 0.25, France of 0.31, Turkey of 0.41 and Mexico of 0.48.[7] The average figure of the member states of the Organization for Economic Cooperation and Development (OECD) is 0.32.[8]

Income inequality has not improved much, if at all, since the end of apartheid. Bhorat at al. state that: 'While inequalities in public services have been reduced, income inequality has increased, and poverty levels have remained stagnant.'[9] Green and Leibbrandt come to the same conclusion, namely that earnings inequality has 'increased in South Africa'[10] since 1994.

> While the estimates of the development since the fall of apartheid were slightly different, the noted trends are similar. It is reported that a worker with a monthly income of R 5 700 has to work for 93 years to receive the average annual bonus of a director of Amplats (Anglo American Platinum Limited).[11] The ILO and Vic van Vuuren, the director of the ILO office in Pretoria, are concerned about this development. Massie et al. state in respect of executive remuneration: 'Perhaps a less well-known fact is that, even by global standards, South African executives are remunerated at extraordinarily generous levels'.[12]
>
> '[I]f you look at Brazil and India, the Gini co-efficient … has at least moved – not much, but there is change,' says Van Vuuren. 'In South Africa it hasn't moved at all. That is an indictment on us.'[13]

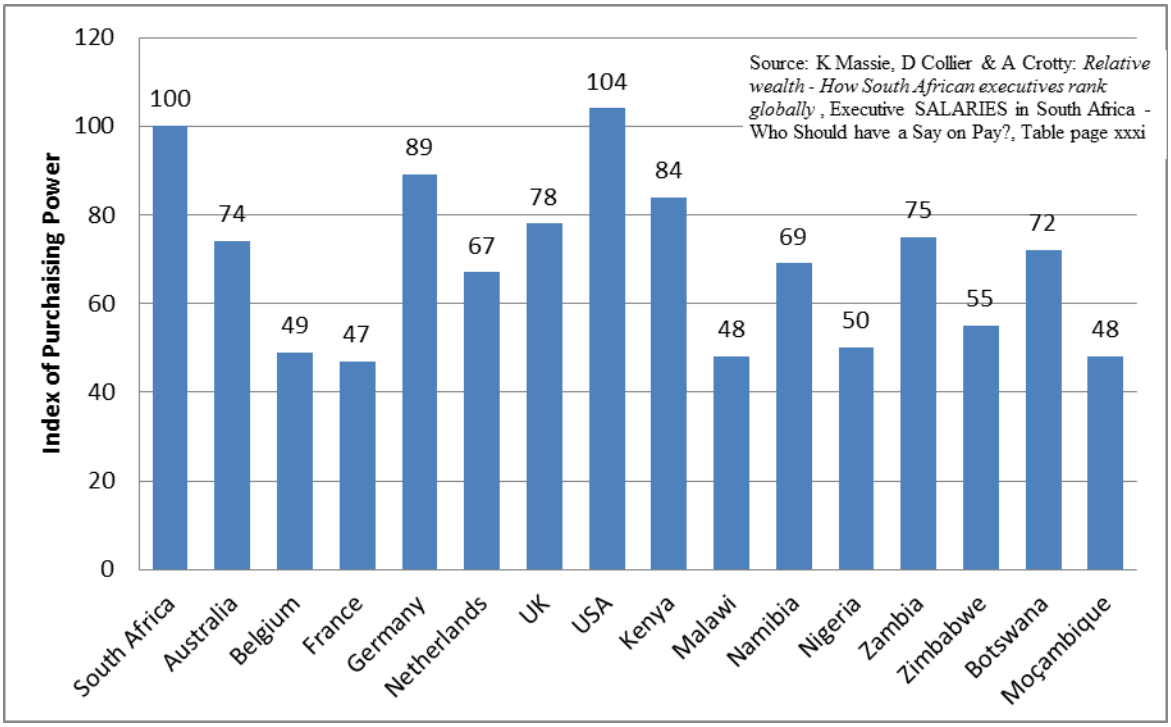


Table 1: Management remuneration by comparison

> The Khayelitsha Commission Report states in reference to the research into the average income in this area in 2013 that: '…the median monthly income was R 2 116 for employed man and R 1 526 for employed women'.[14]

While South African executive remuneration leads in relation to international comparison, the remuneration of low-income groups has remained extremely low. Trends in average wages and the role of wages in income inequality are explored in the ILO *Global Wage Report 2014/2015: Wages and Income Inequality.* In a consideration of wages in both developed and emerging and developing countries, the data on South Africa shows reduced or negative real wage growth and significant inequality between the bottom and the top wage earners. The ILO measures 'top–bottom' income inequality by measuring the distance between the top and bottom deciles of income distribution using the so-called D9/D1 ratio. This methodology identifies ten income groups each representing the income of 10 per cent of the workers, beginning with the highest 10 per cent of income recipients.

10 % lowest wages	10 % 2nd-lowest wages	10 % 3rd-lowest wages	10 % 4th-lowest wages	10 % 5th-lowest wages	10 % 5th-highest wages	10 % 4th-highest wages	10 % 3rd-highest wages	10 % 2nd-highest wages	10 % highest wages
D1		D3		D5		D7		**D9**	

Table 2: The D9/D1 ratio

The threshold value between the 10 per cent of the highest and the 10 per cent of the second-highest income is D9; the threshold between the lowest and the second-lowest income group is the threshold D1. The ratio between these thresholds is used to measure the top–bottom inequality.

Top–bottom inequality of emerging and developing economies over the past decade (D9/D1 ratio) ILO *Global Wage Report 2014-15*[15]

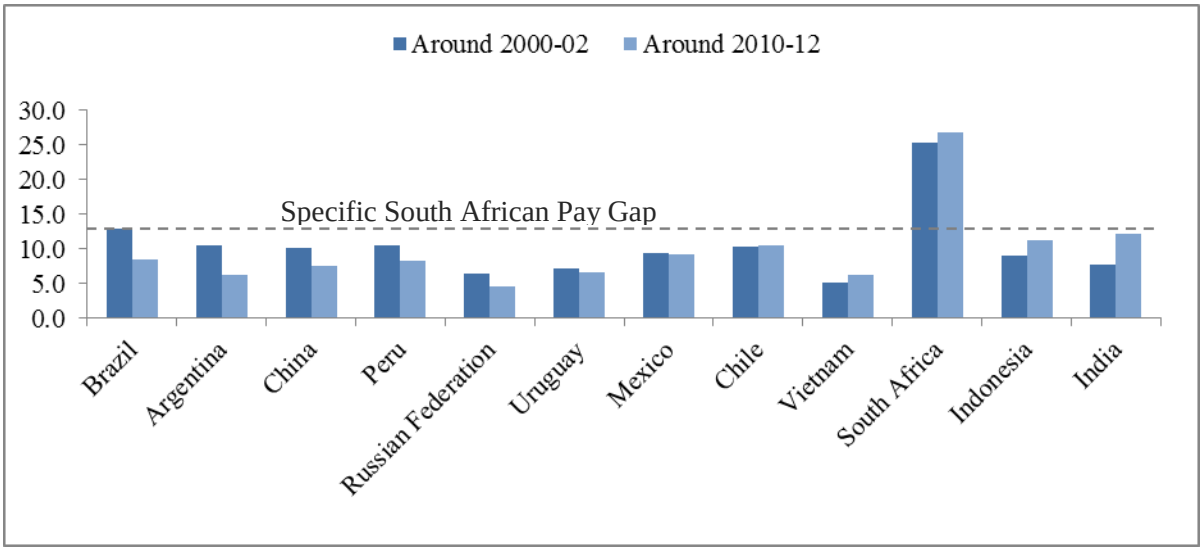


Table 3: Top–bottom inequality (D9/D1)

> The ILO's report pointed out that 'among the countries in our sample inequality increased … in South Africa, from a very high level inherited from the apartheid'.[16]

The OECD found that between the early 1990s and 2000 the D9/D1-ratio decreased from 38 and settled around the year 2000 at the level of 25 or thereabout. After 2000 the decrease stopped and slowly increased again at the end of the first decade of the 21st century.[17]

To identify inequality among the middle class, the threshold between the third and the fourth upper-income group (D7) and the third and the fourth-lowest income group (D3) is used. South Africa has also the most adverse position in the same group of countries with respect to middle-class inequality (D7/D3 ratio).[18]

Middle-class inequality of emerging and developing economies over the past decade (D7/D3 ratio), ILO *Global Wage Report 2014–15*[19]

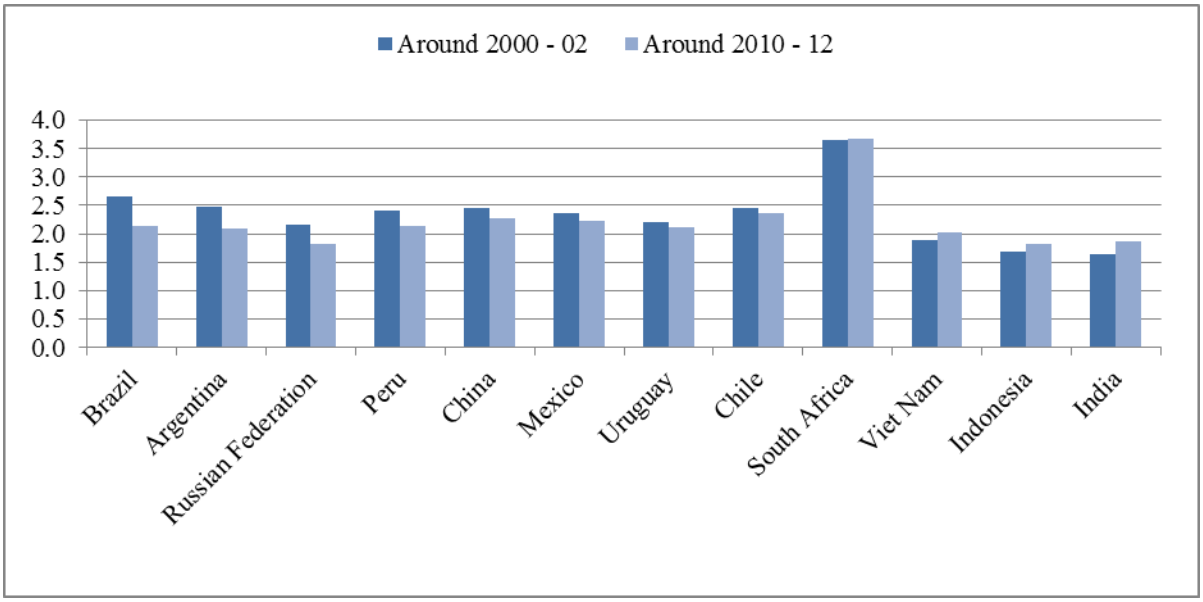


Table 4: Middle-class inequality (D7/D3)

Middle-class inequality in South Africa at a D7/D3-ratio of 3.7 around 2010–12 is higher than the top–bottom inequality in Iceland, Slovakia or Czech Republic at more or less the same time with a D9/D1-ratio of 3.6. This means that the percentage difference between the highest and the lowest income in the Czech Republic is as high as the difference in South Africa exclusively within the middle class.

1.2. The implications of inequality

Extreme inequality is bad for society,[20] especially if the inequality is caused by discrimination. Disproportionate income differentials force humans to live in conditions of poverty. An asymmetrical development of income disparities by increasing inequality

will further strengthen precarity. Social instability aggravates family formation, and growing poverty will be a result. Inequality can have a negative effect on mental and physical health. Extreme inequality encourages or leads to prejudice between groups.

The statement ‘As long as you pretend as if you pay us duly — we pretend to carry out work duly’ [21] was written on the blackboard of a workers’ council. Unfair wages affect productivity and workforce morale. From an industry perspective, an increase of productivity and work quality is appealing. Corina and Court state that a low degree of inequality can be good for an economy:

> ‘[F]or policy, it is most important to avoid the extremes – very low and especially very high inequality reduces growth – and target an “efficient inequality range”.’[22]

According to Corina and Court, from an economic point of view the efficient inequality value lies between 0.25 and 0.4. After explaining what an ‘efficient inequality range’ is, they state that any country that intends to maximize poverty reduction should choose the lowest inequality level, which is 0.25:

> [A]iming for the lower end of range is important because one obtains the same level of growth at lower levels of inequality but it allows the reduction of poverty at a faster rate.[23]

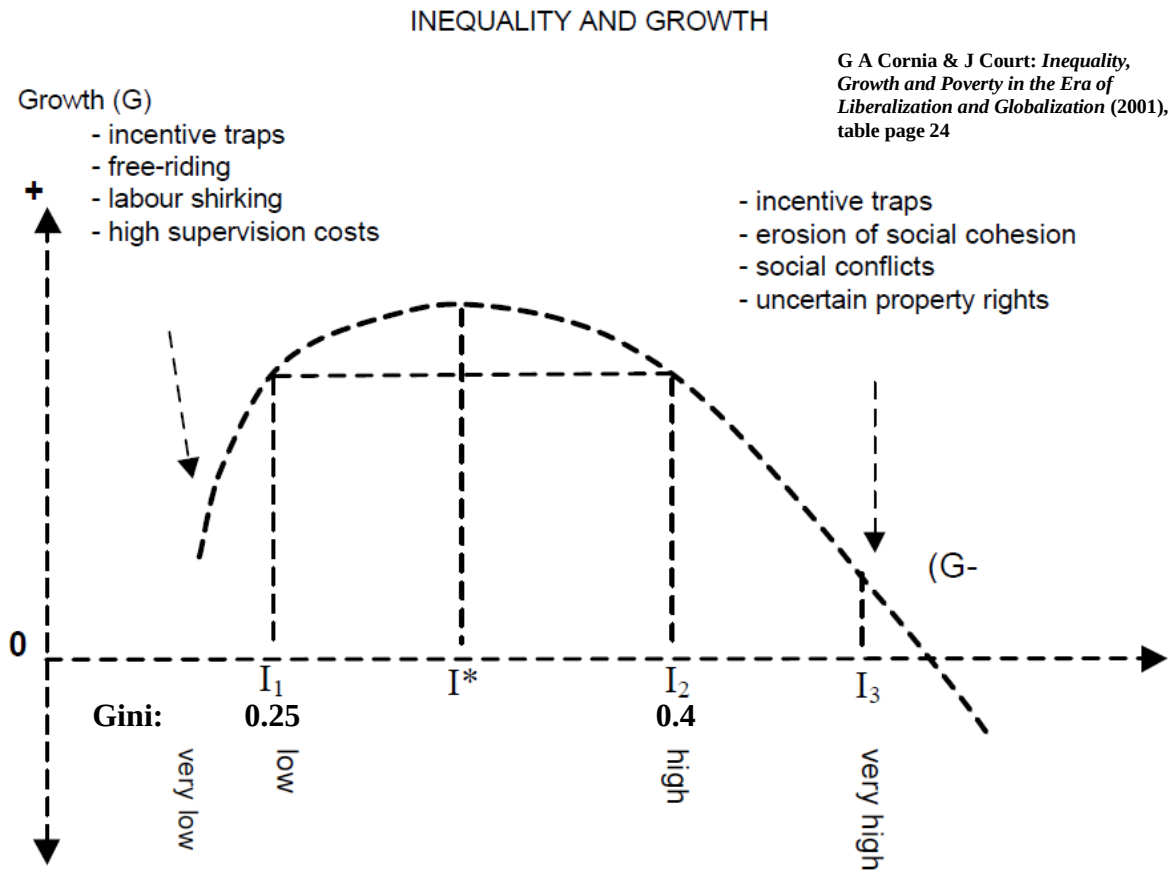


Table 5: Efficient inequality range according to Croina & Court

It is stated in the *Country Report South Africa 2013*: 'By 2030, we seek to eliminate poverty and reduce inequality'.[24] But what is the target Gini coefficient?

The target in the South African country report on the objectives of the United Nations Millennium Development Goals from the year 2000 is a Gini coefficient value of 0.3 for 2030:[25] South Africa accepted these goals. In the introduction to the country report, Minister Trevor Manuel states that 'as South Africans, we hold each other accountable as we re-affirm our commitment to the MDG goals and the achievement thereof'.[26]

The goal referred to in the National Development Plan 2030 does not seem to be that ambitious. The National Development Plan designates as its goal: 'Reduce inequality – The Gini coefficient should fall from 0.69 to 0.6'.[27]

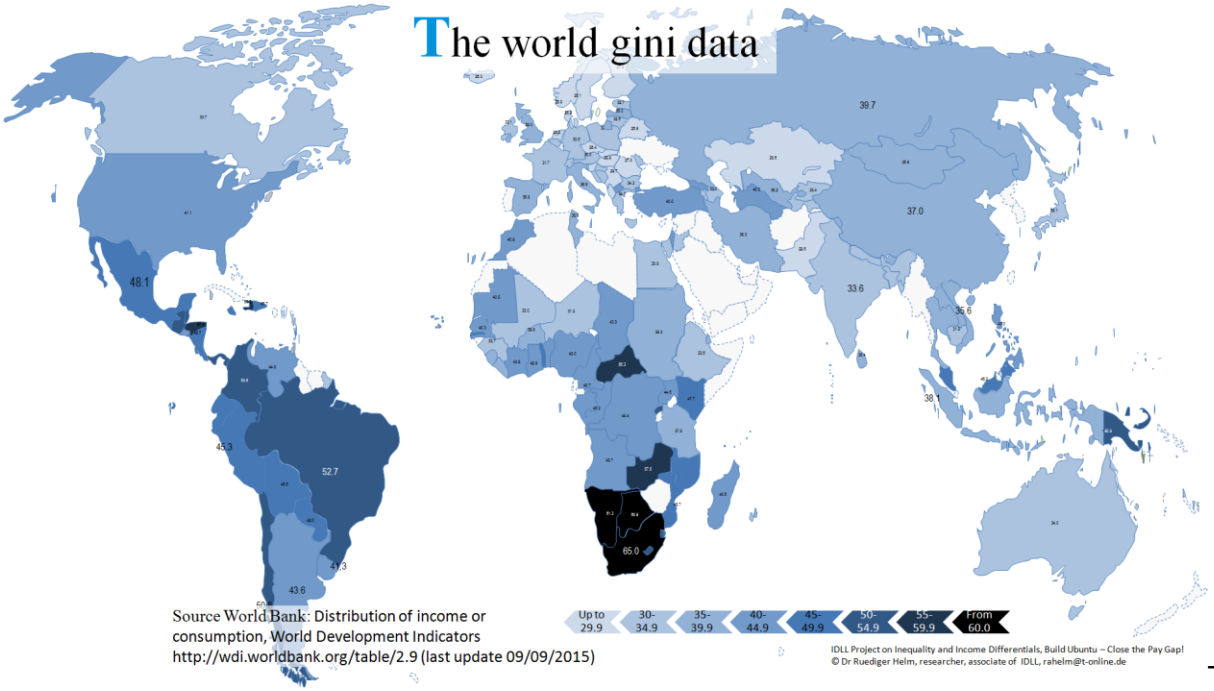


Table 7: World Map of Inequality

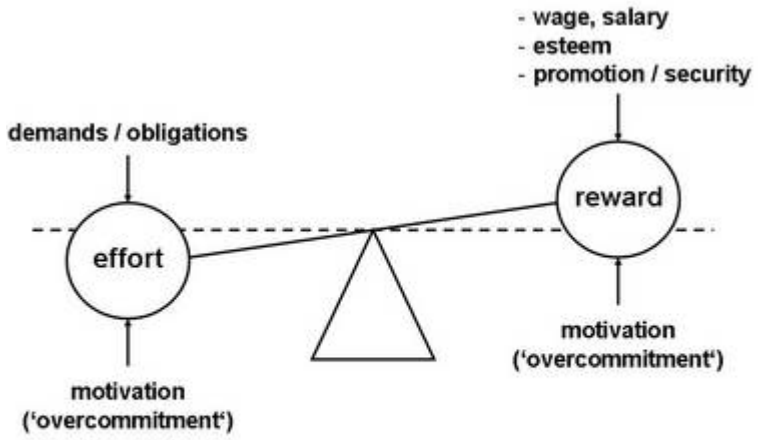
The progressive reduction of the wage gap would have an impact on the everyday consumption patterns of the poorest workers and would affect the local, national and international economy because a lower wage gap would increase the income of those who earn less than they need.

Where daily survival is a mighty struggle for many, where insecurity and disorder prevail, there is also no space for democratic and social activities in the community. An increase of individual income can be a violence-prevention strategy. In 2009 the Community Work Programme (CWP) was introduced in Manenberg to provide work opportunities to unemployed people.[28] It was claimed that: '[I]n Manenberg, in Cape Town, CWP transformed a dumping site that was a crime hotspot into a recreational community park now referred to as a 'peace garden'. [29]

The programme showed that increasing fairness has a positive effect on public safety. It went on to claim that: '

> [T]here is increasing evidence of strong relation between inequality and the crime rate.[30]

Experienced inequality has also a negative effect on mental and physical health. There exist different models to explain this effect. For example, the medical sociologist Johannes Siegerist developed the Effort–Reward–Imbalance (ERI) model:[31]



[32]

Table 8: Effort–Reward–Imbalance (ERI) model[33]

> [A]n imbalance between high effort and low reward (non-reciprocity) increases the risk of reduced health over and above the risk associated with each one of the components.[34]

Precarity has a destructive effect on social cohesion. Lower wage gaps can reduce precarity and social exclusion.

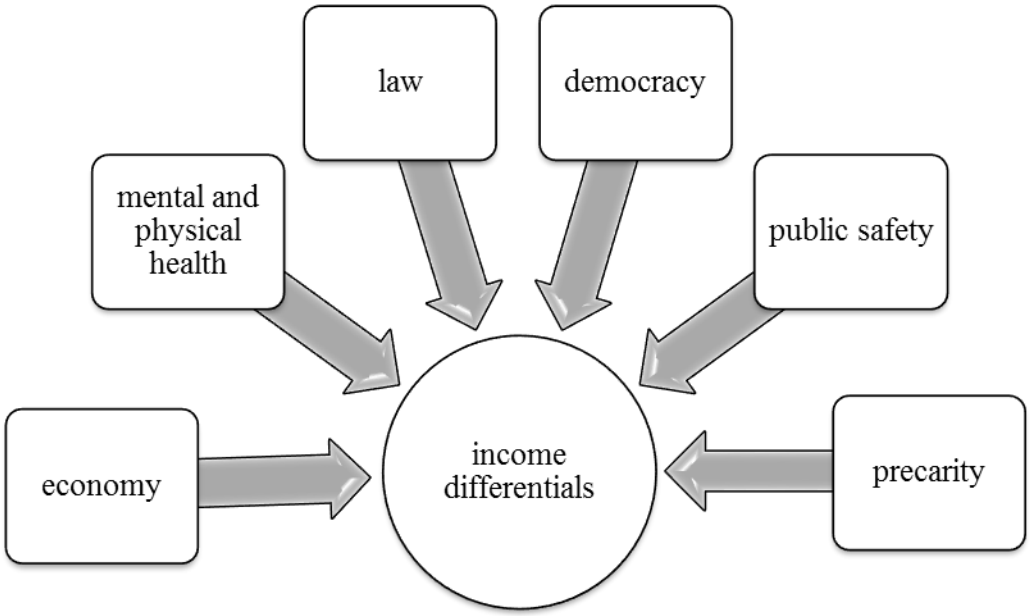


Table 9: Areas of public well-being affected by income differentials

1.3. Eradicating all forms of discrimination

The establishment of a legal framework to achieve a more equal society was a primary objective after the first free elections in 1994. Subsequent to the adoption of the Constitution of the Republic of South Africa, 1996, with its provisions for 'dignity,' 'equality' and 'fair labour practices', supplementary law has been drafted for this purpose. In order to address the imbalances in working conditions employment equity law needed to be established, given that:

> [E]radicating all forms of discrimination in the labour market is one of the fundamental objectives of the Government. This is demanded by the constitution and is an integral part of processes that would help achieve social justice in South Africa.[35]

The Green Paper of 1996[36] summarises key policy considerations for the Employment Equity Bill. The Employment Equity Bill (EEB) was discussed intensively. This discussion led to amendments to the Bill which resulted in the Employment Equity Act (EEA)[37] of 1998. Primary goals of the EEA are to 'narrow the gap between previously

advantaged and disadvantaged individuals' and to 'redress the matters that have created these imbalances in the workplace'.[38]

This monograph will show that a most important outcome of this piece of legislation was the final version of section 27 of the EEA. The concept of the section dealing with vertical inequality was developed by COSATU (Congress of South African Trade Unions) and handed by Neil Coleman to the office of President Nelson Mandela. The provision came into force on 1 December 1999 after a controversial debate.[39]

Section 27 of the EEA is part of the legislation which was passed during the presidency of Nelson Mandela. It addresses disproportionate income differentials between the South African people as a result of an outdated social system, as well as those that exist between the top and the bottom of the income scale, a gap which is still referred to as the 'apartheid wage gap'.[40]

1.4 The apartheid wage gap

Discrimination occurs when people perform equal work or work of equal value and have different salaries according a ground of discrimination, e.g. 'race', gender or age. Action against discrimination in this context aims to achieve pay equality for disadvantaged groups on the horizontal level.[41] Horizontal pay inequality can be distinguished from vertical.

Hepple asserts that the more traditional focus of labour law and of the ILO is the view on income differentials between the parties to the employment relationship, which may be termed 'vertical income differentials'.[42] Legal action based on the maxim 'equal pay for equal work or work of equal value' aims to achieve equal pay for disadvantaged groups on a comparable occupational employment level. Hepple[43] qualifies this aim as horizontal equality. The provision referred to deals with income differentials between the occupational levels. In this context, the term 'vertical inequality' is used with respect to these income differentials. Vertical pay discrimination would mean 'disproportionate

income differentials' between the occupational levels. The ILO Declaration of Philadelphia has, since 1944, called for policies 'to ensure a just share of the fruits of progress to all'.[44] Such a share for all demands for proportionate income differentials between job levels. Income differentials between a doctor and a nurse in a hospital may be justified, but they have to be proportionate. Otherwise the vertical income differentials between the occupational levels are discriminatory.

The ILO Committee of Experts noted with regard to gender equality:

> [T]he Committee notes that historical attitudes towards the role of women in society, along with stereotypical assumptions regarding women's aspirations, preferences, capabilities and "suitability" for certain jobs, have contributed to occupational sex segregation in the labour market. As a result, certain jobs are held predominantly or exclusively by women and others by men. These views and attitudes also tend to result in the undervaluation of "female jobs" in comparison with those of men who are performing different work and using different skills, when determining wage rates.[45]

Oelz et al.[46] use the term 'vertical occupational segregation' to describe the under-representation of women at high-paying job levels. An effect of this vertical segregation is that 'female-dominated jobs (often defined as occupations where more than 60% of employees are women) are generally less paid and less valued than male-dominated jobs'. In the context of this monograph it must be emphasized that discrimination against a disadvantaged group has a double effect. Firstly, the occupational segregation and the 'glass ceiling' make it difficult to have access to more popular jobs and occupational levels. As a result, certain jobs are held predominantly or exclusively by members of the advantaged group. Secondly, discriminatory views and attitudes tend to result in the undervaluation of the jobs that are reserved for the disadvantaged workers in the labour market. An unskilled worker is on the lowest occupational level. If he or she, as a member of a disadvantaged group, is a vulnerable employee, there is a high risk of disproportionate income differentials to employees on higher occupational levels.

The ILO Committee of Experts found that 'views and attitudes also tend to result in the undervaluation.'[47]

The apartheid state was an epitome of vertical discrimination. Discriminatory views and attitudes were backed by laws. The first laws entered into force before the National Party governments' system of apartheid began. These statutes include the so-called 'masters and servants' act from 1926[48] or the tax law from around 1900.[49] Matshikwe points out that discriminatory law can be traced back to at least 1841.[50] The vertical wage gap is part of the legacy of political, social and economic oppression during the past centuries. The pay gap between jobs held by black workers and such held by white workers caused by under- and overvaluation during the time of apartheid was called the 'apartheid wage gap' during the legislation process of s 27 EEA.

> [T]he "apartheid wage gap" refers to the pay differentials between skilled and unskilled workers who are predominantly black and management who are predominantly white.[51]

The term 'apartheid wage gap' describes disproportionate income differentials between the top and the bottom. It describes an effect of prolonged discrimination on the income structure of South Africa. Section 27 of the EEA has been drafted to address this vertical inequality between the occupational levels caused by the discriminatory past.

2. Legislative measures to address the vertical wage gap

Vertical inequality is also reflected in international and constitutional law.

2.1 ILO: Wages and earnings to ensure a just share

2.1.1 The Declaration of Philadelphia (1944)

On 10 May 1944 the general conference of the International Labour Organization (ILO) opted for a 'declaration concerning the aims and purposes of the International Labour Organisation',[52] known as the Declaration of Philadelphia. In chapter III of this declaration the ILO addresses, inter alia, the objective of a non-discriminatory workplace and a more equal world of work as a 'solemn obligation'.

> [T]he Conference recognizes the solemn obligation of the International Labour Organization to further among the nations of the world programmes which will achieve: … policies in regard to wages and earnings … to ensure a just share of the fruits of progress to all, and a minimum living wage to all employed and in need of such protection.[53]

In major decisions and public statements the ILO repeats and encourages the content of the Declaration of Philadelphia, as, for example, in the ILO Declaration on Social Justice for a Fair Globalization of 10 June 2008.[54] Such repetition underlines the fact that the 1944 declaration was a landmark decision of the ILO and must not be forgotten when, in this context, interpreting publications and conventions of the organization.

The above-quoted text of this landmark declaration differentiates between two tasks in respect of the income of employees. Remunerations have to cover a 'minimum living wage' and should be a 'just share'.

The concept of 'a just share' implicitly refers to income differentials between workers and employers in general and the wages at the different occupational levels, in particular, to vertical income differentials.

2.1.2 The ILO Equal Remuneration Convention, 1951, No 100

The ILO Convention No 100 requires ratifying states 'by means appropriate to the methods in operation for determining rates of remuneration, to promote and, in so far as is consistent with such methods, ensure the application to all employees of the principle of equal remuneration for men and women workers for work of equal value'.[55] In addition to the discrimination by 'race', the gender pay gap is also inherited from the past.[56] Ntuli explored gender wage discrimination and, in 2007, found in respect of the wage differentials that, despite 'the abolition of legalised discrimination and the introduction of affirmative action legislation, there is still wide acknowledgement that a significant portion of these wage differentials is due to gender discrimination.'[57] The Report on Equality at Work by the Director-General, presented at the100th session of the International Labour Conference in 2011, stated that 'women are still a long way from achieving gender equality in the labour market'.[58] It notes that in most countries, inclusive of South Africa, the gender pay gap still exists and refers to the findings of Glenn et al. who found that the pay gap related to the income spread by gender is as follows:

> [T]he average pay gaps for the 20 countries for which we had sufficient pay data range from 38.5 per cent in Brazil to 11.1 per cent in Paraguay. The average pay gap results are lower for Denmark (12 per cent), Sweden (13 per cent) and the Russian Federation (14 per cent) and less so for Argentina (29 per cent), Mexico (36.1 per cent) and South Africa (33.5 per cent).[59]

South Africa ratified the ILO Convention No 100 on 30 March 2000. The state is obliged to ensure that pay equity is applied to all employees by methods of national laws; wage determination method; collective bargaining, or a combination of these legal techniques.[60] 'Where such action will assist in giving effect to the provisions of this

Convention, measures shall be taken to promote objective appraisal of jobs on the basis of the work to be performed.'[61] The member states are expected to be sufficiently flexible so as to ensure equal remuneration in ways that best suit their national context.

The ILO Convention No 100 from 29 June 1951 calls for the eradication of any income discrimination on the basis of gender. The Convention obliges the country to ensure, for all employees, the principle of equal remuneration for men and women at the workplace.

2.1.3 The ILO Discrimination Employment and Occupation Convention, 1958, No 111

The ILO Convention No 111 of 1958 was drafted in acknowledgement of the equality component of the Declaration of Philadelphia (1944). It was ratified by South Africa in 1997. The Convention deals with all forms of discrimination.

> [T]he term discrimination includes (...) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation….[and] such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation.[62]

Members for whom the Convention is in force are obliged to undertake and 'pursue a national policy designed to promote (...) equality of opportunity and treatment in respect of employment and occupation, with a view to eliminating any discrimination in respect thereof'.[63] Apartheid strengthened discriminatory elements in the South African remuneration systems. The Convention requires the elimination of any discrimination which includes the apartheid wage gap as a form of vertical income discrimination.

The ILO Convention, No. 111 of 25 June 1958 refers to the Declaration of Philadelphia and calls for the eradication of all forms of inequality, which includes vertical discrimination through the structure of a remuneration system.

2.1.4 Declaration on Fundamental Principles and Rights at Work (1998)

The Declaration on Fundamental Principles and Rights at Work, 1998, states that the elimination of discrimination at work includes the need for non-discriminatory payments which take the value of the work into account. Implicitly, this also addresses the concern of vertical income equality.

> [E]ffective mechanisms are needed to address the obstacles of discrimination when they occur. A common example involves claims for the non-discriminatory payment of wages, which should be set using objective criteria that takes into account the value of the work performed. ILO principles fix minimum thresholds while national laws and practices may well take a broader approach and include more comprehensive means in eliminating discrimination at work.[64]

This most recent declaration underlines that disproportionate income differentials are traceable to discriminatory practices. The Declaration on Fundamental Principles and Rights at Work is a core declaration of the ILO and was adopted by the International Labour Conference on 18 June 1998. The International Labour Conference is the highest organ of the ILO[65] and is authorized to make legally binding decisions. The quoted declaration should be taken into consideration when interpreting ILO conventions.

The ILO Declaration on Fundamental Principles and Rights at Work, 1998, calls for non-discriminatory payment. The 1998 declaration refers also to the ILO Declaration of Philadelphia and has to be reflected in interpreting Convention No. 111 because it expresses the understanding of the goals of equality policies of the highest institution of the ILO.

2.2 The Constitution

Many constitutions bind the public authorities in their relationship to the citizen; third parties are typically bound by the obligations only indirectly. However, the South African Constitution as a modern constitution has a Bill of Rights which applies to everybody, to the extent that the rights are applicable, and the obligations arising from the constitutional equality clause therefore bind the employer to its employees. Section 39 ss(1)(*b*) of the South African Constitution states that in the interpretation of the Bill of Rights, a court, tribunal or forum must consider international law.

Relevant constitutional provisions will be analysed below, with particular focus on their impact on the regulation of vertical inequality.

2.2.1 The interim Constitution

The interim Constitution provided 'a historic bridge between the past of a deeply divided society characterized by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex'.[66]

From the first paragraph in the Preamble to the cited afterword of the interim Constitution, equality has been introduced as a fundamental right and is listed as the first substantive right in section 8 of Chapter 3 of the interim Constitution. Recognising and acknowledging the injustices of the past and determining the necessary steps and means, such as a need for understanding, a need for reparation and a need for ubuntu,[67] section 8 of the interim Constitution could thus provide a critical bridging function vis-à-vis an effective development of a new order in a discrimination-free society.

Albertyn and Kentridge state that that the 'right to equality ... encompasses the right to reparation for past inequality. Only if it is understood in this way is equality equal to the task of reconstruction and reconciliation'.[68] The interim Constitution embraced an anti-discrimination approach which would include overcoming the vertical wage gap. In the case of *The President of the Republic of South Africa vs Hugo* it is stated that:

> [T]he prohibition on unfair discrimination in the interim Constitution seeks not only to avoid discrimination against people who are members of disadvantaged groups. It seeks more than that. At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups. The achievement of such a society in the context of our deeply inegalitarian past will not be easy, but that that is the goal of the Constitution should not be forgotten or overlooked.[69]

The eradication of vertical pay discrimination is a necessary part to build up this new society.

2.2.2 The Constitution of South Africa

The achievement of equality is a guiding principle and a road map in the South African Constitution. Equality is not only an individual right and a guiding principle, according to section 39(1)(*a*) of the Constitution it is a fundamental value and, accordingly, an important part of the interpretation of other constitutional rights as well.

When interpreting the Bill of Rights, jurisdiction 'must consider international law.'[70] In *The State v Makwanyane* the Constitutional Court interpreted the legal order in s 35(1) of the interim Constitution – which is similar to the quoted s 39(1)(*b*) of the South African Constitution — to analyse the interim Constitution's Fundamental Rights'chapter as follows:

> [I]n the context of section 35(1), public international law would include non-binding as well as binding law. They may both be used under the section as tools of interpretation. International agreements and customary international law accordingly provide a framework within which Chapter Three can be evaluated and understood, and for that purpose, decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, the European Commission on Human Rights, and the European Court of Human Rights, and in appropriate cases, reports.[71]

It was also with the aim of reflecting binding and non-binding international law that the South African Constitutional Court referred to the EU Directive on Transfer of Undertakings when it had to interpret the section of the Labour Relations Act regulating the transfer of business in *NEHAWU v University of Cape Town*.[72]

> [I]n giving content to [the concept of fair labour practices] the courts and tribunals will have to seek guidance from domestic and international experience (...). International experience is reflected in the Conventions and Recommendations of the International Labour Organisation.[73]

In this decision the South African Constitutional Court notes with regard to s39(1) of the Constitution that the interpretation of a legal concept has to seek guidance inter alia from ILO Conventions and Recommendations. From that we can conclude that, in addition to the ILO Convention 111 and its roots, the Declaration on Fundamental Principles and Rights at Work (1998) could be considered a source that shows that a non-discriminatory remuneration system is part of the international and South African legal concept of equality. An increasing standard of such a fundamental right may be reflected in interpretations of the Bill of Rights.

The European Court of Human Rights (ECHR) states as well that the interpretation of a fundamental right should refer to increasingly high standards in international law. This

court referred to the ILO Convention No. 87[74] to determine the 'developments in labour law, both international and national, and to the practice of Contracting States in such matters'[75] within the context of the interpretation of article 11 of the European Convention on Human Rights.

> [I]n this connection [the development in labour relations], it is appropriate to remember that the Convention is a living instrument which must be interpreted in the light of present-day conditions, and in accordance with developments in international law, so as to reflect the increasingly high standard being required in the area of the protection of human rights, thus necessitating greater firmness in assessing breaches of the fundamental values of democratic societies.[76]

The German Federal Constitution Court referred to relevant international law, in the case in question, to ILO Convention No. 111 to determine the current content of gender equality.[77]

Section 9 of the South African Constitution has been interpreted as a right to both formal and substantive equality. To fulfil the goal of s 9 of the Constitution, equality cannot be achieved only as a formal right. In respect of the listed grounds, this non-derogable right includes substantive equality and prohibits direct and indirect discrimination. This includes all forms of discrimination, especially vertical discrimination; for instance, if advancement opportunities are blocked for women in a company. After due analysis, it appears that the interpretation of s 9 of the Constitution may reflect the ILO Convention No. 111, the Declaration of Philadelphia and the ILO Declaration on Fundamental Principles and Rights at Work (1998). Equality comprises not only equal treatment on a horizontal level, but also comprises what the Declarations of Philadelphia calls 'a just share of the fruits of progress to all', and what the Declaration on Fundamental Principles and Rights at Work names as a non-discriminatory payment. The prohibition of unfair discrimination accords with human dignity.

> [A]t the heart of the prohibition of unfair discrimination is the recognition that under our Constitution all human beings, regardless of their position in society, must be accorded equal dignity.[78]

Substantive equality includes all aspects of equality. Therefore, the Constitution determines in s 9(2) that affirmative action measures may be taken. Section 27 of the EEA is part of the affirmative action chapter of the EEA.

3. The development of s 27 of the EEA

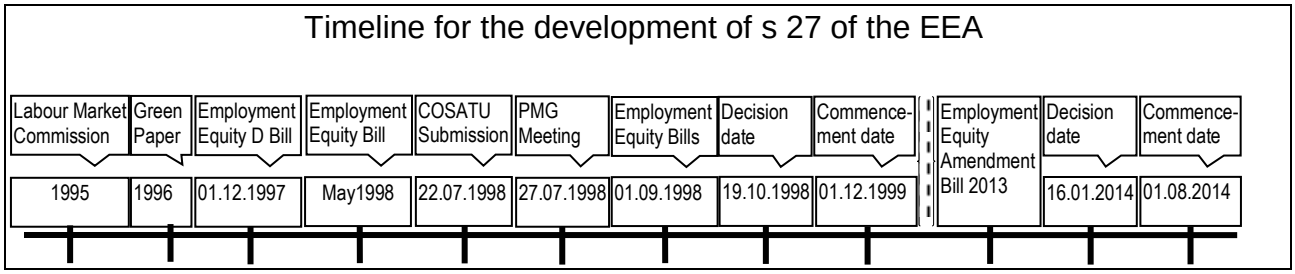


Table 10: Timeline for the development of s 27 EEA

During the development of the provision, the initiators of s 27 of the EEA were guided by principles which inspired this norm's own creation and development, and which s 27 of the EEA seeks to advance:

- addressing the apartheid wage gap
- addressing disproportionate wage differentials
- the rule of law and the rule of collective bargaining
- respect for human dignity, the principles of equality and solidarity
- fairness at the workplace.

3.1 The period until the first draft

3.1.1 The Labour Market Commission 1995

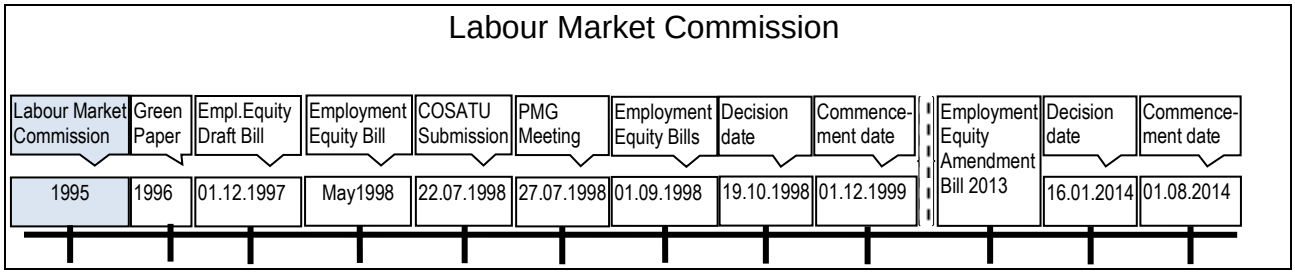


Table 10 A: Timeline Labour Market Commission

The Presidential Commission to Investigate the Development of a Comprehensive Labour Market Policy (hereinafter the Labour Market Commission) was appointed in 1995 against the background of the Reconstruction and Development Programme. The findings of this commission were reported as the Report of the Presidential Commission to Investigate Labour Market Policy in June 1996. In the section 'Specific proposals concerning affirmative action' the Commission describes how discrimination in remuneration may be addressed:

> [A]ffirmative action plans often focus on the demographic proportions of the employed, and devote less attention to the question of discrimination and disadvantage in wages and other conditions of employment. The Commission is mindful that discrimination in remuneration persists and needs to be addressed in ways that are both conceptually and practically demanding. When, for example, are wage differentials justified between different categories of workers, what is the legitimate extent of these differentials, and what are the best methods for identifying and rectifying inequitable differentials?[79]

The Commission pleaded for the consideration of legal tools addressing the vertical wage gap as part of affirmative action laws. Effective legal tools are needed for the identification and rectification of inequitable wage gaps between different categories of workers.

The Labour Market Commission — established in May 1995 — made it clear right from the beginning that any approach to equality at the workplace needs to deal with disproportionate vertical income differentials as an affirmative action measure. As early as June 1996 the Commission indicated in its report that a core concern of the legislation process was the need for the highlight of methods to identify and correct disproportionate wage differentials.

3.1.2 The Green Paper: Employment Equity and Occupational Equity, Department of Labour

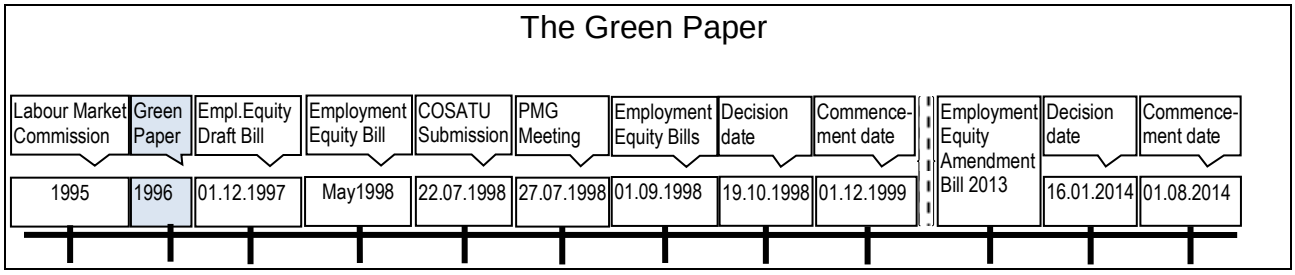


Table 10 B: Timeline Green Paper

A Green Paper published by the Department of Labour to identify policy proposals for inclusion in a new Employment Equity statute was published on 1 July 1996. It was officially adopted as Notice 804 of 1996 by the Department of Labour.[80] It describes South Africa as one of the 'most unequal societies'[81] in the world. In the context of income distribution, it identifies in paragraph 2.4.6 consistent inequalities by 'race' and gender with an 'unusually skew distribution of income'.[82] The paper identifies that 'these inequalities have imposed heavy burdens on society, the economy, and individuals'.[83]

However, the purpose of the Green Paper was to identify policy proposals for equality legislation to give effect to the Constitutional right to equality, and, in its adoption, to address the vertical income differentials in future legislation. It points out that disproportionate income differentials are not only a horizontal problem – as they do not merely state that the distribution within the occupational levels among South Africans needs to be equalized – butalso puts forward that the different income levels need to be changed in respect of those who were disadvantaged in the past since discrimination both during and prior to apartheid had a boosting effect on income differentials.[84] Not only have the historically disadvantaged groups received disproportionately low wages, the whole structure of earnings was so disproportionate that it was 'unusually skew'.[85] This observation is crucial, and describes why a general view of disproportionate income differentials had to be addressed in the equality legislation.

The disproportionate wage structure is a result of a discriminatory past. The huge South African income differentials identified in 1996 would have been unimaginable without the successful exclusion and suppression of large parts of the population, while, at the same time, ensuring privileges to the other part of the population over a long period of

time. This systemic disadvantage, combined with systemic privileged treatment of not disadvantaged people, resulted in the specific nature of the South African income differentials. As in other unequal societies, the majority in South Africa has been oppressed. Unlike other societies, however, the minority has also been systematically preferred, and it is that that has led to the 'unusually skew distribution of income'.

The Green Paper states that this specific skew distribution needs to be addressed in the equality law. The oppression of the majority and the privileging of the minority has been effective in two directions — one that reduces the rights of one group, the other strengthening the rights of the other — and has resulted in an extreme wage gap and one of the 'most unequal societies':[86] [A]n unusually small share of the national income goes to the majority of the population.[87]

Consistent with its aims, then, is the Green Paper's contention that the income differential needs to be addressed in equality law. The report recommends in the chapter on 'the policy formulation process[88] that the work of the Labour Market Commission may also inform the proposals. The paper sates: 'The terms of reference of the Commission include the development of proposals for "mechanisms aimed at redressing discrimination in the labour market".'[89]

The Department of Labour excoriates the unusually skew distribution of income in South Africa in its Green Paper of July 1996. The document refers to the review of the Labour Market Commission especially for new equality law development, including 'mechanisms aimed at redressing discrimination', [90] and states that income distribution needs to be addressed in proposed legislation.

3.1.3 The first agreement in the public sector

During the presidency of Nelson Mandela, the government took its gloves off. The systematic reduction of the vertical wage gap was agreed upon in the public sector through negotiations between the trade unions and employers. The gap between the

bottom and the top in the public sector was around 25:1 in 1994. In 1995 it was reduced to 20:1 through collective agreement. [91] A collective agreement in the public sector implemented in 1995 resulted in a successful reduction of the vertical wage gap and the government announced the next steps to reduce the ratio. In 1997, or in early 1998, the government announced the next steps to reduce the ratio to 12:1 by 1999.[92] During this social and political climate, the Employment Equity Bill was negotiated in 1997 and 1998. The closing of the vertical wage gap was on its agenda.

3.2 The legislative process

3.2.1 The first Employment Equity Draft Bill, 1 December 1997

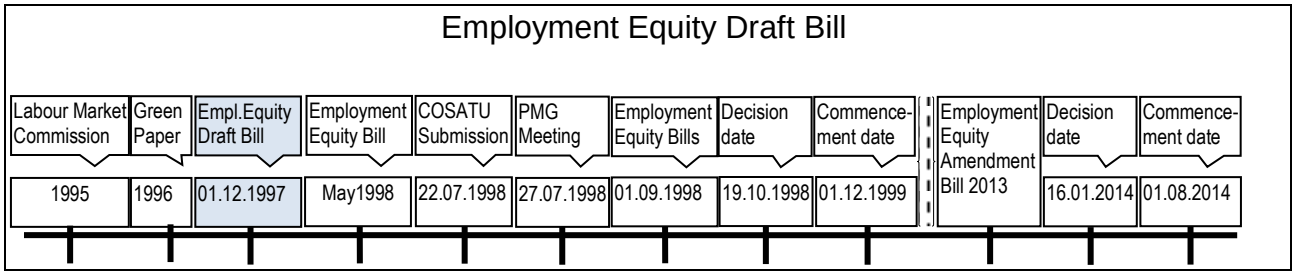


Table 10 C: Employment Equity Draft Bill

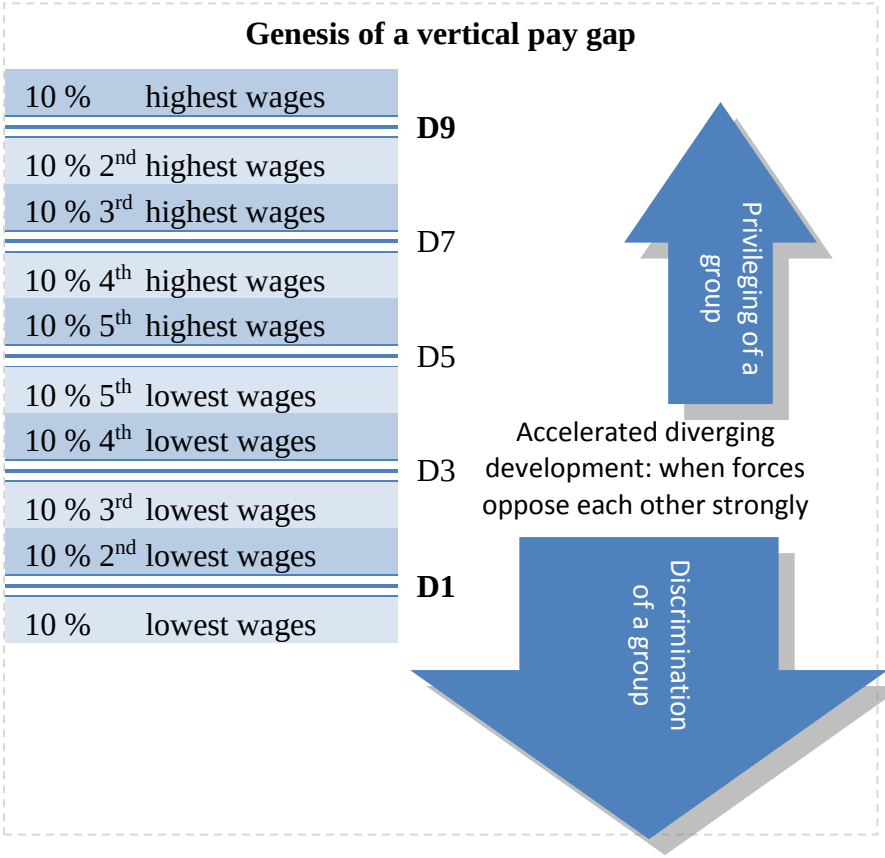
Together with the earnest request for comments 'to enrich' the bill, the Minister introduced the first Employment Equity Bill on 1 December 1997. The draft provided a basis for discussion. This Employment Equity Bill deplored the vertical wage gap but did not include a section about it. Under the headline 'VISION OF THE BILL', the explanatory memorandum states:

> [A]partheid has left behind a legacy of inequality. In the labour market the disparity in the ... incomes reveals the effects of discrimination (...). These disparities are reinforced by social practices which perpetuate discrimination in employment against these disadvantaged groups, as well as by factors outside the labour market, such as the lack of education, housing, medical care and transport. These disparities cannot be remedied simply by eliminating discrimination. Policies,

programmed and positive action designed to redress the imbalances of the past are therefore needed.[93]

Minister of Labour T.T. Mboweni confirmed the multiplier effect of the heritage of apartheid through prolonged discrimination, otherwise known as disproportionate income differentials or the vertical wage gap. The preference of one group and the discrimination toward the other had a strengthening or perpetuating effect on discriminatory remuneration practices.

This type of divided social system forces income levels to the low and high extremes and thins out the middle. As mentioned above, the findings of the ILO *Wage Report 2014/2015* not only describe South Africa as one of the most unequal societies (D9/D1-ratio), but also as a country with the highest middle-class inequality (D7/D3-ratio). This means that South Africa has a very unequal middle-income class.

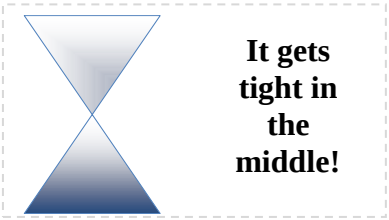


The effect of such discrimination of one group, combined with the preference of shown to another group over a long period of time, is a divergent development on a remuneration system. A boost effect on inequality is the result when the groups (of which there can be more than two) are strictly separated and experience contrary treatment.

Table 11: Genesis of a vertical pay gap

Mboweni's description of the outcomes of past discrimination in South Africa from 1997 provides additional evidence for the findings of the ILO *Wage Report* 2014/2015.

> [P]ressed both by white employers and white workers, who shared an interest in the tight control of black labour, successive governments enacted a web of laws and regulations designed to guarantee and enshrine the superior economic status of whites and to perpetuate a master-servant relationship between the races at all levels of society.[94]



The result of the political and legal oppression and the political and legal preference reminds one at an hourglass. For a society hardly any space in the middle means that the minority is pushed up and the majority down.

Table 12: Hourglass-society

> [S]ome expected reshuffling occurred, as skilled black Africans moved up the ladder and low- skilled whites moved down. But despite significant investment in education and a government vocally committed to fighting inequality, whites continued to earn more than blacks, and income became more concentrated in the top 10th.[95]

This web of laws and regulations made the division of South African society so 'successful', and perpetuated the 'master-servant' relationship between the 'races'.[96] If the privileged were to have worked for the same salaries as the disadvantaged in the past, the apartheid system would not have worked. The 1997 Bill refers to the Green Paper on Employment and Occupational Equity (1996) that states that apartheid policies artificially reduced the cost of the majority labour force and increased the cost of employing a favoured minority.[97] As a result, employers faced higher costs for skilled and supervisory workers and very low costs for unskilled workers.[98]

However, on a reading of the Bill another question immediately arises: How does the concept of the Bill address vertical income inequality or the disproportionate wage gap which it seeks to deal with? The Bill includes equality plans and other instruments for

affirmative action, but a legal instrument that could act against the vertical wage gap is not included. Instruments such as qualification, affirmative action and equality plans can be effective against horizontal inequality and, combined with education, against some forms of vertical inequality, but one crucial effect of vertical inequality is not caused by lack of education. If someone has no qualification, he or she will be paid according to the wages of the lowest occupational level. Additionally, in South Africa, the extremely low wages paid at the lowest level are a result of the prolonged discrimination of one group and the preference of another group.

It is not surprising that the Bill includes no provision to address this heritage of a discriminatory past. There was no international role model for a legal provision to address this wrong. Nevertheless, the Bill's explanatory memorandum confirms the effect of the long period of divergent development on the South African work force and it invited the South African workers and employers to participate in the discussion on the abolishment of all forms of discrimination at the workplace.

> [W]e want to abolish discrimination in the workplace. Let this Bill be the subject of debate in every workplace and by all workers and employers.[99]

Through his request for suggestions to enrich the Bill, the Minister was possibly hoping for proposals to address the discriminatory vertical income differentials. In the following months, a relevant proposal was submitted.

The Employment Equity Draft Bill of December 1997 criticizes the 'master-servant relationship' between South Africans in the past and the consequences related for 'discrimination in employment'. In its explanatory memorandum, the Draft Bill insists on overcoming the consequences of apartheid that must be dealt with 'by positive action designed to redress the imbalances of the past'.

3.2.2 The Employment Equity Bill, May 1998

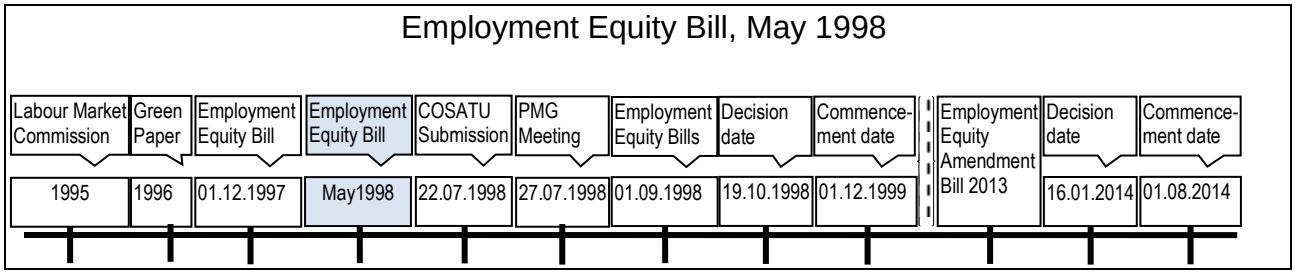


Table 10 D: Timeline Employment Equity Bill May 1998

The 1997 Employment Equity Draft Bill was broadly discussed and, afterwards, put on the table at the National Economic Development and Labour Council (NEDLAC) for negotiation, which resulted in a number of changes. These changes are included in a revision of the proposal which was approved by Cabinet in May 1998 and then introduced to the National Assembly.[100]

The Employment Equity Bill of May 1998 contained no provision for addressing vertical income differentials because of the failure of the members of NEDLAC to reach a unanimous agreement. Parliament had to clarify and examine the issue in detail on how to address the vertical wage gap given the lack of agreement.

3.2.3 The COSATU Submission of 22.07.1998

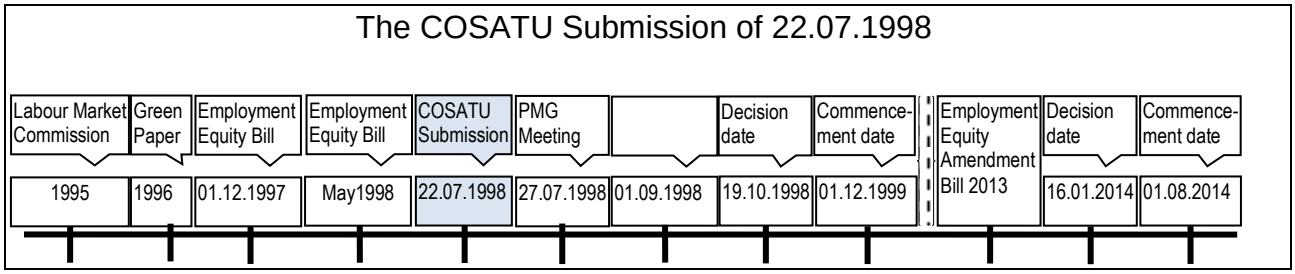


Table 10 E: Timeline COSATU Submission

COSATU took up the invitation to be a part of the debate and submitted a differentiated statement.[101] The trade union umbrella organization supported a large part of the Bill,

but also stated core areas of concern. One crucial concern was entitled 'closing the wage gap'.[102]

The employee representatives explained that 'the average ratio in South Africa of the Managing Director to the lowest paid worker is about 100:1, while in Japan it is on average 7:1.'[103] The COSATU submission states that gradations between unskilled, semi-skilled and artisans, blue collar, production and technical/professional reflect disparities in incomes which are highly significant by international standards. The disproportionate income differentials between the top and the bottom, as well as the unusually large disparities within the workforce, were specifically named.[104] By then, the vertical wage gap was firmly on the table of the legislature. In addition, the focus was no longer on the individual, but rather directly on the social damages of the discriminatory practices of the past.

Both the Green Paper and the Bill identify the prolonged distinction between groups as the cause of the disproportionate wage differentials. The COSATU submission commented on s 6(4) of the Bill, stating that 'this clause in the chapter on unfair discrimination focuses narrowly on wage discrimination involving those doing similar work and does not adequately address'[105] the vertical wage gap. It argued that the enormous wage differentials caused and exacerbated by apartheid also had to be addressed in the Employment Equity Bill. The excerpt 'this is the only way it can become meaningful, particularly for the unskilled and lowly paid workers'[106] from the submission stresses a crucial point and takes in the bigger picture. The vertical wage gap was made worse by apartheid, it argued; therefore, the national approach needed to 'flatten hierarchies' and 'reduce wage inequality'.[107] This approach differed systematically from the individual approach. The submission emphasized that the steep wage gap created by apartheid differed from other more or less unequal societies and iterated that was something that needed to be addressed — whether or not the future low- and high-paid workforce were to become a little more diverse, since the 'glass ceiling' for an individual career could be broken. The Act, it submitted, should not only be confined to a degree of 'horizontal equity' to reach representivity of all South Africans

'in the particular strata, while there continues to be huge 'vertical inequity' between those at the bottom and those at the top'.[108]

Legislative proposals were presented together with the submission, one of which was a new 'section 15A'[109] addressing vertical income inequality.

> [R]educing the Apartheid Wage Gap
> (Legislative draft, item 4 of Annexure A to the COSATU Submission of 22.07.1998)
> Section 15A (new clause)
> Measures to promote the reduction of income differentials (...)
> 15A (1) A designated employer must implement measures to promote the progressive reduction of income differentials between occupational categories or levels of employees in the workplace.
> 15A (2) These measures must include –
> (a) measures to identify the income differentials between employees in the respective occupational categories or levels;
> (b) the setting of targets or ratios for the progressive reduction of these income differentials;
> (c) measures to ensure compliance with-
> (i) collective agreements concluded at bargaining
> (ii) the income differentiation within the employer's workforce as a whole, using a measure of income differentiation prescribed by the Minister.

Table 13: First legislative proposal: 'Reducing the Apartheid Wage Gap'

The similarity of the above with the current s 27 of the EEA is obvious. The submission explained (see below) how the vertical wage gap could be closed with a new provision:

> [T]he intention of the amendment is to ensure that closing the wage gap is reflected in the purpose of the Act; (...). This will provide a framework for ensuring that this issue is put on the agenda of every workplace. However this Bill alone

will not achieve this objective. It must be combined with negotiations at national and sectoral levels.[110]

The possible role of the Minister in addressing the wage gap was part of the proposed amendment, which declared that the 'Minister will need to publish guidelines to ensure a uniform measure for the analysis, plan, and reporting'.[111] COSATU considered that with a legal framework providing a general basis, negotiations at national and sectoral levels should take place to develop norms and benchmarks for closing the vertical wage gap.

The COSATU Submission of 22 July 1998 provided the impetus for the express inclusion of provisions in the Bill for closing the vertical wage gap. The submitted possible new clause was headed 'Measures to promote the reduction of income differentials'. This submission and the reactions to it formed the basis of the next stage in the work of the legislative process.

3.2.4 The PMG meeting, 27. July 1998

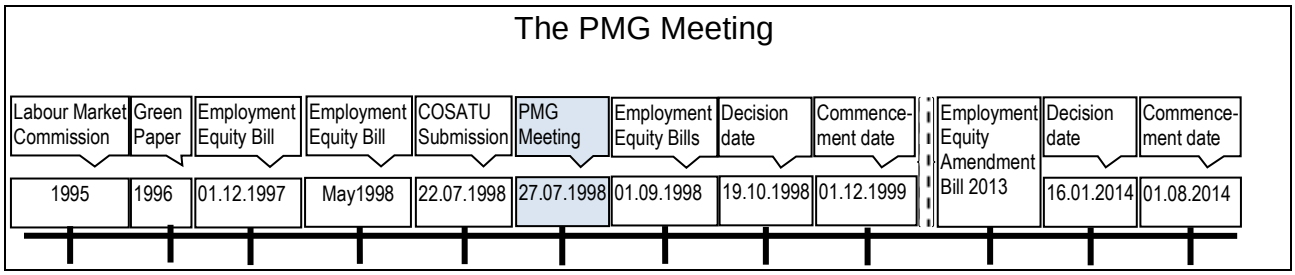


Table 10 F: Timeline PMG Meeting

The COSATU submission to the Parliamentary Labour Portfolio Committee was also discussed at a meeting of the Parliamentary Monitoring Group (PMG) a week after the submission, on 27 July 1998. COSATU was concerned that the EEB would not reduce the apartheid wage gap, which was characterized by a concentration of low-wage and low-skills employment, particularly amongst African and women workers.[112] The recommendation of COSATU's submission was endorsed by NADEL (the National Association of Democratic Lawyers) and FEDUSA (the Federation Unions of South

Africa). [113] The vertical wage gap and, especially the apartheid wage gap, were discussed at the meeting and remained on the agenda. Several organizations voiced their support for the section 'Measures to promote the reduction of income differentials of the COSATU submission as a new clause in the Bill at the PMG meeting of 27 July 1998.

3.2.5 The revised Employment Equity Bills, 1 September 1998

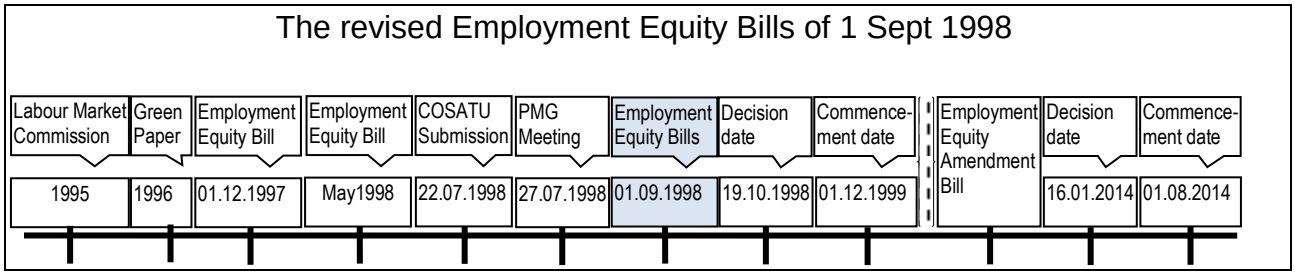


Table 10 G: Timeline of the revised Employment Equity Bills

Subsequent to the PMG meeting, the Portfolio Committee of Labour, a committee of the National Assembly, agreed to include a section dealing with the vertical wage gap in the affirmative action chapter of the EEB. The Portfolio Committee recommended a first wording for a new s 27[114]:

> [S]ection 27 – income differentials (of the first revised Employment Equity Bill)
> 27 (1) Where disproportionate income differentials are reflected in the statement prepared in terms of section 19(3), the measures taken by the employer to reduce such differentials may include-
> (a) collective bargaining;
> (b) compliance with sectoral determinations made by the Minister in terms of section 51 of the Basic Conditions of Employment Act;
> (c) compliance with norms and benchmarks set by the Employment Conditions Commission;
> (d) relevant measures contained in skills development legislation; and
> (e) other similar measures that are appropriate in the circumstances.

> 27 (2) The Employment Conditions Commission established by section 59 of the Basic Conditions of Employment Act must research and investigate norms and benchmarks for proportionate income differentials and advise the Minister on appropriate steps for reducing disproportionate differentials.[115]

Table 14: Second legislative proposal: a draft for a new s 27 EEA – income differentials

One can see a far-reaching similarity to the final s 27 of the EEA. A new s 19 (3), referring to the analysis an employer has to submit in a statement, favoured by the PMG, is reflected in spirit in the revised s 27 (1). The suggested s 27 (1) became the revised s 27 (2). The proposal already includes a role for the Minister and the ECC.

The associated debate resulted in a final version of amendments agreed to in the Employment Equity Bill (B 60A–98). By 1 September 1998 the amendment was textually modified and passed by the Portfolio Committee of Labour.[116] This amendment included a section addressing the vertical wage gap as a part of the affirmative action chapter of the EEA. The final version of the Employment Equity Bill was presented to the National Assembly by the Minister of Labour and gazetted on 1 September 1998. [117]

This new provision in the Act introduces the concept of the 'Measures to promote the reduction of income differentials'. The final version of s 27 of the EEA has been introduced as a direct reaction on the COSATU submission and the concern that other sections in the Act would not offer the capacity to reduce the vertical wage gap. The revised wording includes slightly differing roles for the Minister and collective bargaining, and for the Employment Conditions Commission (ECC). The vertical approach of the section and its placement in the affirmative action chapter was not altered. Collective bargaining was adopted as one measure to reduce the vertical wage gap. It has been argued, however, that:

> [T]he legislature had not paid sufficient attention in the proposed legislation to the pay difference between the highest occupational level and the lowest occupation level. The Department of Labour then proposed section 27 in response to COSATU's proposal for closing the wage gap.[118]

3.3 The decision about and commencement of s 27 EEA

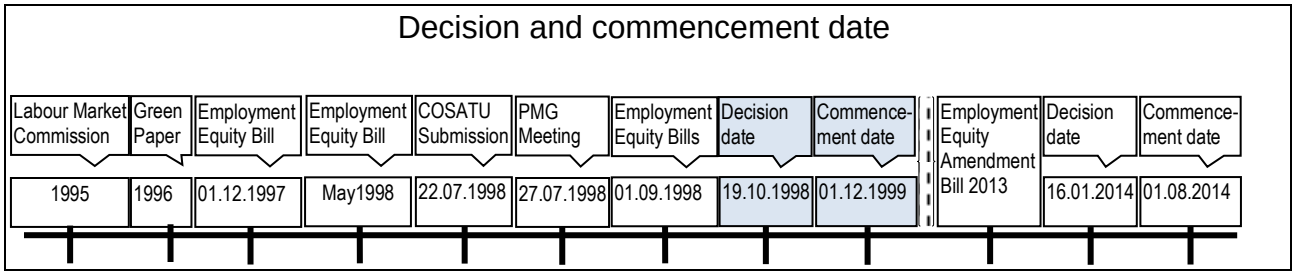


Table 10 H: Decision and commencement date

The final version of s 27 of the EEA as drafted in the Employment Equity Bill (60B–98) was adopted on 19 October 1998[119] and came into force on 1 December 1999. S 27 of the EEA differs from common provisions in equality law. Addressing disproportionate wage differentials also targeted a long period of discrimination, and selective privileging was a bold and controversial step taken during the presidency of Nelson Mandela and broke new legislative ground in South Africa. The debate began in 1995 and the political discussion about it was highly controversial. This cannot surprise since it includes a new approach in equality law. The provision is fundamentally different from many norms in equality law. It directly challenges disproportionate income differentials. It is not necessary to establish that vertical income differentials can be discriminatory. The substantive issue is: Are the vertical income differentials proportionate?

> [T]he section was extremely controversial when introduced into the Act. One can see why; its potential for impacting on wages rates is considerable.[120]

After the strong discussion the circle is now complete as the final version of the Employment Equity Bill addressed the vertical wage gap.

3.4 Intermediate result

The EEA was promulgated in order to fulfil a constitutional obligation to eradicate all forms of discrimination. Chapter 3 of the EEA (s 12–s 27) is referred to as the affirmative action chapter. The section nullifying disproportionate income differentials belongs to these sections dealing with affirmative action. It was an aim of Nelson Mandela`s presidency to introduce affirmative action to redress the discrepancies of the past.

> [A]s president Mandela has said, 'The primary aims of affirmative action must be to redress the imbalances created by apartheid.'[121]

With s 27 of the EEA became the creation of proportionate wage differentials part of the South African affirmative action regulations. Disproportionate income differentials were generated by the prolonged adverse treatment of the majority of South Africans. These disparities cannot be remedied simply by eliminating discrimination. Therefore positive action designed to redress the imbalances of the past were introduced.[122]

> The impact of the long legacy of discrimination demanded that the legislator had to be consistent in finding legal steps based on equality law which would, above all, involve the active cooperation of all stakeholders and the creation of a system of proportionate income differentials that would be more rigorous and better applied. In 1998 Nyman commented that: '[T]his constitutes a progressive step towards the elimination of wage discrimination as it places a positive obligation on employers to eradicate wage differentials'.[123]

Despite the controversial debate leading up to its enactment, and subject to the various appraisals still to be undertaken in the case of individual provisions, credit must be given to s 27 of the EEA for providing, perhaps, the first legal means of addressing pay differentials between the highest and the lowest occupational levels.

The vertical wage gap relates primarily to members of the previously disadvantaged groups; thus, s 27 of the EEA is rightfully part of the affirmative action measures of equality law, being aimed directly at righting the wrongs of South Africa's discriminatory

past. For this reason the provision does not refer to groups or criteria, and the legislator diagnosed the wage gap itself as discriminatory. Fair and just proportionate wage differentials are the central concern of the provision. An interpretation of s 27 of the EEA in relation to international and constitutional law supports this result. Section 3(d) of the EEA adds that the EEA 'and therefore the concept of discrimination'[124] have to be interpreted 'in compliance with the international law obligations of the Republic, in particular those contained in the International Labour Organization Convention (111) concerning Discrimination in Respect of Employment and Occupation'.

4 After the commencement of s 27 of the EEA

4.1 No norms and benchmarks set by the Employment Condition Commission (ECC)

The ECC has not developed norms and benchmarks for proportionate income differentials. According to s 27 (4) of the EEA it is a core task of the ECC to develop norms and benchmarks 'for proportionate income differentials'.[125] It will be necessary to identify why this research work has not be done until today. It also needs to be found out how the ECC can be assisted to fulfil this research work. However it is even more important to identify how s 27 of the EEA can be put into practice without any direction from the ECC.

4.2 The Employment Equity Amendment Act 47 of 2013 – An additional option to s 27 of the EEA

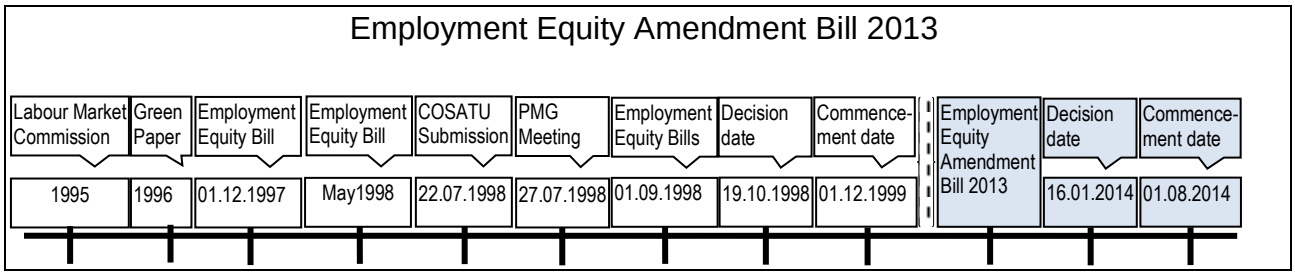


Table 10 I: Employment Equity Amendment Bill 2013

Section 27 of the EEA was amended in 2013 by s 12 of the Employment Equity Amendment Act 47 of 2013. This amendment included three changes to the wording of the section itself and a new headline for the section.[126]

In s 27(1) of the 1998 EEA the reference to s 21(1) and (2) was changed only in reference to s 21(1) of the EEA.[127] The former ss(2) of s 21 of the EEA was deleted and substituted by a new ss(2). The former ss(2) was a special provision requiring a designated employer to submit its first statement. There seems no longer to be a need

for such a provision. The elimination of the reference to the deleted s 21(2) of the EEA was a formal adjustment.

The second amendment to s 27(1) was the deletion of the words 'category and'.[128] From henceforth, designated employers have to report 'on the remuneration and benefits received in each occupational level' of its workforce. Every report now needs to be based on pay on the occupational level and not, additionally, on the occupational category. Occupational levels comprise a group of occupations of equal value. This may be enough to develop norms and benchmarks.

The third amendment incorporated the following clause into ss (2): 'or unfair discrimination by virtue of a difference in terms and conditions of employment contemplated in section 6(4)'.[129] The use of the word 'or' underlines the fact that the previous content of the law has not been altered by the incorporation of the additional text. This amendment to the section includes a new obligation while it retains its previous purpose. This monograph concerns only areas of disproportionate income differentials mentioned in s 27 of the EEA before the addition of aspects of horizontal income inequality.[130] The new additional rule will not be discussed here.

In respect of this monograph, however, it is crucial to note that the amendment did not affect the original Act's wording, content and meaning. This is also reflected in the amended headline of the section with the addition of the words 'and discrimination.'[131] The changed title of s 27 of the EEA is now 'Income differentials *and* discrimination'.

Nevertheless, the new wording is puzzling. Until the amendment was enacted, the only approach of s 27(2) of the EEA was to provide a legal tool to reduce disproportionate income differentials between the top and the bottom income brackets. It is a tool which does not refer to the individual characteristics of a person and only addresses the results of direct discrimination. As described above, a disproportionate pay gap is a result of prolonged discrimination. A tool addressing this without referring to the individual characteristics of the disadvantaged but, at the same time, admitting that

prolonged discrimination also has systemic consequences is innovative. The vertical element of s 27 of the EEA allows for an examination of the future of equality law.

The new component of the norm addresses unequal horizontal income differentials based on unfair discrimination as a result of individual characteristics within an occupational level. This should be taken into account in order to separate the two different issues of the section in the long term.

The Employment Equity Amendment Act 47 of 2013 introduced an additional issue in s 27 of the EEA. The dual orientation is of no benefit for the readability of the provision. In its anticipated effectiveness in the intervention against the wrongs caused by apartheid, s 27 of the EEA has lost nothing of its original intention.

4.3 The EEA 4 form – Income Differential Statement

According to s 27(1) of the EEA, designated employers have to submit a statement for income differentials periodically. The first regulations became effective on 1 December 1999 and included a differentiation between the two forms of income data acquisition. From 1999, the EEA 4 form for companies with 150 workers or more had four sections:

A: Employer details
B: Income differentials per occupational category
C: Income differentials per occupational level
D: Total income differentials[132] (between top and bottom levels).

The simplified Income Differential Statement — the EEA 4A form — was limited to section A and D. Section D was identical in both forms.

Income Differential Statement 1999[133]
EEA 4 and EEA 4A form

Section D: Total income differentials

		Income Levels
All occupations and levels	1.	R
	2.	R

Table 15: The original EEA 4 and EEA 4A form

For reporting purposes, employers had to convert the remuneration and benefits fictitiously up to full-time employment for workers who were employed part-time.[134]
Income levels had to be reported in two wage categories. 'In completing the Income Levels, the first income level (1) represents the average equivalent yearly remuneration and benefits of the five highest-paid employees. The second income level (2) represents the average equivalent yearly remuneration and benefits of the five lowest-paid employees.'[135]

The income differentials between the five highest- and the five lowest-paid occupational levels can be taken as the point of departure for proportionate wage differentials. The purpose of the statement is to reflect disproportionate wage gaps and to set up a plan to flatten an over-divergent remuneration structure.

The design of the EEA 4 form also shows that there can be no question that the approach of s 27 of the EEA is vertical in its original shape. The design of the form was changed once in a while. Nevertheless, when studying the different designs of the EEA 4 form over the past years according to the aim s 27(1) of the EEA, one might get the impression that there is a lack of political will to put the norm into practice. However, it is also possible that the administration felt too much pressure to draft a proper model of norms and benchmarks.

The genesis of the regulations with regard to the EEA 4 forms

No.	Date	Gov Gaz	EEA 4 and EEA 4A forms
First	1999-11-23	1390 of 1999	Sec D: Total income differential five highest- and five lowest-paid
Second	2000-10-02	21583 of 2000	
			Only one EEA 4 form
Third	2006-08-18	29130 of 2006	Questions relating to income of the various occupational levels; no specific 'sec D'
Fourth	2009-07-14	32393 of 2009	
Fifth	2014-08-01	37873 of 2014	

Table 16: The genesis of the EEA 4 forms

The current formulation of the EEA 4 form substituted section D with a request for the wage structure in the different occupational levels. This updated form may specify the remuneration structure but too many details can obscure the whole view.

Section D of the original EEA 4 form and EEA 4A form, used from 1999 until 2006, focuses directly on disproportionate income differentials and underlines the vertical approach of s 27 of the EEA. The subsequent design leads to an elaborate evaluation process but it remains useful.

4.4 The EEA 3 form

In terms of s 25(1) of the EEA, the EEA 3 form was issued in 1999. The purpose of the EEA 3 form was to deliver an official summary of the Act. Until the passage of the Amendment Act, this form stated with regards to s 27 of the EEA, as set out in point 3.9, the following:

> [W]here there are disproportionate income differentials, a designated employer must take measures to reduce it progressively. Such measures may include collective bargaining, compliance with sectoral determinations (section 51 of the

> Basic Conditions of Employment Act); the application of norms and benchmarks recommended by the ECC, relevant measures contained in skills development legislation, and any other appropriate steps.[136]

This description points in a specific direction. There is no need to wait for the application of norms and benchmarks recommended by the ECC. The response to inactivity can be collective bargaining. This result is also supported by the sequence of the means in s 27(3) of the EEA. Collective bargaining is mentioned first as an instrument to reduce disproportionate income differentials. The other means are listed afterwards.

Subsequent to the amendment of the Act in 2013, the description of the duty of an employer in respect of the vertical element of S 27 of the EEA in the EEA 3 form has been changed as set out in the revised point 3.9 as follows:

> [W]here disproportionate income differentials (...) are reflected in the statement contemplated in sub-regulation (a), a designated employer must take measures to progressively reduce such differentials subject to guidance as may be given by the Minister as contemplated in the regulations.[137]

The official summary of s 27 of the EEA, as set out in point 3.9 of the original EEA 3 form, used from 1999 until 2013, focuses directly on the duty of the employer to reduce the wage gap, thereby emphasizing the first measure mentioned in s 27(3) of the EEA, namely collective bargaining. The subsequent design sounds regressive but reaffirms, unaltered, the general obligation to reduce the gap.

4.5 Intermediate result

The specific significance of s 27 of the EEA on vertical income differentials has not changed over the years. Nevertheless, the norm has not been evident until now and the amendment of 2013 obscures the original meaning and reduces the readability of the section. However, the original core demand of the section itself has not been modified.

The original EEA 4 form underlined the vertical approach of the norm. The ECC has not created norms and benchmarks. Reflecting on that, the EEA 4 form from 2006 was changed and is now more difficult to use for the vertical purposes of s 27(2) of the EEA.

5. The way forward

> [S]ection 27 [of the] EEA holds a great potential to reduce the pay gap, but its efficacy will depend on both the extent to which employees, and society, can mobilise around its provisions and the extent to which the EEC is able to fulfil its mandate in providing norms and benchmarks.[138]

5.1 The role of a minimum wage

Minimum wage policies set a floor for the remuneration structure. Section 27 of the EEA addresses the structure beyond the minimum wage. In the context of equality, the minimum wage legislation can be a double-edged sword, for it 'can serve to reduce wage inequality if it rises faster than wages in upper-earning quintiles, or it can actually increase inequality if it falls in real terms'.[139]

Minimum wage legislation is advisable as an instrument to reduce disproportionate income differentials when it includes all employees without loopholes. If it raises wages faster than the average income, this can be attributed to the aim of s 27 of the EEA. It could be a supportive tool to progressively reduce disproportionate income differentials for the most vulnerable of employees.

The ILO Minimum Wage Fixing Convention No. 131 requires no ceiling to a minimum wage. Without prescribing the outcome, it provides rules and offers important advice as to how a minimum wage can be reliably determined. South Africa has not as yet ratified the new ILO Minimum Wage Convention No. 131; it did ratify the first Minimum Wage Convention No. 26 which also included some useful rules. The member states have the duty to implement a mechanism for a minimum wage and have to keep it maintained: 'Each member undertakes to create or maintain machinery whereby minimum rates of wages can be fixed for workers (...) in which no arrangements exist for the effective

regulation of wages by collective agreement or otherwise and wages are exceptionally low'.[140]

The new minimum wage legislation in Germany is regularly audited by a commission of experts. The introduction of the minimum wage in the United Kingdom had the greatest impact on women`s pay since the UK Equal Pay Act 1970. The figures tell us why: Two-thirds of the workers in jobs paid at the minimum wage in the UK in 2009 were women.[141]

5.2 The role of the ECC

The ECC is legally liable to develop norms and benchmarks for proportionate income differentials. This work has not been done as yet. The transposition deficit needs to be reduced, and for that to happen the commission should be put in a position to research and investigate norms and benchmarks for proportionate income differentials if practical difficulties to implement these exist: for example, if the commission can demand staff and the necessary infrastructure to enable it to execute its mandate. .

Hlongwane stresses that the legislator is obliged by ILO Convention No. 100 and ILO Convention No. 111 to comply with international standards, namely to achieve equity in the workplace.[142] According to Article 2 of Convention No. 111, the legislator should enact provisions to achieve equality of opportunity and treatment in the workplace 'with a view to eliminating any discrimination'. The legislature has not enshrined norms and benchmarks for non-discriminatory income differentials inherited from the past as a principle of law in its own right in s 27 of the EEA. The section promotes proportionate income differentials in an indirect manner. In developing proportionate income differentials, South Africa could successful narrow the pay gap and 'would then fully comply with international standards on equal pay'.[143]

Except where the EEA provides otherwise, the Act offers as an enforcement mechanism the general power of the Labour Court in s 50(1)(*f*): 'ordering compliance

with any provision of this Act, including a request made by the Director-General in terms of section 43(2) or a recommendation made by the Director-General in terms of section 44(b)'.

The ECC may benefit from collective bargaining by generalising collective agreements into norms and benchmarks if proportionate. These norms and benchmarks set by the ECC are only one of the possible legal tools available, and, in addition to that, a secondary measure in terms of the order in s 27(3) of the EEA can be used to fulfil the legal requirements of s 27(2) of EEA, as shown above. A remuneration structure for a proportionate income structure can be set by the ECC by defining wage levels from the top to the bottom, as can the determination of the number of wage levels and the size of proportionate gaps between these levels. Results could be supported by collective agreements as role models.

5.3 The role of the 'designated employer'?

Following a strict interpretation of s 1 of the EEA, it might be assumed that the term 'designated employer' is restricted to personal or legal entities which employ 50 or more employees. As mentioned above, the interpretation of the section should include a consideration of the historical context of its origin. As indicated, s 27 of the EEA has been adopted by the legislator to address the apartheid wage gap, including vertical income differentials. This purpose would be undermined if it were bypassed by splitting an entity into a group of companies and, for example, outsource the lowest income groups to a labour broker.

As Van Niekerk et al. state,[144] s 27 of the EEA addresses the socio-economic circumstances of the wages between the different occupational groups – the wages between the top and the bottom. Section 27 of the EEA is part of the affirmative action provisions in the EEA, implemented by the legislator to achieve substantial equality. Affirmative action requires measures which promote the 'achievement of equality,' concerned by s 9(2) of the Constitution. An interpretation enabling it to bypass the

goal of eradicating the apartheid wage gap by the formal design of an organizational unit would undermine the purpose of the Act and disadvantage employers who comply with the law and who seek to eliminate apartheid — and other disproportionate — income differentials.

To address the apartheid wage gap and other disproportionate income differentials as a socio-economic phenomenon is a complex matter. Further reflection is needed on the term ‘employer’ to ensure that the purpose of the section is not undermined. Norms and benchmarks set by the ECC need to consider the de facto or socio-economic employer. Collective agreements can address the purpose of the law by negotiation with all employers forming the group of a socio-economic employer. However, norms set by the ECC could greatly facilitate the enforcement of the provision.

5.4 The role of the measures in s 27 ss (3)?

Since its implementation, the legal requirement embedded in s 27(2) EEA is to 'take measures to progressively reduce [disproportionate] differentials (...)’. At the heart of this section the legal instruction is to reduce income differentials between the top and the bottom. S 27 of the EEA includes a list of possible measures to reduce the wage gap:

> Ss (3) list different legal tools which may be included into these measures:
>
> (a) collective agreements
> (b) compliance with sectoral determinations made by the Minister in terms of section 51 of the Basic Conditions of Employment Act
> (c) applying the norms and benchmarks set by the Employment Conditions Commission
> (d) relevant measures contained in skills development legislation or
> (e) other measures that are appropriate in the circumstances.

The measures (b), (c) and (d) can be withdrawn from the list of possible tools to reduce the gap at this stage. The Minister did not create sectoral determinations addressing the vertical wage gap, and the ECC has not yet published any information on research and investigations into norms and benchmarks. Measures contained in skills development are a supplementary tool to reduce the vertical pay gap. Option (d) can be a tool to change a part of the problem but the main problem is not the lack of skills. Unskilled workers will always earn the lowest wages, therefore. The wide space between the top and the bottom income levels will not be significantly reduced through skills development. While skills development is a useful additional instrument, it is not a key lever to address inequality. This is likely why it is the last tool on the list, followed only by (e) 'other measures that are appropriate in the circumstances'.

Norms and benchmarks set by the ECC may be a proper tool for use in the future while currently it is largely the responsibility of the collective bargaining parties and the duty of employers to address the wage gap. Minimum living wages have an important role guaranteeing against exploitation. In my view it is an aspect of the dignity clause of the constitution to receive a minimum living wage.

The implementation of steps to reduce the wage gap is currently restricted largely to collective bargaining according to s 27(3) (a) and possibly under special circumstances on 'other measures' in terms of s 27(3)(*e*).

5.5 The role of the Minister to give guidance?

The Minister may give guidance; but is not under a legal imperative to do so. When giving guidance the Minister may consider the norms and benchmarks set by the ECC. The Minister is under duty to require that the ECC finalize its guidelines. The ECC is accountable to the Minister. However, to date there has been no evidence that such norms and benchmarks have been established. This is difficult since the norms and benchmarks have not been created until now. The answer to the key issue raised in this subsection is insufficient. The Minister depends on the results of the ECC and cannot

refer to a non-existing outcome. He or she can give guidance in what steps the reduction of disproportionate income differentials can be realized. The legal aim of the reduction is not part of the decision-making scope.

The right of the Minister to give guidance exists independently of the duty to reduce the gap.

5.6 The role of collective bargaining

5.6.1 Bypassing the transformation deficit

Norms and benchmarks for proportionate wage differentials have, to date, not been set by the ECC. Section 27 of the EEA needs to be put into practice by bypassing the transformation deficit. Trade unions, employer and employers' organizations are entitled to engage in collective bargaining. In a collective agreement, working conditions can be formed within the statutory framework. Norms and benchmarks set by the ECC are only one of the possible legal tools and, in addition to these, a secondary measure in terms of s 27(3) to fulfil the legal requirements of s 27(2), as shown above. As the EEA 3 form demonstrated until 2013, and the order in ss 3 highlights, collective bargaining is the primary instrument to be used to address the vertical wage gap.

The origins of labour relations show that in the vast majority of cases collective agreements paved the way for legislation and not the other way around. Parties to a collective agreement are experienced in creating norms and benchmarks and they know that no result is achievable when the parties are not able to turn a blind eye. Collective bargaining is, in general, a solution-oriented experience. It is dominated by practical solution orientation and not by scientific exactness.

5.6.2 Closing the pay gap

Proportionate income differentials can be reached by setting up a fair pay structure reflecting the various sources of income in an organizational unit, or branch, from the top to the bottom. The pay structure could be developed by collective bargaining at a broader level. A remuneration policy based on maximum gap sizes requires an effective system of limited occupational levels to rein in random differentiation. A high number of occupational levels can be an invitation to subjective differentiation. Soft criteria can be introduced with unnecessary wage groups and artificial differentiation. This would be an entry lane for skew distribution or, to call it by its correct name, discrimination.
The legally required proportionality of the income differentials could be achieved by setting percentage distances between all wage and occupational levels from the top to the bottom. Norms and benchmarks may provide certain scales or margins to reflect business realities. The scope may be structured in a branch or enterprise.

The amount of remuneration itself need not be set by the collective agreement. To fulfil the legal order of s 27 of the EEA, only the structure of income distribution from the top to the bottom needs to be on the negotiation table. A remuneration structure can be reached by setting the framework for income structure from the top to the bottom; defining wage levels; their number, and the size of proportionate gaps between the levels.

5.6.3 Objections of critics

Critics may state that the wage gap is caused by the poor education of many employees.

It is a common misconception that the significantly low remuneration of unskilled workers is caused by a lack of education and not as a result of discrimination. The lack of education is the reason why unskilled workers earn the pay of the lowest wage level. Unskilled workers earn the lowest wages everywhere in the world. The significance of the South African situation is the enormous gap that exists even today between higher

wages and remuneration of the lowest paid jobs, which would not be imaginable without the specifics of South African history.

The Bantu Education Act[145] was enacted in 1953. On 16 June 1976 students in Soweto started protesting for better education. The police responded with teargas and bullets. Today 16 June is a national holiday, Youth Day, which honours the young people who lost their lives in the struggle against apartheid and who called for a non-discriminatory education system. The eradication of vertical income discrimination will not change the fact that unskilled workers are paid according to the lowest occupational level. Putting s 27 of the EEA into practice means that employees in the lowest income level receive non-discriminatory wages that, according to the ILO Declaration of Philadelphia, are a 'just share of the fruits of progress'.

Critics may state that employment protection regulations are 'usually seen as an important factor in increasing the reluctance of firms to employ workers on a formal basis' and 'exacerbate wage disparities'. [146] One wonders whether this can be true, as the ILO demonstrated in its *Global Wage Report 2014/2015* that the vertical inequality in South Africa was caused by the discriminatory legal system of the past. Not low skills, not a lack of education, not the free market and not low productivity, but the law caused the extreme income spread between the occupational levels. As Piketty states, 'the history of the distribution of wealth has always been deeply political, and it cannot be reduced to a purely economic mechanism'.[147] The law implemented by politics was an instrument to enlarge differentials.

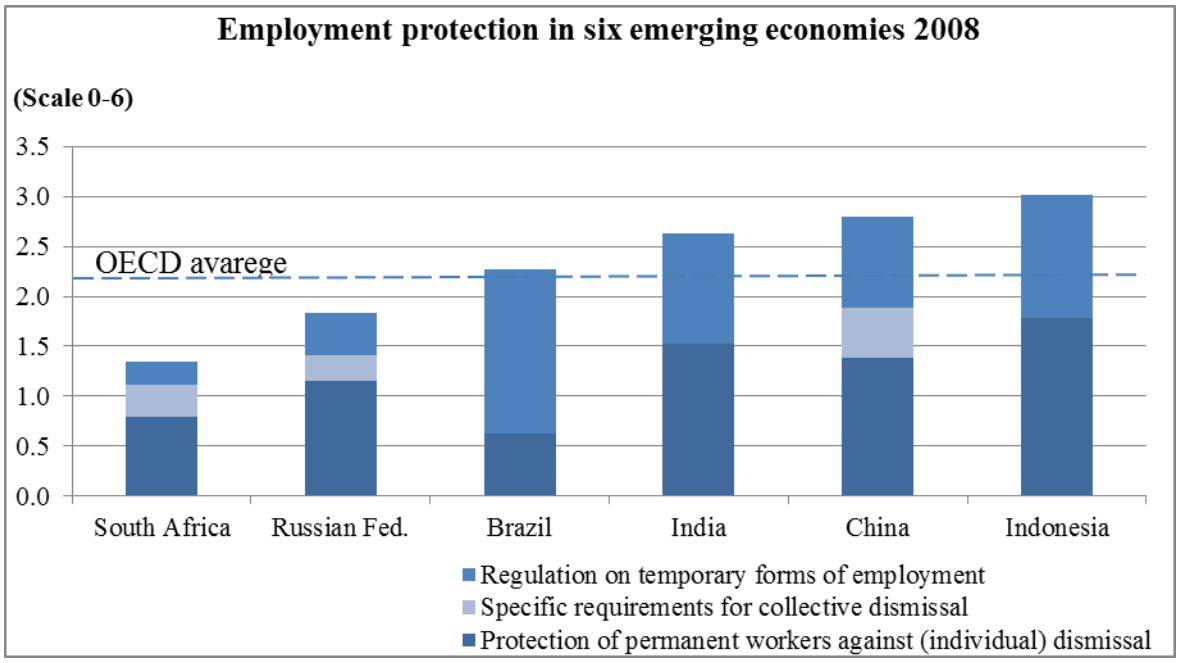
In 2011 the OECD researched the level of employment protection legislation in developed, emerging and developing countries. They found that 'South Africa and Russia have relatively low levels of regulation'. By contrast, in Indonesia, China and India, regulation is well in excess of the OECD average.[148]

Table 18: OECD Employment protection legislation[149]

Law has been used to cause the problem; why not use legal tools to remedy this wrong? Norms and benchmarks set by collective agreements, workplace policies and the ECC can result in non-discriminatory income, providing 'equal dignity and respect regardless of their membership of particular groups'. [150]

5.7 The central statement of s 27 EEA

The legal imperative of s 27 of the EEA is to reduce vertical income differentials between the top and the bottom. This is demonstrated most clearly in the 1999 EEA 4A form. The employer only had to report the five highest and the five lowest incomes of his employees. The information is reduced to the essence. 'Proportionate' means that the



income distance between the top and the bottom leads to a low D9/D1-ratio and no heritage of apartheid is reflected in the distribution of remuneration.

Disproportionate income differentials need to be reduced until the income distribution is more proportionate, resulting in a lower D9/D1-ratio. Socio-economic aspects can be

taken into account by scheduling the steps for the progressive achievement of proportionate income differentials.

The key issue of the section is that the employer takes measures to reduce the pay gap and not that the Minister gives guidance or that the ECC comes to a decision. However regrettable it may be, the ECC`s hesitancy and delay in this respect cannot justify the employer`s failure to act. The *ILO Wage Report 2014/2015* has shown that South Africa has a specific vertical wage gap inherited from apartheid. A wage gap resulting from apartheid can never be proportionate. Therefore, there is a rebuttable presumption regarding a remuneration system of disproportionate wage differentials. The heritage of apartheid is so significant for the South African income distribution that a statement which reflects proportionate income differentials would be a rare exception.

Employers with 50 or more employees are obliged to reduce the inherited apartheid wage gap progressively, irrespective of whether or not the ECC sets norms and benchmarks or whether the Minister provides guidance.

The measure which currently should be used to realize the purpose of the Act is collective bargaining. Steps for the progressive eradication of disproportionate income differentials set out in a collective agreement are presumed to be reasonable: s 27(3) of the EEA gives bargaining partners a wide discretion to determine the steps of progressive reduction.

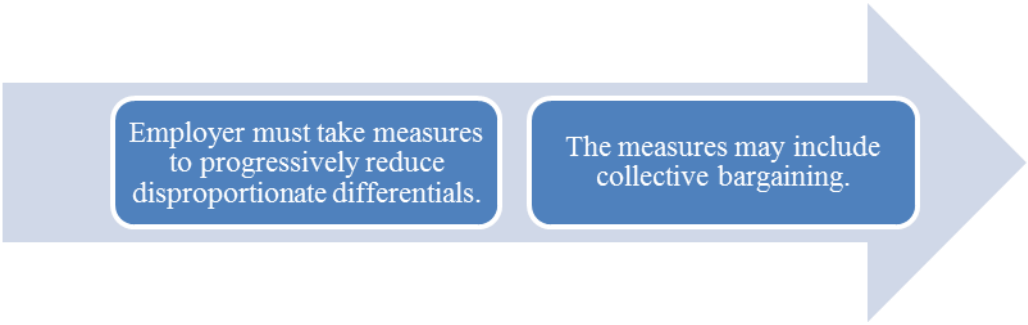


Table 17: The key message of s 27 of the EEA

5.8 The international perspective

Putting s 27 of the EEA into practice is also important on an international scale.

Some international companies have the same or very similar production processes across the globe. Comparing the remuneration of comparable jobs in South Africa and factories elsewhere (primarily in Europe) will highlight the different practices and policies between the income of skilled and unskilled workers in various regions of the world. , Using survey analysis, research and case studies income data at comparable workplaces in different parts of the world will be collected and compared to the findings of the Inequality-adjusted Human Development Index (IHDI) and other international indices.

Section 27 of the EEA can prove to be a more effective method to reduce disproportionate income differentials and to close discriminatory pay gaps. This would also address the previously discussed issue described of relative effectiveness of the existing legislation. S 27 of the EEA may turn out as a concept to give more effectiveness to affirmative action legislation. This could also contribute to the issue of the ILO Woman at Work Initiative and the implementation of equality law in general.

Multinational companies would be able to implement the standards in their codes of conduct and would have an indicator to prove fair treatment of unskilled workers. In a world where it is becoming important for the consumer in Sweden to know how a production company located in South Africa treats its employees, this can be a significant outcome which could develop into an international standard in the future.

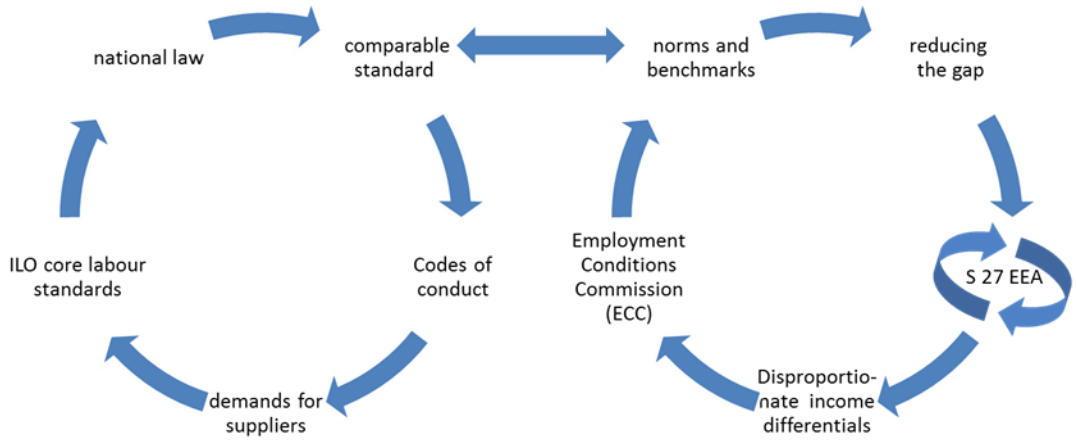


Table 19: South African and international legal circle

5.9 Build ubuntu – close the pay gap!

According to s 25(1) of the EEA, every employer has to display a summary of the Act containing a standard notice. This standard notice was issued as an EEA 3 form in November 1999. The EEA 3 form summarises s 27 of the EEA as follows:

> [W]here there are disproportionate income differentials, a designated employer must take measures to reduce it progressively. Such measures may include collective bargaining (...).[151]

Section 27 of the EEA holds a great potential to reduce vertical pay differentials.[152] The most realistic way to put the provision into practice is to enter well prepared into collective bargaining. The lack of norms and benchmarks set by the ECC does not justify suspending the progressive reduction of income differentials.

From a legal point of view there is no way to justify the current wage differentials, inherited from apartheid, as proportionate. These income differentials are set as disproportionate. Over and above these bases, bargaining partners may negotiate norms and benchmarks for proportionality since the enactment of s 27 of the EEA, and

the equality law is extensive. Results of collective bargaining could also be used as a role model for norms and benchmarks set by the ECC.

There is no legal justification to delay the implementation of concepts for the progressive eradication of vertical income differentials inherited from apartheid. Alistair Smith, the former executive director of NEDLAC, has commented thus:

> [A]s a society we cannot escape the reality that the current state of our labour relations environment and tripartite social dialogue reflects the deeper material and structural challenges in our economy and labour market.
>
> The potential for conflict and violence is always high in situations where high inequality is pervasive and patterned along racial and ethnic lines. The South African private sector workplace is by and large still trapped in the apartheid era.[153]

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