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Gender pay discrimination in the hospitality industry in South Africa

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Abstract

This article documents laws and codes of practice regulating pay discrimination in South Africa, as well as the applicable international laws pertaining to gender pay discrimination. The legal application of international law is explained and the practical application of international and domestic law pertaining to gender pay discrimination is discussed. Gender pay discrimination is particularly rife in the hospitality industry, given the prevalence of sex-typed jobs and the resulting intensified relevance of gender pay discrimination to be found there. Gender inequality is generally based on archaic notions of male superiority and other similar, highly conservative and fallacious notions. It is clear that gender stereotyping and other unfair notions are precluding women from breaking "glass ceilings" in the industry – something that is ironic given that the majority of employees in hospitality are, in any event, women. Women should be assisted to address work–life balance and to have equal opportunity for upward mobility in the industry. The practical advantages and better access to justice relating to such issues that have arisen as a consequence of recent amendments to South African legislation are discussed.

Keywords: international law, constitution, gender-based pay discrimination, legislation

Introduction

Hospitality is a huge and fast-growing service sector. The average global female participation is about 55.5 per cent, and this goes up to 70 per cent at regional levels. Women are employed in an extensive assortment of roles, including as cleaners and kitchen employees, front-line customer service persons and – far less frequently – in senior management. Going forward, the recruitment, retention and promotion of talented women for technical and managerial leadership positions will be necessary to meet the future skills and productivity requirements of this growing sector. The United Nations World Tourism Organization (UNWTO) states that tourism is a leading contributor to export earnings, that it accounts for 6 per cent of all global exports in services, and that it is the fourth largest export sector after fuels, chemicals and automotive products. Women will soon make up a larger percentage of the sector's client base as more of them travel for business and leisure. This aspect will certainly impact on gender equality in the recruitment of employees for hospitality (Baum, 2013). There is however much gender discrimination in the industry. Any form of discrimination is a violation of basic human rights. The numerous international conventions and treaties protecting people against all forms of discrimination bear testimony to this. Basic human rights have attracted attention from all four corners of the planet in recent decades. There is an increased awareness amongst societies of the importance of enforcing these basic human rights and protecting

humanity against the violation of these rights. This is because violation of these fundamental rights is perceived as an aberration by the vast majority of the citizens of the world.

Also in the last few decades, the matter of sex discrimination has been prevalent in news headlines. In addition, the patriarchal mindset has fallen out of vogue amongst the more enlightened in society, a trend which is reflected not only in international conventions and treaties, but also in the constitutions of many countries. The South African Constitution – considered to be one of the most progressive constitutions in the world – is a shining example of this enlightenment.

The purpose of this article is to set out the international and national laws applicable in South Africa regarding gender pay discrimination, with particular reference to the challenges in their application in the tourism industry. This literature review explores the concept of gender pay and general gender discrimination and puts these matters into perspective. Gender discrimination is the thread that runs through the arguments presented in this paper. Current gender discrimination issues are considered to determine the direction of the gender discrimination discourse, with an emphasis on equal pay for equal work.

Sex-typed jobs in the hospitality industry

It is an international phenomenon that women in the hospitality industry generally occupy under-valued, low ranking and low paying jobs such as cleaners, general administrators, receptionists and assistants in the kitchen, while their male counterparts dominate positions such as managers and executive chefs, which are high ranking jobs and pay much more. (Biswas & Cassell, 1996) This international phenomenon is succinctly described as follows:

> Other explanations for the wage gap are rooted in discrimination. These are occupational overcrowding, devaluation of women's work, and social closure. Occupational overcrowding would occur when women are forced into a small set of occupations due to belief systems about what constitutes "appropriate" work for them. This in turn, results in there being too many (female) workers for the jobs available and thus lower wages for that job category. Even if "women's occupations" are not overcrowded, several researchers have observed that occupations dominated by women generally have lower pay rates, due to that fact that work stereotypically associated with women is devalued… (Sturman, 2015)

The legacy of women as an "underutilised and undervalued resource" is echoed by Maxwell (1997:234).

Some of the reasons for women generally taking a back seat when it comes to jobs in the hospitality industry are social, cultural and traditional (Baum, Amoah & Spivack, 1997).

The result of this is that: "The taken-for-granted assumptions about gender that are embedded deeply within established organizational discourses serve to create organizational environments where it is difficult for women to succeed" (Biswas and Cassell, 1996: 23).

Gender pay discrimination in hospitality in a global context: the USA and Spain

In order to demonstrate the magnitude of gender pay discrimination in the hospitality industry, and so as to draw some comparisons, we have also looked briefly at the situation in Spain and the United States of America. It is clear that, in general, the devaluation of female work (England, 1992), is a key reason. Excuses are also made on the grounds of occupational overcapacity (Bergmann, 1974). The rates of wages are based on labour supply in relation to the need for them in the hospitality business. Gender stereotyping is applied so that women invariably have less scope for employment and, when they are employed, they receive lower wages for the same work carried out by their male counterparts. Women employees in hospitality, apart from wage discrimination, are far more likely to be released by their employers on a seasonal basis than are males (Cukier-Snow & Wall, 1993). The sector is thus

characterised by great diversity, complexity, inter-linkages, and high levels of fragmentation when it comes to employment relations and working conditions and benefits, but women always get the "short straw". Female room attendants in hotels, who are in the majority from a gender perspective, commonly earn much less than male kitchen porters whose work demands differing physical exertions but is at an equivalent skills level (Baum, 2013). Hunter-Powell and Watson (2006), in a study of hotel room attendants, cite the notion of gender-segregated occupation. They stress that the derivation of this is related to social construction of the nature of skills involved which are viewed as "domestic", rather than being based on an objective analysis of the tasks that are involved.

In the United States of America, a 2017 Restaurant Management Salary Survey Report conducted by Gecko Hospitality, which is a recruitment organisation, used data from 2 089 restaurant management professionals to draw conclusions relating to gender inequity in the industry (Hotel Business, 2018). The report clearly demonstrates that, in all hospitality employment types and at all levels, the gender pay gap is still ubiquitous. Men still receive greater bonuses than women and their starting salaries also exceed those of women. Such a discrepancy is unethical. There are arguments put forward that there is an oversupply of women in the industry and that they often lack the needed skills. In quick-service restaurants (QSR), fast casual, family dining, casual, upscale casual, and upscale establishments, the trend showed that across all positions, men gained greater benefits with an average of $4 728 per year more than women. Even in hourly positions, women make an average of $0.76 less per hour than men. Furthermore, the positions of executive chef, sous chef, kitchen manager and general manager are dominated by men. Women serve mainly in catering, sales and event manager positions (Hotel Business, 2018). Employers make use of gender stereotypes that diminish women's work and, consequently, women receive lower pay than men (England, 2010).

Occupation and industry category have been demonstrated to be the greatest contributors to gender wage gaps (Blau and Kahn, 2006). When looking at managers who accepted a management position within a company, 37% of women received a salary increase as opposed to only 31% of men, highlighting the desire of companies to preferably hire females as a cheaper option (Hotel Business, 2018). White men also tend to be involved in exclusionary practices that reserve the top opportunities and jobs for other white men, thus perpetuating a socio-economic advantage for themselves as a group. Women are, however, seeking full and equal integration into all aspects of development in order to enable their own economic growth and a more efficient and equitable exploitation of their talent in the workplace (Verveer, 2012).

Clausing (2018) states that a report by the Castell Project and the American Hospitality & Lodging Association's Women in Lodging forum exposed that, the industry's dependence on women for many lower-level jobs notwithstanding, American women in 2016 held only a scant 5% of CEO positions in American hotel companies. Equally disturbing was the finding that women comprised 9% of U.S. hotel company presidents in 2016, up by a mere 1% from four years earlier. Cultural bias was identified as a factor when considering the wide gender gap. Diversity and transformation clearly has a long way to go in efforts to stop gender pay discrimination in the hospitality industry. In the 1970s, the hospitality school at Cornell University had very few women students enrolled. Currently, according to the Castell study, about 70% of hospitality students are women (Clausing, 2018). Breaking ground in gender equity initiatives in the United States are the Marriott and Hilton groups which have thousands of hotels globally. Marriott reports that 50% of the direct reports to CEO Arne Sorenson are female, and 50% of the brand leaders under the company's global head of luxury and lifestyle brands are women (Clausing, 2018). Sadly, an unexplained wage gap between women and men continues to persist globally. Hilton stresses diversity which, for them, begins with a

programme to recruit future general managers from hospitality schools. They are then rotated through various jobs in hotels and more importantly at corporate headquarters.

It is often the case that some women are paid much less than men for performing the same tasks. In Europe, this explains only a minor part of the gender pay gap, due to the effectiveness of the EU and national legislations (Baum, 2013). In Spain the male-female gender gap is flourishing in six core tourism regions (García-Pozo et al., 2012). Marchante et al. (2005) have also explained the gender wage gap as problematic in that men receive higher salaries despite women often having better qualifications and experience. Muñoz-Bullón (2009) discovered that men received 6.7 percent higher monthly wages than women working in the industry. Lillo and Ramón (2005) assert that the tourism sector in Spain is categorised as being a low-tech and traditionally labour-intensive industry, particularly in the hotel and restaurant subsector, that it has a far greater presence of women in its workforce, and that a wage gap still exists between men and women. Women are, however, partly protected by a minimum wage law, but the wage gap does suggest that there is level of gender discrimination (Muñoz-Bullón, 2009).

Degree of gender pay discrimination in South Africa

Gender pay discrimination occurs when two individuals in a company do the same or similar work, or work of equal value, but one is paid less because of his or her sex. (See section 6(4) of the Employment Equity Act 55 of 1998, hereinafter the "EEA"). According to the publication *Shout Africa* (1 April 2014) "South Africa has an overall gender gap of 25%, as measured by economic population and opportunity, education, health and political empowerment, yet its gender pay gap remains static at 35%." Statistics regarding the gender wage gap in South Africa are hard to come by. One of the reasons for this is that determining what jobs or job categories constitute work or jobs of similar value is not an exact science. There are a multitude of factors that have to be considered in determining this. These factors do not constitute a *numerus clausus* and the value to be attached to each determining factor or criterion is also open to interpretation and dependent on variable, possibly subjectively determined outcomes. Suffice it to say that the gender pay gap is significant in South Africa and is very prevalent in the hospitality industry given the stereotypical, low ranking, low paying sex-typed jobs in the hospitality industry as alluded to above. The South African (2018) states:

> "Since the beginning of 2017, the difference in the gender pay gap has fluctuated wildly. Almost two years ago, SA was heading in the right direction – with the sexes separated by just 10%. However, that figure almost tripled within a three-month period, to a little under 30%. There was something of a recovery at the start of 2018, but another damaging quarter means that the pay gap is back up to 22%."

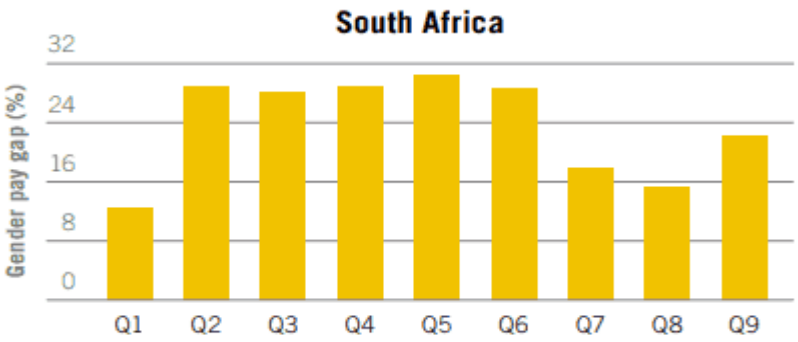

Figure 1. Global Wage Report 2018 Source: The South African, 2018

International law

International law in the form of international human rights instruments, including the core international labour standards, constitute a source of law. The means of incorporating international law into national legal systems can be broadly divided into two systems. Civil law jurisdictions, which include many countries in Europe, take a "monist" approach. This means that international laws, in the form of conventions and treaties, are incorporated into the national law system and form part of the national law. Common-law jurisdictions, being legal systems that are associated with the United Kingdom and its former colonies, such as South Africa, traditionally take what is termed a "dualistic" approach to the incorporation of international law into their legal systems. The "dualist" approach does not consider international law to be part of the national legal system (Kelsen, 1945). As stated by G Ferreira and B Ferreira-Snyman "A dualist approach, on the contrary, implies that public international law has to be formally incorporated into municipal law before it would be enforceable before a municipal court." (Ferreira and Ferreira-Snyman, 2014)

Section 231 of the South African Constitution enables the incorporation of international law into the South African national legal system. It reads:

"(1) The negotiating and signing of all international agreements is the responsibility of the national executive.
(2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).
(3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.
(4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.
(5) The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect."

However, Section 232 of the Constitution provides that customary international law is incorporated into law in South Africa unless it is inconsistent with the Constitution or an act of Parliament. Ferreira *et al.* therefore conclude: "In view of these provisions one can therefore say that South Africa follows a monist approach with regard to customary international law, but a dualist one as far as treaties are concerned. The result is that customary international law is directly enforceable before a South African court, while treaty law must first be incorporated into South African legislation before it becomes enforceable in municipal law."

Another factor indicating a type of hybrid approach to the incorporation of international law in South Africa, despite its dualist foundation, are certain constitutional mandates regarding the incorporation of international law (Brownlie, 2008; Dugard, 2005). Section 233 of the Constitution mandates courts to interpret all legislation in accordance with international standards. Section 39 of the Constitution contains a constitutional mandate to South African courts to interpret the rights contained in the Bill of Rights, which is proclaimed as the cornerstone of South African democracy in section 7(1) of the Constitution, in accordance with international law.

In January 1996, the South African Government ratified the International Convention on the Elimination of all Forms of Discrimination against Women (CEDAW). The Convention was

adopted in 1979 by the United nations General Assembly. The Convention defines discrimination against women as:

> "...any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."

This ratification by the South African Parliament legally bound Parliament and the Executive to actively take steps to ensure the abolition of gender discrimination by abolishing all discriminatory laws and adopting laws that enforce the principle of equality between the genders.

The most important international Conventions regarding gender pay discrimination for South Africa emanate from the International Labour Organisation (ILO). South Africa is a member state of the ILO. International Labour Organisation (hereinafter "ILO") Convention 111 on Discrimination in Employment was ratified by Parliament on 5 March 1997, requires member states to enact legislation "to promote equality of opportunity and treatment in respect of employment and occupation with a view to eliminating any discrimination in respect thereof." (Articles 2–3).

On 30 March 2000, the South African Parliament ratified ILO Convention 100 on equal remuneration, which requires states to "promote…and ensure the application to all workers of the principle of equal remuneration for men and women workers for work of equal value." (Article 2(1)).

South African legislation

The Constitution of South Africa is the supreme law of the Republic of South Africa. It provides the legal foundation for the existence of the republic, sets out the rights and duties of its citizens, and defines the structure of the government. The current Constitution, the country's fifth, was drawn up by the Parliament elected in 1994 in the South African general election, 1994. It was promulgated by President Nelson Mandela on 18 December 1996 and came into effect on 4 February 1997.

The cornerstone of anti-discrimination legislation in South Africa takes the form of what is commonly known as the "equality clause" contained in section 9 of the Constitution. Section 9 of the Constitution reads:

"(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.
(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.
(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

One of the purposes of the Employment Equity Act 55 of 1998 (EEA) is to give effect to the equality clause of the Constitution as set out above. It provides in section 6 that:

> "...no person may unfairly discriminate, directly or indirectly, against an employee in any employment policy or practice, on one or more grounds including race, gender, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, and birth or on any other arbitrary ground."

An "employment policy or practice" is defined in section 1 of the EEA as including, "remuneration, employment benefits and terms and conditions of employment."

Based on this definition section 6(1), read with the definition of a policy or practice in section 1, can be the basis for a claim of gender pay discrimination. (*Mangena & others v Fila South Africa (Pty) Ltd & others*; *Ntai & others v South African Breweries Ltd; Mutale v Lorcom Twenty Two CC*). This is a rather indirect way of implementing a claim for gender or sex pay discrimination. This is no longer necessary as the 2013 amendments to the Employment Equity Act introduced section 6(4) which reads:

> "(4) A difference in terms and conditions of employment between employees of the same employer performing the same or substantially the same work or work of equal value that is directly or indirectly based on any one or more of the grounds listed in subsection (1) is unfair discrimination."

Section 5 provides:

> "(5) The Minister, after consulting the Commission, may prescribe the criteria and prescribe the methodology for assessing work of equal value contemplated in subsection (4)."

The introduction of these sections was a direct result of criticism levelled against South Africa by the ILO for failing to include an explicit provision dealing with equal remuneration claims in the EEA. (Commission for Employment Equity in respect of opportunity and treatment in employment Annual Report 2009–2010 at 3; Clause 3.3.3 of the Memorandum on Objects of Employment Equity Amendment Bill, GG No 35799 of 19 October 2012.)

These provisions now leave no doubt regarding the possibility of a claim for gender pay discrimination. On 1 June 2015, the Minister of Labour published the Code of Good Practice on Equal Pay Remuneration for Work of Equal Value ("the Code") in terms of the EEA.(Gazette Number GN 448 in CG 38837 0f 01 June 2015). The purpose of the Code is to provide practical guidance for the practical application of the principle of equal pay for work of equal value provided for in section 6(4) of the EEA. The Code obliges employers to take steps to eliminate differences in terms and conditions of employment including pay or remuneration of employees who perform the same or substantially the same work or work of equal value.

Regulation 6 of the Code provides the following guidelines to assist employers in determining the value of a particular job:

i) The responsibility demanded of the work, including responsibility for people, finances and material;
ii) The skills, qualifications, including prior learning and experience require to perform the work, whether formal or informal;
iii) Physical, mental and emotional effort required to perform the work; and
iv) The assessment of working conditions may include an assessment of the physical environment, psychological conditions, time when and geographic location where the work is performed.

Regulation 7 provides that a difference in terms and conditions of employment including remuneration does not constitute unfair discrimination if the difference is fair and rational, and is based on any one or a combination of the following grounds:

i) The individual's seniority or length of service;
ii) The individual's qualifications, ability, competence or potential above the minimum acceptable levels required for the performance of the job;
iii) The individual's performance, quantity or quality of work, provided that employees are equally subject to the employer's performance evaluation system and that the employer's evaluation system is consistently applied;
iv) Where an employee is demoted as a result of organisational restructuring or for any other legitimate reason without a reduction in pay/remuneration and fixing the employee's salary at this level until the pay/remuneration of employees in the same job category reaches this level;
v) Where an individual is employed temporarily in a position for purposes of gaining experience or training and as a result receives different pay/remuneration or enjoys different terms and conditions of employment;
vi) The existence of a shortage of a relevant skill in a particular job classification; and
vii) Any other relevant factor that is not unfairly discriminatory in terms of section 6(1) of the EEA.

The Code also provides guidelines regarding the process to be used when evaluating jobs for the purpose of equal pay/remuneration for work of equal value. In terms of this process the employer must:

i) Determine the scope of the audit to be conducted to identify inequalities in pay/remuneration on account of gender race disability or on any other listed or arbitrary ground;
ii) Identify jobs that would be subjected to the audit;
iii) Ensure that job profiles or job descriptions exist and are current before evaluating jobs;
iv) Utilise a job evaluation and/or grading system that is fair and transparent and does not have the effect the discriminating unfairly on any listed or arbitrary ground;
v) Compare jobs that are the same, similar or of equal value in the employer's organisation including comparing female dominated jobs with male dominated jobs as well as any other jobs that may have been undervalued;
vi) Select a method of comparing pay/remuneration both in money and in kind, in the relevant jobs. This can be done by using either the average or the median earnings of employees in the relevant jobs as the basis for pay/remuneration comparisons or by using another method that will compare pay/remuneration in a fair and rational manner;
vii) Identify the reasons for differences in pay/remuneration;
viii) Where differentiation is found to be unjustifiable, determine how to address the inequalities identified, without reducing the pay/remuneration of employees in order to achieve equal remuneration; and
ix) Monitor and review the process annually.

Onus of proof

The 2013 Amendments also introduced provisions regarding the onus of proof:

Section 11 now reads:

"(1) If unfair discrimination is alleged on a ground listed in section 6(1), the employer against whom the allegation is made must prove, on a balance of probabilities, that such discrimination—

(a) did not take place as alleged; or

(b) is rational and not unfair, or is otherwise justifiable.

(2) If unfair discrimination is alleged on an arbitrary ground, the complainant must prove, on a balance of probabilities, that—

(a) the conduct complained of is not rational;

(b) the conduct complained of amounts to discrimination; and

(c) the discrimination is unfair."

Prior to these amendments, the claimant had to establish a *prima facie* case that the reason for the difference in remuneration was discrimination on the basis of any of the listed grounds contained in section 6 (1) of the EEA. In *Ex parte Minister of Justice : In re R v Jacobson and Levy* , Stratford J explained what is meant by *prima facie* proof or a *prima facie* case as follows: "*Prima facie* evidence in its usual sense is used to mean *prima facie* proof of an issue, the burden of proving which is upon the party giving that evidence. In the absence of further evidence from the other side, the *prima facie* proof becomes conclusive proof and the party giving it discharges the onus."

In order to discharge the onus of proof, the claimant had to identify a comparator and establish firstly, that the work done by the comparator was either the same or of equal value and secondly, that the comparator was earning more than the claimant. Thereafter, the claimant had to establish a causal link between the unequal remuneration and a listed or analogous ground for discrimination. If the claimant managed to do this, the employer then bore the onus of proving that the discrimination was fair in order to escape liability. *(Mangena & others v Fila South Africa (Pty) Ltd & others* at 1225).

The Labour Court per van Niekerk J stated (at 1299):

> "…a claimant in an equal pay claim must identify a comparator, and establish that the work done by the chosen comparator is the same or similar work (this calls for a comparison that is not over-fastidious in the sense that differences that are infrequent or unimportant are ignored) or where the claim is for one of equal pay for equal value, the claimant must establish that the jobs of the comparator and the claimant, while different, are of equal value having regard to the required degree of skill, physical and mental effort, responsibility and other relevant factors. Assuming that this is done, the claimant is required to establish a link between the differentiation being the difference in remuneration for the same work or work of equal value) and a listed or analogous ground. If the causal link is established, section 11 of the EEA requires the employer to show that the discrimination is not unfair i.e. it is for the employer to justify the discrimination that exists."

The question, therefore, is whether the new section 11 of the EEA eases the burden of proof borne by the applicant. Nothing is said about making out a *prima facie* case in the amendments to the EEA. All that is stated is that once the discrimination on a listed ground is alleged, the

onus of proof rests with the employer to prove that either the alleged discrimination did not take place as alleged or that it is rational and not unfair, or is otherwise justifiable. A literal interpretation of this amendment suggests that all that is required of the applicant is a mere allegation and the respondent employer then bears the burden of proving either that there was no such discrimination or it was otherwise not unfair or justified.

Since the primary rule regarding interpretation of statute is to give its ordinary or literal meaning, unless it is clear that this was not the intention of the legislature or unless a literal meaning makes no sense or is preposterous, there seems to be no reason to interpret this amendment in any other way than according to its literal meaning. The amendment makes it much easier for the applicant to prove his or her case. It also makes practical sense because, very often, employees are not privy to what the salaries of other workers or what the employers' policies or motivations regarding these differences are. Consequently it makes sense to require the employer to justify the differences.

Access to justice

Prior to the 2013 amendments, any litigant alleging unfair discrimination in any form at the workplace was obliged to take the matter to the Labour Court if the conciliation process at the CCMA (Commission for Conciliation, Mediation and Arbitration) failed to bring about a settlement. As is commonly known, access to justice through the courts is both costly and time consuming. Another disincentive to referring a dispute to the courts is that the outcome is usually difficult to predict. Given these facts, it is easy to conclude that many litigants give up the fight if it means going to court. However the 2013 amendments provide hope for claimants who have been discriminated against in the workplace because referral to the CCMA has no legal cost implications.

Section 10(6) of the EEA provides:

"(a) an employee may refer the dispute to the CCMA for arbitration if—

(i) the employee alleges unfair discrimination on the grounds of sexual harassment; or

(ii) in any other case, that employee earns less than the amount stated in the determination made by the Minister in terms of section 6(3) of the Basic Conditions of Employment Act; or

(*b*) any party to the dispute may refer it to the CCMA for arbitration if all the parties to the dispute consent to arbitration of the dispute."

Procedures at the CCMA do not cost anything. Aggrieved employees who do not have the financial means to approach the Labour Court for relief may now refer the matter to the CCMA where there are no costs associated with legal representation. This will enhance access to justice and involve savings in costs and time for employees and employers. The CCMA arbitration award is final and binding and is subject only to review, not appeal. Even where the applicant earns more than the threshold of earnings prescribed by the Minister of Labour, it is still possible to have the matter arbitrated at the CCMA at no cost instead of going to the Labour Court if both parties agree to this. If one of the parties refuses to agree to arbitration and forces the matter to be referred to the Labour Court,that party bears the risk of a costs order being awarded against them should they be the unsuccessful party in the end.

Enforcement via monitoring by the Department of Labour

Section 27 of the amendments to the EEA enable the Department of Labour to use the system for reporting on wage differentials as a mechanism for uncovering and combating discriminatory practices in respect of wages and remuneration. It is hoped that monitoring and policing by the Department of Labour in terms of this provision will act not only as a deterrent to errant employers, but will also help claimants in pay discrimination cases to prove their cases in court.

Managerial Implications

Gender equality, and thus no pay discrimination, means that women and men must have equal conditions for realising their full human rights and for contributing to, and benefiting from, economic, social, cultural and political development (Baum, 2013). Gender equality is then the equal valuing by society of the likenesses and the variances between men and women and the roles they play. It is based on women and men being full partners in their workplaces. Bastounis and Minibas-Poussard (2012) posit that stereotyping women in certain roles and at certain pay levels is so entrenched that it will be difficult to overcome but, with perseverance, it is highly likely.

Hospitality managers will need to consider how to contend with issues relating to wage gaps in salaries for women employees but, additionally, will also need to handle pressing issues which plague women in the sector in general, inter alia, the often surprisingly inhospitable corporate culture that pervades hospitality businesses – poor mentoring and lack of opportunity for women to break glass ceilings, pre-conceived notions and social stereotyping, and often abusive male co-workers. Women also need to try to navigate the “push and pull” issues between family-personal issues and their impact on the workplace.

Given the seriousness of the global gender inequity issue in the hospitality industry, employers who are prudent will strive to develop acquisition and retention strategies that tend to attract top talent irrespective of gender, and pay both male and females the same wages. Only in this way can employee commitment, quality service and a passion for the industry be maintained. Employee satisfaction is critical for the industry’s sustainability. Simons and Hinkin (2001) state that employee turnover rates have a decisive impact on hotel profits. Given that many women leave to get better pay, it is time to transform and adopt equitable labour policies. This is, in any event, the fair and ethical course of action that is required given that women now account for over 50 percent of college, master’s, and doctoral graduates (Catalyst, 2013). Women need to be assuming positions in all levels of the hospitality industry’s organisational matrices, but should also be more visible in senior leadership roles (Nielsen & Huse, 2010). Fair compensation is critical for all industries, but especially in hospitality, an industry where competition is growing very rapidly and where there is a strong need for quality, service-oriented employees (Chuang and Dellmann-Jenkins, 2010; Walsh and Taylor 2007).

Recommendations

There needs to be a higher level of dialogue and fair action between hospitality businesses and employees, especially relating to equal opportunity. Women must be given equal access to jobs paying the same salaries as received by men. Hotels especially, as the main employers of women in the industry, should promote employees based on merit and not on gender. Education and training programmes need to be developed with women in mind so as to encourage and facilitate higher levels of participation by them within hospitality business initiatives.

This means that some industry players will need to revamp their gender equality and equal opportunity policies and practices. The career of an industry employee needs to be managed at a high level of human consciousness so that employees can have a good work-life and work-family balance. All real obstacles to female participation in senior leadership positions, or in roles at lower levels in organisational matrices based on archaic social construct creation must be removed. Hospitality workplaces must consider providing enhanced social and physical security, flexible working conditions and shifts, and access to flexible and equitable arrangements for training and development.

Conclusion

Women entering hospitality companies must be accorded more opportunities for upward movement into top executive positions which, for many decades, have been the preserve of men. More aggressive efforts are needed to overcome the lack of transformation, diversity and gender discrimination which exists in the hospitality industry.

From a legal perspective, the industry is headed in the desired direction. McCarthy (2004) states that employers and the government should contemplate supporting women in their drive for equality with males. The South African government is taking steps in the right direction in this regard. The latest amendments to the EEA leave no doubt regarding employees' rights to inter alia gender pay equality. Claims based on pay discrimination need no longer be made indirectly on the basis of section 6(1) read with section 1 of the EEA which defines an employment policy or practice as including remuneration. The claim for pay discrimination based on any listed ground (which includes gender), or based any other arbitrary ground, can now be made directly in terms of section 6(4) of the EEA.

The Code issued in June 2015 provides practical guidelines for employers on how to ascertain whether certain jobs are of equal value, what justifications are valid for pay discrimination and the process to be followed in order to prevent pay discrimination.

Regarding access to justice, the alternative of referring a dispute to the CCMA for those who cannot afford the cost of litigation in the Labour Court will go a long way to providing access to justice for those who cannot afford litigation processes in court. The shifting of the burden of proof to the employer to prove fairness will go a long way to assist applicants in winning their cases and will also have the indirect effect of helping to ensure that employers do not implement unjustified and unfair pay discrimination.

The Code also sheds some light on how employers can, from a practical perspective, ensure the elimination of pay discrimination. Although, the Code does, to some extent, address the situation where men and women do the same or similar work, or work of similar value, this is not directly addressed in the EEA. The Minister of Labour should prescribe a more detailed and concise system that ensures that traditionally female jobs are accorded accurate value.

The system provided for in terms of section 27 of the amendments, whereby wage discrimination is uncovered, may serve not only to help eradicate discriminatory practices in general, but may also assist individual claimants in making out *prima facie* cases of discrimination.

Discourses around gender pay and related matters ought to concentrate on mitigating the regressive stereotypes, preconceived notions and biases, cultural values and sensitivities that encourage the exploitation of women and which keep them from breaking the "glass ceilings" and attaining the leadership roles that many of them deserve in the hospitality industry.

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