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EMPLOYMENT ALERT

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ISSUE

EQUAL PAY: COMPARISON DO'S AND DON'TS

A brief explanation of the role of comparators in equal pay claims.

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EQUAL PAY: COMPARISON DO'S AND DON'TS

South African law requires that the comparator must be employed by the same employer.

South African law and academia are quiet about what happens to comparators once chosen.



A brief explanation of the role of comparators in equal pay claims.

An equal pay claim generally ensures that two people doing equal work are paid equally. It is brought by the claimant, an employee, either as an unfair discrimination claim, or an equal treatment claim. Both claims require comparators to be selected by the claimant. The claimant must then compare their position to that of the chosen comparator in order to prove that there is a pay disparity, where after the employer may raise certain defenses as set out in Regulation 7 of the Employment Equity Act, No 55 of 1998 (EEA) or s198D of the Labour Relations Act, Act, No 66 of 1995 (LRA).

How do you choose a comparator?

Presently, South African law requires that the comparator must be employed by the same employer.

In the United Kingdom (UK), claimants may use questionnaires, apply to the tribunal or approach the relevant trade union for information relating to potential comparators. There are no such similar procedures in South Africa.

For a South African claimant, it is important to ensure that the chosen comparator reflects the choice of claim that you are bringing. A s6 EEA claim would require a comparator to have different terms and conditions of employment despite performing the same or substantially the same work or that such work is of equal value. The claimant must prove discrimination on a listed or an arbitrary ground.

A s198D LRA claim would require a permanent employee to be chosen when the claimant is a "temporary employment service employee" or a fixed-term employee and it must be proven that the inequality is not justifiable on the basis of seniority, experience, merit, quality or quantity of work performed etc. It is not required to prove discrimination. This remedy only applies to employees earning below the BCEA threshold and employed for a period of longer than three months.

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EQUAL PAY: COMPARISON DO'S AND DON'TS

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The UK tribunals have also held that pay will not fall back to its previous level if your comparator leaves the employment.



Stuck with your comparator?

South African law and academia are quiet about what happens to comparators once chosen.

The UK is a good source of information which can aid the interpretation of our legislation. The Constitution of the Republic of South Africa, Act, No 108 of 1996 states that the courts must prefer any reasonable interpretation of any legislation that is consistent with international law over any alternative interpretation that is inconsistent with the same.

In the UK, an employee can name more than one comparator, though the House of Lords have warned tribunals that picking too many may be seen as abusing the equal pay procedure. This may be of application to South Africa.

Once chosen, can one change comparators?

In the UK case of *Prest & Ors v Mouchel Business Services Ltd & Anor*, the tribunal found that the actual substitution of comparators did not matter as long as the work done by the new comparator was comparable to the work done by the claimant, so that the nature of the claim did not change.

Additionally, the UK tribunals have also held that pay will not fall back to its previous level if your comparator leaves the employment. This shows that the claim is linked to the actual employment held by the comparator, not to the individual.

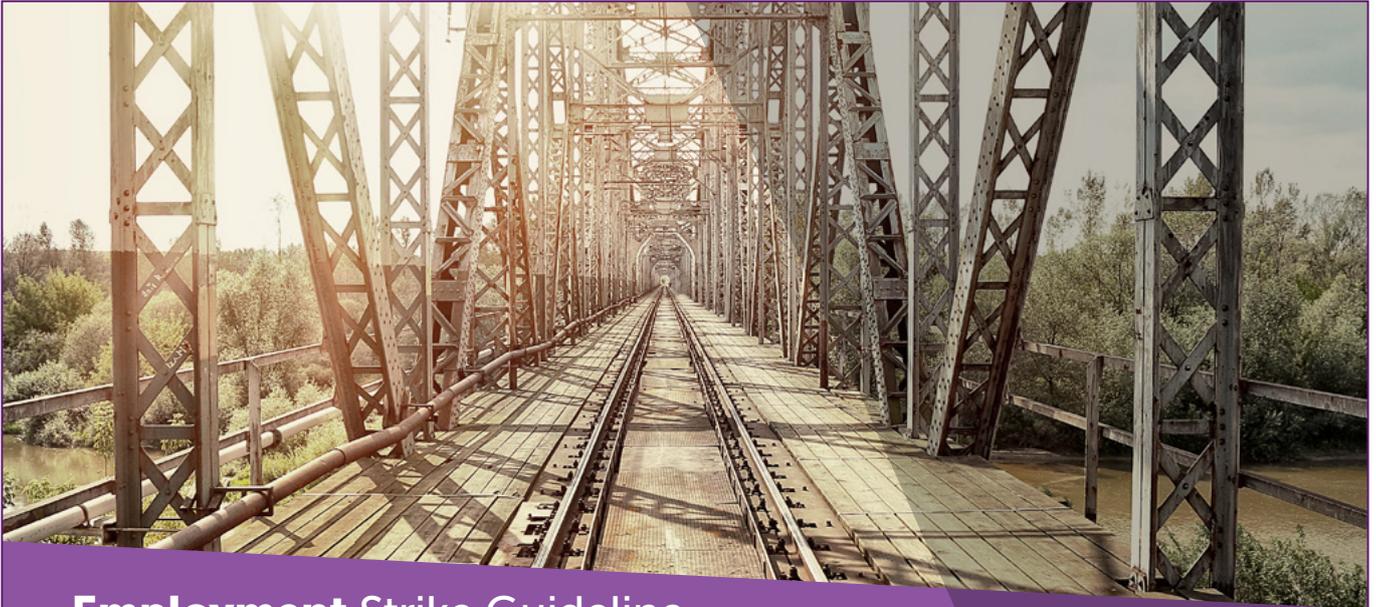
When one applies this international law to South Africa, employees should be able to choose more than one comparator, substitute comparators (provided the nature of the claim is not changed) and experience no pay decreases if the comparator leaves employment.

Hugo Pienaar and Michaela Grieve

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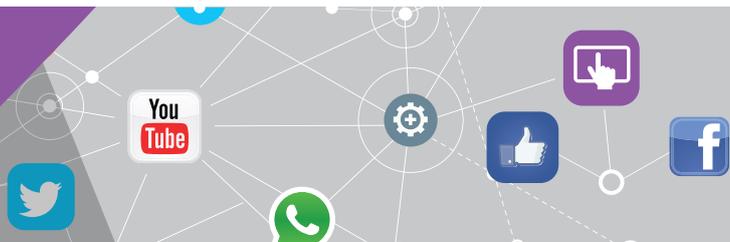
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OUR TEAM

For more information about our Employment practice and services, please contact:



Aadil Patel
National Practice Head
Director
T +27 (0)11 562 1107
E aadil.patel@cdhlegal.com



Thabang Rapuleng
Director
T +27 (0)11 562 1759
E thabang.rapuleng@cdhlegal.com



Anelisa Mkeme
Senior Associate
T +27 (0)11 562 1039
E anelisa.mkeme@cdhlegal.com



Gillian Lumb
Regional Practice Head
Director
T +27 (0)21 481 6315
E gillian.lumb@cdhlegal.com



Samiksha Singh
Director
T +27 (0)21 481 6314
E samiksha.singh@cdhlegal.com



Sean Jamieson
Associate
T +27 (0)11 562 1296
E sean.jamieson@cdhlegal.com



Kirsten Caddy
Director
T +27 (0)11 562 1412
E kirsten.caddy@cdhlegal.com



Gavin Stansfield
Director
T +27 (0)21 481 6313
E gavin.stansfield@cdhlegal.com



Zola Mcaciso
Associate
T +27 (0)21 481 6316
E zola.mcaciso@cdhlegal.com



Jose Jorge
Director
T +27 (0)21 481 6319
E jose.jorge@cdhlegal.com



Michael Yeates
Director
T +27 (0)11 562 1184
E michael.yeates@cdhlegal.com



Tamsanqa Mila
Associate
T +27 (0)11 562 1108
E tamsanqa.mila@cdhlegal.com



Fiona Leppan
Director
T +27 (0)11 562 1152
E fiona.leppan@cdhlegal.com



Ndumiso Zwane
Director
T +27 (0)11 562 1231
E ndumiso.zwane@cdhlegal.com



Bheki Nhlapho
Associate
T +27 (0)11 562 1568
E bheki.nhlapho@cdhlegal.com



Hugo Pienaar
Director
T +27 (0)11 562 1350
E hugo.pienaar@cdhlegal.com



Steven Adams
Senior Associate
T +27 (0)21 481 6341
E steven.adams@cdhlegal.com



Siyabonga Tembe
Associate
T +27 (0)21 481 6323
E siyabonga.tembe@cdhlegal.com



Nicholas Preston
Director
T +27 (0)11 562 1788
E nicholas.preston@cdhlegal.com



Anli Bezuidenhout
Senior Associate
T +27 (0)21 481 6351
E anli.bezuidenhout@cdhlegal.com

BBBEE STATUS: LEVEL TWO CONTRIBUTOR

Cliffe Dekker Hofmeyr is very pleased to have achieved a Level 2 BBBEE verification under the new BBBEE Codes of Good Practice. Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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JOHANNESBURG

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa. Dx 154 Randburg and Dx 42 Johannesburg.
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

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