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EMPLOYMENT ALERT

IN THIS 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.

CHAMBERS GLOBAL 2014 - 2019 ranked our Employment practice in Band 2: Employment.

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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.

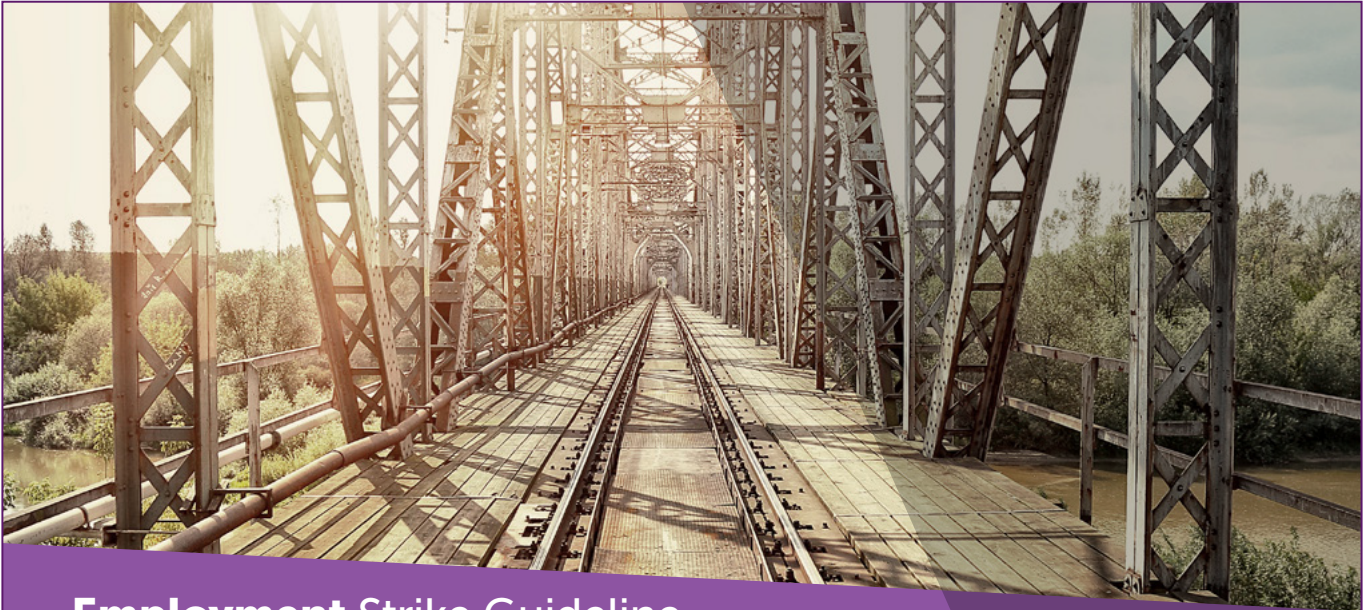
When one applies this international law to South Africa, employees should be able to choose more than one comparator, substitute comparators (provided the nature of the claim is not changed) and experience no pay decreases if the comparator leaves employment.

Hugo Pienaar and Michaela Grieve

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Included 53 of CDH's Directors across Cape Town and Johannesburg.


Recognised Chris Charter as Lawyer of the Year for Competition Law (Johannesburg).

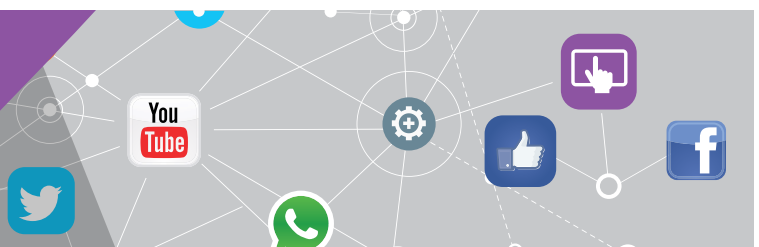
Recognised Faan Coetzee as Lawyer of the Year for Employment Law (Johannesburg).

Recognised Peter Hesseling as Lawyer of the Year for M&A Law (Cape Town).

Named Cliffe Dekker Hofmeyr Litigation Law Firm of the Year.

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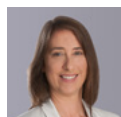


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BBBEE STATUS: LEVEL TWO CONTRIBUTOR

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.

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

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