The Ambit of Terms and Conditions of Employment in Equal Pay Claims Under Section 6(4) of the *EEA*: Lessons from International Labour Law

S Ebrahim*

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Author

Shamier Ebrahim

Affiliation

University of South Africa

Email

Ebrahs1@unisa.ac.za

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Abstract

Section 6(4) of the *Employment Equity Act* 55 of 1998 (hereafter the *EEA*) seeks to provide an explicit basis for three types of equal pay claims. It is clear from section 6(4) of the *EEA* that there are various elements that an equal pay claimant must prove across the three equal pay causes of action. The only element considered in this article is "[a] difference in terms and conditions of employment". No definition is provided in the *EEA*, the *Employment Equity Regulations* (GN R595 in GG 37873 of 1 August 2014) or the *Code of Good Practice on Equal Pay/Remuneration for Work of Equal Value* (GN 448 in GG 38837 of 1 June 2015) as to what would fall within the ambit of "terms and conditions of employment" as referred to in section 6(4) of the *EEA*. It is important to know what would fall within the ambit of terms and conditions of employment as one of the elements an equal pay claimant must prove is that there is a difference in "terms and conditions of employment". This importance is furthermore evidenced by the fact that an employer can defeat an equal pay claim if it is able to show that the cause of the equal pay complaint does not fall within the ambit of terms and conditions of employment. This article seeks to answer the question as to what falls within the ambit of terms and conditions of employment for the purpose of equal pay claims as contemplated in section 6(4) of the *EEA* by having reference to domestic and international labour law.

Keywords

Equal pay; equal terms and conditions of employment; terms and conditions of employment; pay; working conditions; *Employment Equity Act*; *Equal Pay Code; Employment Equity Regulations.*

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1 Introduction

Section 6(4) of the *Employment Equity Act*[1] (hereafter the *EEA*) seeks to provide an explicit basis for three types of equal pay claims which are equal pay for the same work, equal pay for substantially the same work, and equal pay for work of equal value. It should be stated at the outset that these claims are commonly referred to as equal pay claims even though they go beyond pay and apply to terms and conditions of employment. To this end, section 6(4) of the *EEA* provides the following:

> 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.

It is clear from section 6(4) of the *EEA* that there are various elements that an equal pay claimant must prove across the three equal pay causes of action. The only element considered in this article is "[a] difference in terms and conditions of employment". No definition is provided in the *EEA*, the *Employment Equity Regulations*[2] (hereafter the *Employment Equity Regulations*) or the *Code of Good Practice on Equal Pay/Remuneration for Work of Equal Value*[3] (hereafter the *Equal Pay Code*) as to what would fall within the ambit of "terms and conditions of employment" as referred to in section 6(4) of the *EEA*. It is important to know what would fall within the ambit of terms and conditions of employment as one of the elements an equal pay claimant must prove across all three equal pay causes of action set out above, is that there is a difference in "terms and conditions of employment", failing which the claim will not make it out of the starting blocks. An employer can likewise defeat an equal pay claim if it is able to show that the cause of the equal pay complaint does not fall within the ambit of terms and conditions of employment as referred to in section 6(4) of the *EEA*. The ascertaining of what falls within the ambit of "terms and conditions

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* Shamier Ebrahim. LLB (NMMU) LLM Labour Law (*cum laude*) LLD (UNISA). Senior Lecturer, Department of Mercantile Law, University of South Africa. Advocate of the High Court of South Africa. E-mail: ebrahs1@unisa.ac.za. ORCiD: https://orcid.org/0000-0002-2702-9247. This article is based on part of my unpublished thesis *A comprehensive analysis of the law regulating equal pay in South Africa* (LLD thesis, University of South Africa 2023). I should like to acknowledge the support provided to me by the University of South Africa in the form of the Academic Qualification Improvement Programme Grant which allowed me to complete my doctorate. The opinions and conclusions expressed in this article should not be attributed to the University of South Africa; they are solely mine.

1 *Employment Equity Act* 55 of 1998 (hereafter the *EEA*).

2 GN R595 in GG 37873 of 1 August 2014 (hereafter the *Employment Equity Regulations*).

3 GN 448 in GG 38837 of 1 June 2015 (hereafter the *Equal Pay Code*).

of employment" is an aspect that affects both an employee and employer and is thus worthy of analysis.

Against this background the purpose of this article is to answer the crisp question which is, what falls within the ambit of terms and conditions of employment for the purpose of equal pay claims as contemplated in section 6(4) of the *EEA*, by having reference to domestic and international labour law.

2 Terms and conditions of employment (South African law)

As already stated, there is no definition in the *EEA*, the *Employment Equity Regulations* or the *Equal Pay Code* relating to what falls within the ambit of terms and conditions of employment for the purpose of equal pay claims as contemplated in section 6(4) of the *EEA*. The Labour Court (including the then Industrial Court) has heard equal terms and conditions claims only relating to remuneration.[4] It is self-evident that remuneration falls within the ambit of "terms and conditions of employment" and can be considered the most important term thereof. The Labour Court thus provides limited guidance as to what would be justiciable as an equal terms and conditions claim in terms of section 6(4) of the *EEA*.

Item 2.1.2 of the *Equal Pay Code* states that it must be read in conjunction with the *Code of Good Practice on the Integration of Employment Equity into Human Resources Policies and Practices*[5] (hereafter the *Integration of Employment Equity Code*), in particular the part that deals with terms and conditions of employment. The *Integration of Employment Equity Code* includes the following under terms and conditions of employment: (a) working time and rest periods; (b) annual leave; (c) sick leave; (d) maternity leave; (e) family responsibility leave; (f) any other types of leave; (g) rates of pay; (h) overtime rates; (i) allowances; (j) retirement schemes; (k) medical aid; and (l) other benefits.[6]

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4 See *SA Chemical Workers Union v Sentrachem* 1988 9 ILJ 410 (IC); *National Union of Mineworkers v Henry Gould* (Pty) Ltd 1988 9 ILJ 1149 (IC); *Mthembu v Claude Neon Lights* 1992 13 ILJ 422 (IC); *TGWU v Bayete Security Holdings* 1999 4 BLLR 401 (LC); *Louw v Golden Arrows Bus Services (Pty) Ltd* 2000 21 ILJ 188 (LC); *Heynsen v Armstrong Hydraulics (Pty) Ltd* 2000 12 BLLR 1444 (LC); *Ntai v SA Breweries Ltd* 2001 22 ILJ 214 (LC); *Co-operative Worker Association v Petroleum Oil and Gas Co-operative of SA* 2007 1 BLLR 55 (LC); *Mutale v Lorcom Twenty Two CC* 2009 3 BLLR 217 (LC); *Mangena v Fila South Africa (Pty) Ltd* 2010 31 ILJ 662 (LC); *Duma v Minister of Correctional Services* 2016 37 ILJ 1135 (LC); *Pioneer Foods (Pty) Ltd v Workers Against Regression (WAR)* 2016 37 ILJ 2872 (LC); *Sethole v Dr Kenneth Kaunda District Municipality* 2018 1 BLLR 74 (LC).

5 GN 1358 in GG 27866 of 4 August 2005 (hereafter the *Integration of Employment Equity Code*).

6 Item 11.1 of the *Integration of Employment Equity Code*.

It is submitted that the above terms and conditions of employment mentioned under the *Integration of Employment Equity Code* fall within the ambit of *terms and conditions of employment* in section 6(4) of the *EEA*. This submission is based on the following. Item 2.1.2 of the *Equal Pay Code* explicitly states that the *Equal Pay Code* must be read in conjunction with that part of the *Integration of Employment Equity Code* that deals with terms and conditions of employment (which is the above list of terms and conditions of employment) and this is peremptory and not directory. Furthermore, item 2.6 of the *Equal Pay Code* states that it provides guidance when interpreting the *EEA*. This means that the *Equal Pay Code* read with the part of the *Integration of Employment Equity Code* dealing with terms and conditions of employment provides guidance to the phrase "terms and conditions of employment" referred to under section 6(4) of the *EEA*. It is further submitted that the list of terms and conditions of employment contained in the *Integration of Employment Equity Code* should specifically be mentioned in the *Equal Pay Code* to promote legal certainty regarding what falls within the ambit of terms and conditions of employment in section 6(4) of the *EEA*.

Whilst the relationship between section 6(4) of the *EEA* and the *Equal Pay Code* might seem axiomatic, it is prudent to briefly explain this. The *Equal Pay Code* has been issued in terms of section 54(1) of the EEA. In *Joy Mining Machinery (A division of Harnischfeger (SA) (Pty) Ltd) v NUMSA*[7] the Labour Court made some general remarks regarding a code of good practice issued under section 54 of the *EEA*. It stated that section 54 of the *EEA* does not state what the purpose of a code is, but it may be assumed that a code is intended to provide guidance to a court and persons applying the *EEA*. It further stated that it may also be assumed that a court will take a code into account when adjudicating a matter before it. It stated, however, that a court is not bound by a code but where it finds a part of a code to be unacceptable then it would provide reasons for not following the code.[8] It is submitted that section 3(c) of the *EEA* assists in this regard, and it should be read with section 54 of the *EEA* in order to ascertain the purpose of a code of good practice. Section 3(c) of the *EEA* states that the Act must be interpreted taking into account any relevant code of good practice issued in terms of the Act. Section 3(c) thus makes it mandatory to interpret the Act by taking a relevant code of good practice into account. Applying this to the context of section 6(4) of the *EEA* and the *Equal Pay Code* means that section 6(4) of the *EEA* must be interpreted by taking the *Equal Pay Code* into account. Item 2.6 of the *Equal Pay Code* captures this by stating that

7 *Joy Mining Machinery (A Division of Harnischfeger (SA) (Pty) Ltd) v NUMSA* 2002 4 BLLR 372 (LC).

8 *Joy Mining Machinery (A Division of Harnischfeger (SA) (Pty) Ltd) v NUMSA* 2002 4 BLLR 372 (LC) para 19.

the code provides guidance when interpreting the *EEA*. Item 2.2 of the *Equal Pay Code* buttresses this by stating that the code applies to all employers and employees covered by the Act. Furthermore, it is submitted that the *Equal Pay Code* forms part of the equal pay legal framework and it would be strange were it simply to be ignored.

Item 2.4 of the *Equal Pay Code* makes reference to the Schedule on the Calculation of Employee's Remuneration in terms of section 35(5) of the *Basic Conditions of Employment Act* 75 of 1997[9] (hereafter the *BCEA Schedule*) in a footnote while referring to the definition of remuneration in the *Basic Conditions of Employment Act* 75 of 1997 in the text.[10] The *BCEA Schedule* lists the following payments that are included in an employee's remuneration for the purposes of calculating pay for annual leave, payment instead of notice and severance pay:

> (a) Housing or accommodation allowance or subsidy or housing or accommodation received as a benefit in kind;
>
> (b) Car allowance of[or] provision of a car, except to the extent that the car is provided to enable the employee to work;
>
> (c) Any cash payments made to an employee, except those listed as exclusions in terms of this schedule;
>
> (d) Any other payment in kind received by an employee, except those listed as exclusions in terms of this schedule;
>
> (e) Employer's contributions to medical aid, pension, provident fund or similar schemes;
>
> (f) Employer's contributions to funeral or death benefit schemes.[11]

The *BCEA Schedule* also lists the following payments that do not form part of remuneration for the purposes of the above calculations, which are:

> (a) Any cash payment or payment in kind provided to enable the employee to work (for example, an equipment, tool or similar allowance or the provision of transport or the payment of a transport allowance to enable the employee to travel to and from work);
>
> (b) A relocation allowance;
>
> (c) Gratuities (for example, tips received from customers) and gifts from the employer;
>
> (d) Share incentive schemes;
>
> (e) Discretionary payments not related to an employee's hours of work or performance (for example, a discretionary profit-sharing scheme);
>
> (f) An entertainment allowance;

9 GN 691 in GG 24889 of 23 May 2003 (hereafter the *BCEA Schedule*).
10 Footnote 3 under item 2.4 of the *Equal Pay Code*.
11 Item 1(a)-(f) of the *BCEA Schedule*.

(g) An education or schooling allowance.[12]

It is not clear from the *Equal Pay Code* as to the intended purpose of the *BCEA Schedule* in relation to the *Equal Pay Code* and, in particular, the phrase "terms and conditions of employment". It is not proper to suggest, without more, that the phrase "terms and conditions of employment" under section 6(4) of the *EEA* should be interpreted in accordance with the *BCEA Schedule* lists of payments. It is thus prudent to analyse international labour law relating to equal pay in order to ascertain whether or not there is support for all or some of the payments listed in the *BCEA Schedule* to fall within the phrase "terms and conditions of employment" and any further guidance that can be gleaned therefrom.

3 Terms and conditions of employment (international labour law)

The use of international law in domestic law is dealt with in the *Constitution of the Republic of South Africa*, 1996[13] as well as in the *EEA*. Section 39(1)(b) of the *Constitution* states that a court, tribunal or forum must consider international law when interpreting the Bill of Rights. Section 233 of the *Constitution* goes further and states that a court interpreting any legislation must give preference to any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with it. It is clear that section 233 of the *Constitution* requires any legislation, which would include the EEA, to be interpreted in accordance with international law. It is submitted that applying section 233 of the *Constitution* in the context of the *EEA* means that the courts must prefer any reasonable interpretation of the Act that is consistent with international labour law over any alternative interpretation that is inconsistent with the same. It is axiomatic that the branch of international law which is relevant to the *EEA* is international labour law.[14]

In *NUMSA v Baderpop (Pty) Ltd*[15] the Constitutional Court held that it has acknowledged that the Conventions and Recommendations of the International Labour Organisation are important sources of international (labour) law.[16] Regional instruments such as instruments of the European

12 Item 2(a)-(g) of the *BCEA Schedule*.

13 *Constitution of the Republic of South Africa*, 1996 (hereafter the *Constitution*).

14 Biagi 1997 https://training.itcilo.org/actrav_cdrom1/english/global/law/lablaw.htm states that international labour law is one category (a branch) of international law.

15 *NUMSA v Baderpop (Pty) Ltd* 2003 3 SA 513 (CC).

16 *NUMSA v Baderpop (Pty) Ltd* 2003 3 SA 513 (CC) para 28. Also see *SANDU v Minister of Defence* 1999 6 BLLR 615 (CC) para 25 where the Constitutional Court held the following: "Section 39 of the Constitution provides that when a court is interpreting chapter 2 of the Constitution, it must consider international law. In my view, the conventions and recommendations of the International Labour Organisation (the ILO), one of the oldest existing international organisations, are

Union (EU) also constitute a source of international labour law.[17] The courts have also recognised that regional instruments can constitute a source of international labour law. In *S v Makwanyane*[18] the Court concisely set out the importance of having regard to both International Labour Organisation (ILO) and regional instruments by stating the following:

> 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 of specialised agencies such as the International Labour Organisation may provide guidance as to the correct interpretation of particular provisions of Chapter Three.[19]

Section 3(d) of the *EEA* states that the Act must be interpreted in compliance with the international law obligations of the Republic, especially those contained in the ILO Convention No 111 of 1958 concerning *Discrimination in Respect of Employment and Occupation*. The *EEA* thus requires its provisions to be interpreted in accordance with international labour law. Reference to international law in the interpretative process is peremptory and should be complied with.

Based on the above, it is submitted that international labour law should thus not be seen as being foreign to our domestic labour law but should rather be embraced as forming part of (having a close connection with) our domestic labour law in the sense that it can assist domestic law where interpretations are needed and/or its experience is needed in order to better understand a specific aspect/s of domestic labour law.

According to the ILO *Equal Remuneration Convention*[20] (hereafter the *Equal Remuneration Convention*) member states are required to apply the principle of equal pay to males and females according to methods which they consider appropriate.[21] While the *Equal Remuneration Convention* refers to "remuneration" it does not refer to "terms and conditions of employment". The ILO *Discrimination (Employment and Occupation)*

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important resources for considering the meaning and scope of 'worker' as used in section 23 of our Constitution."

17 Valticos and Von Potobsky *International Labour Law* 49, 71-74.

18 *S v Makwanyane* 1995 3 SA 391 (CC).

19 *S v Makwanyane* 1995 3 SA 391 (CC) para 35.

20 *Equal Remuneration Convention* 100 of 1951 (hereafter the *Equal Remuneration Convention*). South Africa has ratified the *Equal Remuneration Convention* on 30 March 2000 (ILO 2024 https://normlex.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200_COUNTRY_ID:102888).

21 Article 2(1) of the *Equal Remuneration Convention*.

Convention[22] (hereafter the *Discrimination Convention*) on the other hand, expressly proscribes unfair discrimination in relation to terms and conditions of employment.[23] The ILO *Equal Pay Guide* states that the *Discrimination Convention* is closely linked with the *Equal Remuneration Convention*.[24] This link means that both Conventions, when read together, prohibit unfair discrimination in terms and conditions of employment (including pay). The *EU Recast Directive*[25] prohibits both unfair discrimination in pay as well as in terms and conditions of employment in one instrument.[26] The *Equal Remuneration Convention* defines remuneration to cover the basic wage and any additional emoluments whatsoever payable directly or indirectly, whether in cash or in kind, by the employer to the worker and arising out of the worker's employment.[27] The ILO *Equal Remuneration General Survey by the Committee of Experts on the Application of Conventions and Recommendations*[28] (hereafter the *ILO Equal Remuneration General Survey*) states that the *Equal Remuneration Convention's* definition of remuneration is couched in broad terms, which ensures that equality is not limited to the basic wage and neither can it be restricted by placing reliance on semantic distinctions. It further states that the phrase "any additional emoluments whatsoever" contained in the definition of remuneration includes "elements as numerous as they are diverse", which will include increases based on seniority, marital status benefits, cost of living allowances, housing allowances, family allowances and the provision and cleaning of work clothes, *inter alia*. The *ILO Equal Remuneration General Survey* also states that the phrase "arising out of the worker's employment" in the definition of remuneration includes social security schemes financed by the employer(industry) but excludes social security schemes which are purely public (purely public social security schemes).[29]

22 *Discrimination (Employment and Occupation) Convention* 111 of 1958 (hereafter the *Discrimination Convention*).

23 Article 1(1)(a) read with Art 1(3) of the *Discrimination Convention*.

24 Oelz, Olney and Manuel *Equal Pay* 3.

25 *Directive 2006/54/EC on the Implementation of the Principle of Equal Opportunities and Equal Treatment of Men and Women in Matters of Employment and Occupation (Recast)* (2006) (hereafter the *EU Recast Directive*).

26 Article 14(1)(c) of the *EU Recast Directive*.

27 Article 1(a) of the *Equal Remuneration Convention*.

28 ILO *Equal Remuneration: General Survey* of 1986 (hereafter the *ILO Equal Remuneration General Survey*).

29 *ILO Equal Remuneration General Survey* paras 14, 15, 17.

The *EU Recast Directive* contains a similar definition in respect of "pay" as follows:

> the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly, in respect of his/her employment from his/her employer.[30]

The *Equal Pay Guide* states that the definition of "remuneration" in the *Equal Remuneration Convention* is wide enough to incorporate all elements in addition to the basic wage and these elements should be considered as part of the definition of remuneration for the purposes of the *Equal Remuneration Convention* if equality is to be attained in the workplace.[31] It states that the basic wage is generally a small part of the overall payment and benefits that a worker receives and discrimination will be continuous if equality is pursued for the basic wage only, to the exclusion of other work-related payments/benefits. Article 4 of the *EU Recast Directive* seeks to remove pay discrimination relating to all aspects and conditions of remuneration – which extends beyond the basic wage. The *Equal Pay Guide* emphasises the fact that while the definition of remuneration is broad enough to cover other payments and benefits, it can do so only provided that the payments and benefits arise out of the worker's employment.[32] It states that nothing turns on whether the term "remuneration" or "pay" is used as long as the term includes the broad range of elements contemplated in the *Equal Remuneration Convention*.[33] The *Equal Pay Guide* sets out the following list of examples of elements that will fall under the term "remuneration":

(a) basic wage, minimum wage, ordinary wage;

(b) overtime pay;

(c) productivity bonus;

(d) performance payments;

(e) seniority increment;

(f) family, child or dependency allowance;

(g) tips (gratuities);

(h) laundering provided or an allowance;

(i) travel allowance or expenses;

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30 Article 2(1)(e) of the *EU Recast Directive*. Landau and Beigbeder *From ILO Standards to EU Law* state the following at 95: "The wide definition of pay under EU law is inspired by the ILO definition of 'remuneration'".

31 Oelz, Olney and Manuel *Equal Pay* 24, 34.

32 Oelz, Olney and Manuel *Equal Pay* 34-35.

33 Oelz, Olney and Manuel *Equal Pay* 35.

(j) car provided;

(k) accommodation provided or an allowance;

(l) clothing provided or an allowance;

(m) commission;

(n) life insurance;

(o) employer or industry social insurance;

(p) company shares or profits;

(q) food provided or an allowance.[34]

The following list of payments from the *BCEA Schedule* is listed as falling under the term pay for the purpose of unfair pay discrimination in terms of the above international instruments and materials: (a) a housing or accommodation allowance including housing or accommodation provided as a benefit in kind;[35] (b) a car or travel allowance including a car being provided;[36] (c) employer's contributions to medical aid, pension, provident fund or similar schemes;[37] (d) employer's contributions to death benefit schemes (which may include funeral benefits);[38] (e) gratuities (for example, tips received from customers);[39] (f) share incentive schemes;[40] and (g) discretionary payments not related to an employee's hours of work or performance (for example, a discretionary profit-sharing scheme).[41] Based on this, it is submitted that these payments should fall under the phrase "terms and conditions of employment" under section 6(4) of the *EEA*.

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34 Oelz, Olney and Manuel *Equal Pay* 35.

35 This allowance (payment) is set out in item 1(a) of the *BCEA Schedule* and also falls under pay according to the *ILO Equal Remuneration General Survey* and the *Equal Pay Guide* as discussed above.

36 This allowance (payment) is set out in item 1(b) read with item 2(a) of the *BCEA Schedule* and also falls under pay according to the *Equal Pay Guide* as discussed above.

37 This allowance (payment) is set out in item 1(e) of the *BCEA Schedule* and also falls under pay as an "Employer or industry social insurance" according to the *Equal Pay Guide* as discussed above.

38 This allowance (payment) is set out in item 1(f) of the *BCEA Schedule* and also falls under pay as "Life insurance" according to the *Equal Pay Guide* as discussed above.

39 This allowance (payment) is set out in item 2(c) of the *BCEA Schedule* and also falls under pay as "Tips (gratuities)" according to the *Equal Pay Guide* as discussed above.

40 This allowance (payment) is set out in item 2(c) of the *BCEA Schedule* and also falls under pay as "Company shares or profits" according to the *Equal Pay Guide* as discussed above.

41 This allowance (payment) is set out in item 2(e) of the *BCEA Schedule* and also falls under pay as "Company shares or profits" according to the *Equal Pay Guide* as discussed above.

While international labour law gives a broad definition of remuneration it has a useful test to ascertain whether a payment falls within the definition of remuneration, which test is whether the payment arises out of the worker's employment.[42] It is submitted that this test should be used to determine whether terms and conditions (including pay) fall within terms and conditions of employment under section 6(4) of the *EEA* where there is a dispute regarding this, as no test exists in either the *EEA*, the *Employment Equity Regulation*s or the *Equal Pay Code* in order to ascertain this - and it is a useful test in this regard. It is important to note that whilst the elements of remuneration in the form of the basic wage, minimum wage, ordinary wage and overtime pay as set out in the *Equal Pay Guide* above are not found in the *BCEA Schedule*, these forms of remuneration are found in the *Integration of Employment Equity Code* as rates of pay and overtime rates and thus strengthen the submission made above that these forms of remuneration fall within the ambit of terms and conditions of employment under section 6(4) of the *EEA*.

The following elements of what falls within the ambit of pay (working conditions) under international labour law as discussed above are not mentioned in the *BCEA Schedule* or the *Integration of Employment Equity Code*:[43] (a) increases based on seniority (seniority increment); (b) marital status benefits; (c) cost of living allowance; (d) family allowance; (e) provision of working clothes or an allowance; (f) cleaning of working clothes (laundering) or an allowance; (g) productivity bonus; (h) performance payments; (i) child or dependency allowance; (j) commission; and (k) food provided or an allowance. Nevertheless, the following guidance can be extracted. This list of payments (working conditions) provides examples of what falls under the ambit of pay (including working conditions) for the purposes of an equal pay (terms and conditions) claim in international labour law, and to this end, it is submitted that these items should be listed as such in the *Equal Pay Code,* which could assist with determining whether such pay (working conditions) fall within the ambit of "terms and conditions of employment" in section 6(4) of the *EEA*.

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42 Article 1(a) of the *Equal Remuneration Convention*; *ILO Equal Remuneration General Survey* paras 14, 15, 17; Art 2(1)(e) of the *EU Recast Directive*; Oelz, Olney and Manuel *Equal Pay* 34-35.

43 Set out in para 2 above.

3.1 European Union case law dealing with what falls within the ambit of pay and working conditions (terms and conditions of employment)

3.1.1 Overtime pay, pay supplements and sick pay

In *Elsner-Lakeburg v Land Nordrhein-Westfalen*[44] the European Court of Justice (ECJ), in a matter dealing with pay differentials between full-time and part-time workers, held that pay for additional hours of work fell within the ambit of the term "pay" as set out in Article 141 of the *EC Treaty*[45] and Article 1 of the *Equal Pay Directive*.[46] The dispute in this case concerned Ms Elsner-Lakeberg (the plaintiff) not being paid for working 2.5 additional hours in a month because the relevant legislation allowed for additional work to be remunerated only if it exceeded 3 hours in a month.[47] This case strengthens the submission made above that overtime rates (pay) as set out in the *Integration of Employment Equity Code* fall within terms and conditions of employment under section 6(4) of the *EEA*.[48]

In *Brunnhofer v Bank der Osterreichischen Postsparkasse*[49] the ECJ held that a monthly salary supplement paid to employees in terms of their employment falls within the ambit of pay as contained in Article 119 of the *EEC Treaty*[50] and the *Equal Pay Directive*. The Court further held that equal pay must be guaranteed with regard to each aspect of pay taken in isolation and not only on the basis of an overall assessment of all the consideration.[51] A monthly salary supplement provides an example of what falls under the term pay for the purposes of an equal pay claim in international labour law and it is submitted that it should be mentioned as such in the *Equal Pay Code,* which could assist with determining whether such payment can fall within terms and conditions of employment under section 6(4) of the *EEA*.

In *Jämställdhetsombudsmannen v Örebro Läns Landsting*[52] the ECJ was seized with the question regarding whether an inconvenient-hours supplement enjoyed by midwives, *inter alia*, formed part of the pay to be

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44 *Elsner-Lakeburg v Land Nordrhein-Westfalen* Case C-285/02, 2005 IRLR 209 (ECJ).

45 *Consolidated Versions of the Treaty on European Union and the Treaty Establishing the European Community* (2002) (hereafter the *EC Treaty*).

46 *Directive 75/117/EEC Relating to the Application of the Principle of Equal Pay for Men and Women* (1975) (hereafter the *Equal Pay Directive*).

47 *Elsner-Lakeburg v Land Nordrhein-Westfalen* Case C-285/02, 2005 IRLR 209 (ECJ) paras 6, 7, 16.

48 See para 2 above.

49 *Brunnhofer v Bank der Osterreichischen Postsparkasse* Case C-381/99, 2001 IRLR 571 (ECJ).

50 The *Treaty Establishing the European Economic Community* (1957) (also known as the *Treaty of Rome*) (hereafter the *EEC Treaty*).

51 *Brunnhofer v Bank der Osterreichischen Postsparkasse* Case C-381/99, 2001 IRLR 571 (ECJ) para 80.

52 *Jämställdhetsombudsmannen v Örebro Läns Landsting* 2000 IRLR 421 (ECJ).

compared in a pay discrimination claim. The Court had regard to the definition of pay in Article 119 of the *EEC Treaty* and held that an inconvenient-hours supplement constitutes a form of pay to which a worker is entitled by reason of her employment, and which is paid to her for performing duties at inconvenient hours.[53] An inconvenient-hours supplement provides an example of what falls under the term "pay" for the purpose of an equal pay claim in international labour law, and to this end, it is submitted that it should be mentioned as such in the *Equal Pay Code,* which could assist with determining whether such payment can fall within terms and conditions of employment in section 6(4) of the *EEA*.

In *Rinner-Kuhn v FWW Spezial-Gebaudereinigung GmbH*[54] the ECJ held that the continued payment of the wages of an ill employee falls within the meaning of pay as contained in Article 119 of the *EEC Treaty*. The question before the ECJ was whether Article 119 of the *EEC Treaty* and the *Equal Pay Directive* prohibits national legislation which allows employers to exclude those workers whose work do not exceed 10 hours per week or 45 hours per month from the continued payment of wages in the event of their illness (sick leave pay) in circumstances where this exclusion affects a larger percentage of females than males. The Court held that this type of differentiation results in discrimination against female workers and should be regarded as being prohibited by Article 119 of the *EEC Treaty* unless the differentiation can be justified by objective factors unrelated to discrimination on the grounds of sex.[55] The continued payment of wages in the event of illness (sick leave pay) strengthens the submission made above that sick leave (which is normally paid leave) as contained in the *Integration of Employment Equity Code* falls within terms and conditions of employment under section 6(4) of the *EEA*.[56]

3.1.2 Bonus

In *Kruger v Kreiskrankenhaus Ebersberg*[57] the ECJ was faced with the question regarding whether Article 119 of the *EEC Treaty* should be interpreted to mean that the following exclusion constitutes indirect discrimination against female employees where it affects a larger percentage of females than males. The exclusion by a collective agreement of employees, working less than 15 hours a week and earning pay which exempts them from compulsory social insurance, to a special annual bonus.

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53 *Jämställdhetsombudsmannen v Örebro Läns Landsting* 2000 IRLR 421 (ECJ) paras 26-27, 40, 42.

54 *Rinner-Kuhn v FWW Spezial-Gebaudereinigung GmbH* Case 171/88, 1989 ECR (ECJ).

55 *Rinner-Kuhn v FWW Spezial-Gebaudereinigung GmbH* Case 171/88, 1989 ECR (ECJ) paras 5, 7-8, 12.

56 See para 2 above.

57 *Kruger v Kreiskrankenhaus Ebersberg* Case C-281/97, 1999 ECR I-5141 (ECJ).

The Court restated that Article 119 of the *EEC Treaty* prohibits discrimination in collective agreements. The ECJ held that an end of year bonus which is paid under a law or collective agreement falls within the meaning of pay in Article 119 of the *EEC Treaty* because it is received in relation to the person's employment. It finally held that Article 119 of the *EEC Treaty* should be interpreted to mean that the following exclusion constitutes indirect discrimination against female employees where the exclusion applies independently of the employee's sex but where it, in effect, affects a larger percentage of females than males. The exclusion by a collective agreement of employees, working less than 15 hours a week and earning pay which exempts them from compulsory social insurance, to a special annual bonus.[58]

In *Lewen v Denda,*[59] the ECJ was faced with the question regarding whether a Christmas bonus falls within the ambit of Article 119 of the *EEC Treaty,* notwithstanding that it is paid by the employer exclusively as an incentive for future work or loyalty or both (voluntarily as an exceptional allowance). The Court stated that it is settled in its case law that pay in Article 119 of the *EEC Treaty* includes all consideration in connection with employment paid to a worker, whether immediate or in the future and whether paid under a contract of employment, in terms of legislation or on a voluntary basis. The Court held that the reason for the payment is not relevant for the purposes of Article 119 of the *EEC Treaty* as the decisive factor is whether the benefit has been granted in connection with employment. The Court further held that a Christmas bonus which is paid voluntarily as an exceptional allowance falls within the ambit of pay as contained in Article 119.[60]

An annual bonus (also known as a Christmas bonus) provides an example of what falls within the ambit of the term pay for the purposes of an equal pay claim in international labour law, and to this end, it is submitted that it should be mentioned as such in the *Equal Pay Code* which can assist with deciding whether such payment can fall within terms and conditions of employment in section 6(4) of the *EEA*. The Court in both cases applied the test, whether the payment has been granted in connection with the employee's employment, in order to decide whether the payments in question fell within the ambit of pay, and it came to the finding that an annual bonus falls within the ambit of pay as it is paid to the employee by reason of her employment. It is submitted that the use of the test by the court strengthens the submission made above that this test should be used to decide whether terms and conditions fall within the ambit of "terms and conditions of employment" under section 6(4) of the *EEA*. It is further

58 *Kruger v Kreiskrankenhaus Ebersberg* Case C-281/97, 1999 ECR I-5141 (ECJ) paras 12, 17, 20, 30.

59 *Lewen v Denda* Case C-333/97, 1999 ECR I-7266 (ECJ).

60 *Lewen v Denda* Case C-333/97, 1999 ECR I-7266 (ECJ) paras 16, 17, 19-21, 24.

submitted that the way in which the court phrased this test should be added to the manner in which the test is phrased under international labour law above and the result of this will be the phrasing of the test as follows: whether the payment arises out of *or is connected* with the worker's employment. It is submitted that this version of the test should be stated as the test to be used to determine whether terms and conditions fall within the ambit of "terms and conditions employment" under section 6(4) of the *EEA*.

3.1.3 Redundancy payment

In *Commission of the European Communities v Kingdom of Belgium*[61] the Commission of the European Communities launched an application before the ECJ seeking a declaration that the Kingdom of Belgium had breached Article 119 of the *EEC Treaty* by rendering compulsory a collective agreement by Royal Decree that excludes female employees over the age of 60 from being eligible for an additional redundancy payment but does not exclude males over the age of 60. The collective agreement provided for additional payments to be made to workers who are made redundant at a certain age. This additional payment would be paid by the employee's last employer and it was equal to half the difference between the net wage and the unemployment benefit. The Commission argued that the additional payment in this case fell within the ambit of pay in Article 119 of the *EEC Treaty* and the fact that female employees aged between 60-65 could not obtain the payment unlike their male counterparts who are in the same age group infringed the principle of equal pay for male and female employees. The Kingdom of Belgium argued that the additional payment could not be taken to fall within the ambit of pay in Article 119 of the *EEC Treaty* and it was not a redundancy payment but was rather payment which supplemented the unemployment benefit in the event of redundancy. The ECJ held that the additional payment fell within the ambit of pay in Article 119 of the *EEC Treaty* as the payment was to be received from the employee's last employer, the payment was connected to the employment relationship, and the agreement to make the payment applied only to persons' employment in terms of a contract of employment. The Court further held that the mere fact that the additional payment supplements a social security benefit is not decisive. It thus rejected the Kingdom of Belgium's arguments and upheld the application.[62]

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61 *Commission of the European Communities v Kingdom of Belgium* Case C-173/91, 1993 ECR I-693 (ECJ).

62 *Commission of the European Communities v Kingdom of Belgium* Case C-173/91, 1993 ECR I-693 (ECJ) paras 1-3, 7, 9, 15-16, 18, 20, 23.

In *Barber v Guardian Royal Exchange Assurance Group*[63] the ECJ dealt with the question as to whether a redundancy benefit falls within the ambit of pay in Article 119 of the *EEC Treaty*. The Court restated the definition of pay in Article 119 and held that the fact that certain benefits are paid post the termination of employment does not preclude such benefits from falling within the ambit of pay. It then held that a redundancy benefit granted to an employee falls within the ambit of pay in Article 119 of the *EEC Treaty*. The Court also held that the principle of equal pay must be applied to each element of remuneration and not on the basis of a comprehensive assessment of pay (on pay as a whole).[64] The *EU Memorandum on Equal Pay* states that an argument which advances that the total package should be assessed to achieve equal pay seems to be unacceptable. It further states that the impact of Article 119 of the *EEC Treaty* and the *Equal Pay Directive* proper is that where work is found to be of equal value then the "favourable elements of terms and conditions apply equally to the female and male jobs."[65]

A redundancy payment and additional redundancy payment provide examples of what falls under pay for the purposes of an equal pay claim in international labour law. It is submitted that it should be mentioned as such in the *Equal Pay Code,* which could assist with deciding whether such payments can fall within terms and conditions of employment in section 6(4) of the *EEA*. The Court has stated that the principle of equal pay must be applied to each of the elements of remuneration and not on the basis of a comprehensive assessment of pay and this has also been stated in *Brunnhofer* and the *EU Memorandum on Equal Pay* as referred to above. It is submitted that this should be applied to equal pay claims under section 6(4) of the *EEA*.

3.1.4 Termination payments

In *Gruber v Silhouette International Schmied GmbH & Co KG*[66] the ECJ noted that it was not contested before it that termination payments fell within the ambit of pay in Article 119 of the *EEC Treaty* as the dispute concerned the calculation of the amount of the termination payment which could be claimed. The Court made this observation in the context of a question being referred to it which involved whether Article 119 of the *EEC Treaty* precludes national legislation which provides a reduced termination payment to

63 *Barber v Guardian Royal Exchange Assurance Group* Case C-262/88, 1990 ECR I-1944 (ECJ).

64 *Barber v Guardian Royal Exchange Assurance Group* Case C-262/88, 1990 ECR I-1944 (ECJ) paras 7, 12, 14, 35.

65 *EU Memorandum on Equal Pay for Work of Equal Value* (1994) (hereafter the *EU Memorandum on Equal Pay*) 37.

66 *Gruber v Silhouette International Schmied GmbH & Co KG* Case C-249/97, 1999 ECR I-5315 (ECJ).

workers who prematurely end their employment relationship to care for their children, because of a lack of child-care facilities to care for them, but does not reduce the termination payment for those workers who give notice of resignation for an important reason. The workers who received the reduced payment were predominantly women.[67]

In *Hlozek v Roche Austria Gesellschaft mbH*[68] the ECJ was seized with the question regarding whether a bridging allowance which was to be paid to employees who had reached a certain age at the time of their dismissal fell within pay in Article 141 of the *EC Treaty* and Article 1 of the *Equal Pay Directive*. The Court stated that it is settled in its case law on Article 119 of the *EEC Treaty* that the concept of pay within the meaning of Article 141 of the *EC Treaty* and Article 1 of the *Equal Pay Directive* is broad enough to include any consideration whether in cash or kind, whether immediate or future, provided that the worker receives it in respect of his employment. It further stated that the fact that a certain benefit is paid after an employment relationship is terminated does not hinder it from being considered pay. The Court held that such pay is considered as deferred pay, that an employee is entitled to it by reason of his employment, and that the purpose of such payment is to assist the employee to adjust to the circumstances arising from the employment termination. The Court further held that the mere fact that the deferred payment can be regarded as reflecting social policy considerations does not take away from the fact that such a payment falls under pay. It then held that the bridging allowance fell within the ambit of "pay" as contained in Article 141 of the *EC Treaty* and Article 1 of the *Equal Pay Directive*.[69]

In *Kowalska v Freie und Hansestadt Hamburg*[70] the ECJ dealt with the question as to whether or not a severance grant paid to employees on the termination of their employment fell within pay in Article 119 of the *EEC Treaty*. The Court noted that the term pay had been interpreted to cover any consideration, whether it be cash or in kind and whether or not it be immediate or in future, provided that the employee received it directly or indirectly from his employer arising from his employment. The Court held that benefits that are paid after the termination of the employment relationship are not prevented from falling within pay in Article 119 of the *EEC Treaty*. It held that this was a form of deferred pay which the employee was entitled to as a result of his employment. The Court then concluded on this point by finding that a severance grant paid to an employee on

67 *Gruber v Silhouette International Schmied GmbH & Co KG* Case C-249/97, 1999 ECR I-5315 (ECJ) paras 21-22.

68 *Hlozek v Roche Austria Gesellschaft mbH* Case C-19/02, 2004 ECR I-11523 (ECJ).

69 *Hlozek v Roche Austria Gesellschaft mbH* Case C-19/02, 2004 ECR I-11523 (ECJ) paras 2, 33, 35, 37, 39-40.

70 *Kowalska v Freie und Hansestadt Hamburg* Case C-33/89, 1990 ECR I-2607 (ECJ).

termination of his employment falls within the ambit of pay as contained in Article 119 of the *EEC Treaty*.[71]

Termination payments, a bridging allowance and a severance grant paid after the termination of the employment relationship provide examples of what falls within the ambit of pay for the purposes of an equal pay claim in international labour law. It is submitted that they should be mentioned as such in the *Equal Pay Code,* which could assist with deciding whether such payments can fall within "terms and conditions of employment" in section 6(4) of the *EEA*.

3.1.5 Loss of earnings due to attending training courses

In *Kuratorium für Dialyse und Nierentransplantation e.V. v Lewark*[72] the ECJ held that payment received as a result of loss of earnings due to an employee attending training courses which are required in order to perform their staff functions must be considered as pay falling within Article 119 of the *EEC Treaty* as the payment is connected to the employment relationship.[73]

In *Arbeiterwohlfahrt der Stadt Berlin e. V. v Bötel*[74] the ECJ dealt with the question regarding whether compensation in the form of paid leave or overtime pay granted for attending training courses fell within pay in Article 119 of the *EEC Treaty*. This question arose in circumstances where the respondent employee, who was a part-time help, claimed compensation from her employer for attending training courses. She was required by law to attend the training courses because she chaired a staff council of one of the employer's branches and this was a requirement. She was also, in terms of that law, to be released from her duties without loss of pay. The ECJ remarked that it had consistently held that the term pay in Article 119 of the *EEC Treaty* includes any consideration, whether in cash or kind, which the worker receives in respect of her employment and irrespective of whether she receives it under a contract of employment, in terms of legislative provisions or on a voluntary basis. It held that this definition was applicable to the compensation mentioned *in casu* as it was paid by the employer in terms of legislative provisions.[75]

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71 *Kowalska v Freie und Hansestadt Hamburg* Case C-33/89, 1990 ECR I-2607 (ECJ) paras 8-11.

72 *Kuratorium für Dialyse und Nierentransplantation e.V. v Lewark* Case C-457/93, 1996 ECR I-260 (ECJ).

73 *Kuratorium für Dialyse und Nierentransplantation e.V. v Lewark* Case C-457/93, 1996 ECR I-260 (ECJ) para 23.

74 *Arbeiterwohlfahrt der Stadt Berlin e.V. v Bötel* Case C-360/90, 1992 ECR I-3589 (ECJ).

75 *Arbeiterwohlfahrt der Stadt Berlin e.V. v Bötel* Case C-360/90, 1992 ECR I-3589 (ECJ) paras 2-4, 11-14.

Payment for loss of earnings, overtime pay and paid leave all received as a result of an employee's attending a training course related to her employment provide examples of what falls within the ambit of the term pay for the purposes of an equal pay claim in international labour law, and to this end, it is submitted that they should be mentioned as such in the *Equal Pay Code,* which could assist with deciding whether such payments can fall within "terms and conditions of employment" in section 6(4) of the *EEA*.

3.1.6 Maternity leave pay

In *Gillespie v Northern Health and Social Services Boards*[76] the ECJ held that a benefit paid under legislation or a collective agreement to a female employee on maternity leave falls within pay as contained in Article 119 of the *EEC Treaty* as it is paid pursuant to the employment relationship. The Court further held that a female employee who is on maternity leave is entitled to receive a pay increase where the same is granted because to deny such an increase to the employee discriminates against her on the grounds of her pregnancy as she would have received the increase had she not been pregnant.[77]

In *Abdoulaye v Regie Nationale des Usines Renault SA*[78] the ECJ dealt with the question regarding whether the principle of equal pay in Article 119 of the *EEC Treaty* prohibits a lump-sum payment made exclusively to female employees who take maternity leave. The ECJ held that a benefit paid to a female employee when she goes on maternity leave falls within the ambit of pay as contained in Article 119 of the *EEC Treaty* as it is based on the employment relationship. The Court held further that the fact that the maternity benefit is not made periodically does not change its nature of being pay. It finally held that the principle of equal pay in Article 119 of the *EEC Treaty* does not prohibit a lump-sum payment made exclusively to female employees who take maternity leave where it is intended to offset the occupational disadvantages that arise for female workers on maternity leave due to their being away from work.[79]

The cases strengthen the submission made above that maternity leave, which normally attracts maternity leave pay, as set out in the *Integration of Employment Equity Code,* falls within "terms and conditions of employment" under section 6(4) of the *EEA*.[80] The entitlement to a pay increase for an

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76 *Gillespie v Northern Health and Social Services Boards* Case C-342/93, 1996 ECR I-492 (ECJ).

77 *Gillespie v Northern Health and Social Services Boards* Case C-342/93, 1996 ECR I-492 (ECJ) paras 14, 21-22.

78 *Abdoulaye v Regie Nationale des Usines Renault SA* Case C-218/98, 1999 ECR I-5742 (ECJ).

79 *Abdoulaye v Regie Nationale des Usines Renault SA* Case C-218/98, 1999 ECR I-5742 (ECJ) paras 10, 14-15, 22.

80 See para 2 above.

employee who is on maternity leave provides an example of what falls under the term pay for the purposes of an equal pay claim in international labour law, and to this end, it is submitted that it should be mentioned as such in the *Equal Pay Code,* which could assist with deciding whether such payment can fall within "terms and conditions of employment" in section 6(4) of the *EEA*.

3.1.7 Expatriation allowance (relocation allowance)

In *Sabbatini-Bertoni v European Parliament*[81] the ECJ had to decide whether the withdrawal of an expatriation allowance to an employee of the European Parliament in accordance with its Staff Regulations amounted to unfair discrimination in that it contravened the principle of equal pay for male and female workers in Article 119 of the *EEC Treaty*. The applicant, a female Italian national, joined the European Parliament on 1 January 1960. Upon her appointment she was granted an expatriation allowance in accordance with the Staff Regulations. The purpose of the expatriation allowance was to provide compensation to those employees who are obliged to change their place of residence as a result of entering into the employ of the European Parliament, similar to a relocation allowance. The European Parliament (the defendant), however, withdrew the expatriation allowance once the applicant married her husband, who was not an official of the European Communities, in terms of their Staff Regulations, which provided that an employee who marries someone who at the date of marriage does not qualify for the allowance shall forfeit the grant of the allowance unless that employee becomes the head of the household. The applicant then applied to have this decision reviewed but was unsuccessful. The ECJ found that the Staff Regulations created an arbitrary difference of treatment between male and female employees because the status of "head of household", which is required in order to retain the expatriation allowance if an employee marries someone who is not entitled to that allowance automatically regards male employees to be heads of households and women only in exceptional cases. It annulled the decision to withdraw the applicant's expatriation allowance. A narrow point argued by the applicant was that it was incontestable that the expatriation allowance granted to her fell within the ambit of pay in Article 119 of the *EEC Treaty*.[82] No issue was taken with this argument and it seems that the ECJ also found it to be self-evident that the expatriation allowance fell within the ambit of pay as contained in Article 119 of the *EEC Treaty* as it did not deal with this in its judgment.

81 *Sabbatini-Bertoni v European Parliament* Case 20/71, 1972 ECR 345 (ECJ).

82 *Sabbatini-Bertoni v European Parliament* Case 20/71, 1972 ECR 345 (ECJ) 346-348, para 8 of 351, paras 12-13 of 351 and 352.

It is submitted that a relocation allowance listed in the *BCEA Schedule* falls within "terms and conditions of employment" under section 6(4) of the *EEA.*[83] This submission is based on this case, which regards an expatriation allowance as falling within the ambit of pay for the purposes of equal pay.

3.1.8 Travel concessions

In *Grant v South West Trains*[84] the ECJ held that travel concessions granted to the spouses/partners of employees as a result of their employment contract fell within pay in Article 119 of the *EEC Treaty*. This finding by the Court arose in circumstances where it dealt with the question regarding whether it is contrary to Article 119 of the *EEC Treaty* and Article 1 of the *Equal Pay Directive* for an employer to refuse to grant travel concessions to an unmarried cohabiting same-sex partner where these were granted to an unmarried opposite-sex partner of an employee.[85] In *Garland v British Rail Engineering Ltd*[86] the ECJ dealt with the issue regarding whether a special travel facility granted to male employees after their resignation fell within pay in Article 119 of the *EEC Treaty*. The Court noted that the special travel facility was granted to the male employees in "kind" as referred to in the definition of "pay" as contained in Article 119 of the *EEC Treaty*. It further found that the special travel facility was an extension of the benefit granted during the period of employment. The dispute related to female employees who, on retirement, lost the special travel facility for their spouses and dependent children, whereas male employees who retired continued to enjoy this special travel facility for their spouses and dependent children. The ECJ held that this difference constituted unfair pay discrimination within the meaning of Article 119 of the *EEC Treaty*.[87]

A travel concession granted to spouses/partners and a special travel facility granted for spouses and dependent children provide examples of what falls within the ambit of the term pay for the purposes of an equal pay claim in international labour law, and to this end, it is submitted that it should be mentioned as such in the *Equal Pay Code,* which could assist with deciding whether such payments can fall within "terms and conditions of employment" in section 6(4) of the *EEA*.

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83 See para 2 above.

84 *Grant v South West Trains* Case C-249/96, 1998 ECR I-636 (ECJ).

85 *Grant v South West Trains* Case C-249/96, 1998 ECR I-636 (ECJ) paras 11, 14, 47, 50.

86 *Garland v British Rail Engineering Ltd* Case 12/81, 1982 ECR 360 (ECJ).

87 *Garland v British Rail Engineering Ltd* Case 12/81, 1982 ECR 360 (ECJ) paras 2, 5, 7-9, 10-11.

3.1.9 Pension

In *Bilka-Kaufhaus GmbH v Weber von Hartz*[88] the ECJ dealt with whether an occupational pension scheme which was contractual rather than statutory in nature fell within pay in Article 119 of the *EEC Treaty*. The Court held that the occupational scheme was based on an agreement between the employer and its employees and had the effect of supplementing the social benefits to be paid under national legislation. The Court noted that the scheme formed part of the employment contracts and relationship. It held that the occupational scheme could not be regarded as a social security scheme governed by statute, which would take it outside the sphere of Article 119 of the *EEC Treaty*. The Court further held that the occupational pension scheme fell within pay in Article 119 of the *EEC Treaty* as it amounted to a consideration received by an employee from his employer in respect of his employment.[89] In *Griesmar v Ministre de L'Economie, des Finances et de L'Industrie*[90] the ECJ dealt with whether a pension provided for in terms of a retirement scheme for civil servants fell within pay in Article 119 of the *Treaty of Rome*. The Court found that the pension in question fell within pay in Article 119 of the *Treaty of Rome* because it applied to a particular category of workers, it was determined according to length of service, and it was calculated in accordance with the employee's salary. It held that such a pension satisfies the employment criterion.[91]

In *Podesta v CRICA*[92] one of the questions placed before the ECJ was whether a supplementary retirement pension scheme can fall within the ambit of pay in Article 119 of the *EEC Treaty*. The Court stated that according to settled case law, while social security schemes do not fall within the ambit of pay, benefits that were granted under a pension scheme did. The Court further stated that the decisive criterion to answer the question as to whether a supplementary retirement pension scheme falls within the ambit of pay is whether it is paid to the employee as a result of the employment relationship. The Court then held that the supplementary retirement pension scheme fell within the term pay in Article 119 of the *EEC Treaty*.[93] In *Worringham and Humphreys v Lloyds Bank Limited*[94] the ECJ had to determine whether contributions paid by an employer in the name of

88 *Bilka-Kaufhaus GmbH v Weber von Hartz* Case 170/84, 1986 ECR 1620 (ECJ).
89 *Bilka-Kaufhaus GmbH v Weber von Hartz* Case 170/84, 1986 ECR 1620 (ECJ) paras 20-22.
90 *Griesmar v Ministre de L'Economie, des Finances et de L'Industrie* Case C-366/99, 2001 ECR I-9413 (ECJ).
91 *Griesmar v Ministre de L'Economie, des Finances et de L'Industrie* Case C-366/99, 2001 ECR I-9413 (ECJ) paras 25-26, 31, 34-35, 38.
92 *Podesta v CRICA* Case C-50/99, 2000 ECR I-4055 (ECJ).
93 *Podesta v CRICA* Case C-50/99, 2000 ECR I-4055 (ECJ) paras 22, 24-26, 41.
94 *Worringham and Humphreys v Lloyds Bank Limited* Case 69/80, 1981 ECR 768 (ECJ).

the employee to a retirement scheme by way of an addition to the gross salary fell within pay in Article 119 of the *EEC Treaty*. This question arose in circumstances where male employees under the age of 25 years old were required to contribute 5% of their salary to their retirement scheme but women who were under the age of 25 were not required to do so. The plaintiff female employees alleged unequal pay against them because the employer added an additional 5% to the gross salary paid to those male employees who were required to contribute 5% to their retirement schemes. This was not received by the plaintiff female employees. The ECJ held that payments such as the one in question which are included in the employees' gross salary and which determine the calculation of other advantages such as unemployment benefits and redundancy benefits fall within pay in Article 119 of the *EEC Treaty* even if they are immediately deducted by the employer and paid over to a retirement scheme on behalf of an employee.[95]

In *Birds Eye Walls Ltd v Roberts*[96] the ECJ, dealing with a dispute relating to the payment of a bridging pension, held that it was common cause that the bridging pension fell within pay as contained in Article 119 of the *EEC Treaty*. It held that it is not contrary to Article 119 of the *EEC Treaty* to take into account the State pension amount that male employees will receive from 65 years old and female employees will receive from 60 years old, when calculating the amount of a bridging pension paid by the employer to male and female employees who have taken early retirement for reasons of ill health and which pension is intended to bridge (compensate) them for the loss of income due to their not having yet reached the required age to obtain the State pension.[97] In *Ten Oever v Stichting Bedrijfspensioenfonds voor het Glazenwassers-en Schoonmaakbedrijf*[98] the ECJ held that where benefits are paid after the end of the employment relationship, this does not preclude it from falling within pay as contained in Article 119. It then held that a survivor's pension provided for in terms of an occupational pension scheme, which is not a social security scheme, falls within the ambit of pay.[99]

These cases strengthen the submission made above that pension (retirement) schemes as set out in the *Integration of Employment Equity Code* fall within "terms and conditions of employment" under section 6(4) of

95 *Worringham and Humphreys v Lloyds Bank Limited* Case 69/80, 1981 ECR 768 (ECJ) paras 5, 12-13, 15, 25.

96 *Birds Eye Walls Ltd v Roberts* Case C-132/92, 1993 ECR I-5599 (ECJ).

97 *Birds Eye Walls Ltd v Roberts* Case C-132/92, 1993 ECR I-5599 (ECJ) paras 12, 24.

98 *Ten Oever v Stichting Bedrijfspensioenfonds voor het Glazenwassers-en Schoonmaakbedrijf* Case C-109/91, 1993 ECR I-4939 (ECJ).

99 *Ten Oever v Stichting Bedrijfspensioenfonds voor het Glazenwassers-en Schoonmaakbedrijf* Case C-109/91, 1993 ECR I-4939 (ECJ) paras 8-9, 14.

the *EEA*.[100] They furthermore provide examples of what falls within the ambit of pay for the purposes of an equal pay claim in international labour law, and to this end, it is submitted that the following aspects therefrom should be mentioned as such in the *Equal Pay Code,* which could assist with deciding whether such payments can fall within "terms and conditions of employment" in section 6(4) of the *EEA*: (i) a supplementary retirement scheme; (ii) contributions made by an employer to a retirement scheme for the benefit of an employee by way of an addition to his/her salary; (iii) a bridging pension (paid to employees who take early retirement due to ill health to compensate them for loss of income until they obtain a state pension); and (iv) a survivor's pension.

3.1.10 Nursery scheme

In *Lommers v Minister van Landbouw, Natuurbeheer en Visserij*[101] the ECJ dealt with the question regarding whether the *Equal Treatment Directive*[102] precludes an employer from having rules in terms of which subsidised nursery places are made available only to its female employees and only to male employees in an emergency situation which would be determined by an employer. The Court held that the *Equal Treatment Directive* does not preclude an employer from addressing the underrepresentation of female employees by having rules which make subsidised nursery places available to its female employees, with male employees having access to the same in emergency situations to be determined by the employer, provided that those male employees who take care of their children themselves are allowed to access the nursery scheme on the same conditions as their female counterparts. The Court accepted that the nursery scheme fell within the ambit of a working condition and not within the ambit of pay because the mere fact that the scheme had monetary consequences was not sufficient to bring it within pay.[103] A nursery scheme provides an example of an equal terms and conditions claim in international labour law, and to this end, it is submitted that it should be mentioned as such in the *Equal Pay Code,* which could assist with deciding whether such working condition can fall within "terms and conditions of employment" in section 6(4) of the *EEA*.

100 See para 2 above.

101 *Lommers v Minister van Landbouw, Natuurbeheer en Visserij* Case C-476/99, 2002 ECR I-2921 (ECJ).

102 *Directive 76/207/EEC on the Implementation of the Principle of Equal Treatment for Men and Women as Regards Access to Employment, Vocational Training and Promotion, and Working Conditions* (1976) (hereafter the *Equal Treatment Directive*).

103 *Lommers v Minister van Landbouw, Natuurbeheer en Visserij* Case C-476/99, 2002 ECR I-2921 (ECJ) paras 23, 26, 28, 50.

3.1.11 Breastfeeding leave

In *Roca Álvarez v Sesa Start España ETT SA*[104] the ECJ dealt with the question regarding whether the Equal Treatment Directive must be interpreted in a manner that precludes a measure which provides that female employees who are mothers are entitled to take breastfeeding leave during the first nine months following the child's birth but male employees who are fathers are not entitled to such leave unless their child's mother is also employed. The breastfeeding leave allowed the employee to be absent during the working day for a certain period or to be entitled to a reduction of the working day. It thus had the effect of changing working hours and as such affected the working conditions within the meaning of the *Equal Treatment Directive*. The Court noted that employed mothers were entitled to breastfeeding leave, whereas employed fathers were entitled to such leave only if the child's mother was also employed. It further noted that the requirement for females was the status of being an employee, but this was not adequate for a male to be awarded the leave. The Court held that the *Equal Treatment Directive* precludes the measure of the entitlement of breastfeeding leave because there was no justification for differentiating between male and female employees regarding the additional requirement for male employees.[105] It should, however, be mentioned that this type of leave could be connected with maternity leave as found under the *Integration of Employment Equity Code,* but it is a leave that is not common in South African law and can, at best, offer the following guidance. It provides an example of what falls within the ambit of "working conditions" for the purposes of an equal terms and conditions claim in international labour law, and to this end, it is submitted that it should be mentioned in the *Equal Pay Code* as such, which could assist with deciding whether such working condition can fall within "terms and conditions of employment" in section 6(4) of the *EEA*.

3.2 Further "terms and conditions of employment" (pay)

The following payments in the *BCEA Schedule*[106] have not been mentioned as falling within the ambit of pay (terms and conditions of employment) under the discussion of international labour law above: (a) any cash payments made to an employee; (b) any other payment in kind received by an employee; (c) any cash payment/payment in kind provided in order to enable the employee to work; (d) an equipment (tool) allowance; (e) an entertainment allowance; and (f) an education allowance.[107] Nevertheless,

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104 *Roca Álvarez v Sesa Start España ETT SA* Case C-104/09, 2010 ECR I-8677 (ECJ).

105 *Roca Álvarez v Sesa Start España ETT SA* Case C-104/09, 2010 ECR I-8677 (ECJ) paras 18, 21, 23, 31, 38-39.

106 See para 2 above.

107 Items 1(c)-(d), 2(a), 2(f)-(g) of the *BCEA Schedule* as set out in para 2 above.

it is submitted that these payments are still capable of falling within "terms and conditions of employment" under section 6(4) of the *EEA* provided that they arise out of or are connected to the employment relationship, because this is the test that is used in international labour law to decide whether or not a payment (working condition) falls within the ambit of pay (or working conditions) for the purpose of equal pay (terms and conditions) and based on the argument that this test should be used under section 6(4) of the *EEA*.[108]

4 Conclusion

This article has dealt extensively with terms and conditions of employment under equal pay claims as dealt with in domestic and international labour law in order to answer the question posed in this article, which is, what falls within the ambit of terms and conditions of employment for the purpose of equal pay claims as contemplated in section 6(4) of the *EEA*. This question has been answered in this article in the following manner: (a) submissions have been made as to which terms and conditions/payments fall within the ambit of the phrase terms and conditions of employment in section 6(4) of the *EEA*;[109] (b) submissions have been made with regard to examples of what has been found under international labour law to fall within the ambit of pay/working conditions;[110] (c) submissions have been made to the effect that the test used in international labour law to determine whether a payment falls within the definition of remuneration should be used to determine whether terms and conditions fall within the phrase "terms and conditions of employment" under section 6(4) of the *EEA* where there is a dispute regarding this;[111] and (d) submissions have also been made that the international labour law principle that equal pay must be applied to each of the elements of remuneration and not on the basis of a comprehensive assessment of pay should be applied to equal pay claims under section 6(4) of the *EEA*.[112]

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108 See reference to this test under para 3 above.
109 See paras 2, 3, 3.1.7 above.
110 See paras 3, 3.1.1-3.1.6, 3.1.8-3.1.11, 3.2 above.
111 See paras 3, 3.1.2 above.
112 See para 3.1.3 above.

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List of Abbreviations

BCEA	Basic Conditions of Employment Act 75 of 1997
ECJ	European Court of Justice
EC Treaty	Consolidated Versions of the Treaty on European Union and the Treaty Establishing the European Community
EEA	Employment Equity Act 55 of 1998
EEC Treaty	Treaty Establishing the European Economic Community
EU	European Union
ILO	International Labour Organisation