International Journal of Research Radicals in Multidisciplinary Fields (IJRRMF), ISSN: 2960-043X
Volume1, Issue 2, July-December, 2022, Available online at: www.researchradicals.com

# Making Equal Pay for Equal Work a Reality

**Neha Pawar**

Academician

## INTRODUCTION

The principle of equal pay for equal work can be conceptualized in two distinct forms. One form is that a woman employed for the same work that a man has been employed for must be paid the same wages as that man. The other form is that two persons performing similar tasks must be paid the same wages. Despite the existence of these two different forms of the principle of equal pay for equal work, one will notice that first form appears to be a subset of the second. If two persons performing similar tasks are paid the same wages, then it follows that this would be the case even where one of the persons is a man and the other a woman.

The importance given to the first form of the principle has far outweighed that given to the second in most jurisdictions. While the first form has been accorded the status of a human right, the latter has been enunciated as an egalitarian ideal. Our Constitution provides that the State shall direct its policy for securing that there is equal pay for equal work for both men and women.[1] This is an expression of the first form of the principle of equal pay for equal work and seeks to prevent discrimination in wages based on gender. However, this constitutional recognition does not go to the extent of conferring an enforceable right but merely lays it down as one of the fundamental principles in the governance of the country.[2] Nevertheless, there have been legislative measures to implement the same.[3] The second form of the principle does not find express mention anywhere in our Constitution, though it is found in the Preamble to the Constitution of the International Labour Organization.

If one breaks down the principle of equal pay for equal work into its constituent parts, one is left with two concepts – 'equal pay' and 'equal work'. Most of the confusions about the same arise due to an incomplete understanding of the aforementioned two concepts. This project seeks to deal with these two concepts in detail before attempting to arrive at an understanding of the principle of equal pay for equal work.

## EQUAL WORK

In *K.M. Bakshi* v. *Union of India*,[4] one of the earliest Indian Supreme Court cases dealing with the principle of equal pay for equal work, certain income tax officers challenged the reconstitution of the income tax services to separate income tax officers into Class I and Class II income tax officers. One of the grounds for challenge was that the said reconstitution was violative of Article 14 of the Constitution because though both Class I and Class II income tax officers did the same kind of work, their pay scales were different. However, a 5-Judge Bench of the Supreme Court upheld the validity of the impugned reconstitution and observed that the abstract principle of equal pay for equal work has nothing to do with Article 14 of the Constitution.

This decision sheds some light on the concept of 'equal work'. It indicates that the test for determining equality of work done is dissociated from the nature of the work and linked to classification of employees under the applicable service rules. Thus, in the opinion of the Das Gupta, J., even though Class I and Class II income tax officers do the same work, i.e. carry out assessments, paying the former higher wages than the latter did not offend the principle of equal pay for equal work. Another proposition that emerges from this case is that the mere fact that two persons belong to two different grades under the applicable service rules is enough to infer that they are not performing similar tasks.

Two decades later, a 3-Judge Bench of the Supreme Court, in *Randhir Singh* v. *Union of India*,[5] discussed the *K.M. Bakshi* case and interpreted it narrowly as merely laying down the proposition that different scales of pay for different grades of

[1] Article 39(d) of the Constitution of India, 1950.
[2] Article 37 of the Constitution of India, 1950.
[3] *See* Equal Remuneration Act, 1976.
[4] *Kishori Mohanlal Bakshi* v. *Union of India*, AIR 1962 SC 1139.
[5] *Randhir Singh* v. *Union of India*, (1982) 1 SCC 618.

employees was permissible when there were higher academic qualifications or greater experience based on length of service prescribed for the higher grade that could reasonably sustain the classification. In this case, a driver in the Delhi Police Force was entitled to claim the same pay as the other drivers in the service of the Delhi Administration. The Supreme Court allowed the claim and observed that the principle of equal pay for equal work was deducible from Articles 14 and 16 of the Constitution and could be properly applied to cases of unequal scales of pay based on no classification or irrational classification where persons drawing different scales of pay are doing identical work under the same employer.

The decision in the *Randhir Singh* case was followed by a 2-Judge Bench of the Supreme Court in *Jaipal* v. *State of Haryana*,[6] where it was held that if two persons do the same work under the same employer with similar responsibility under similar working conditions, the doctrine of equal pay for equal work would apply. In the opinion of K.N. Singh, J., there need not be complete identity between the works done by the two persons in order to invoke the principle of equal pay for equal work.

The decisions in the *Randhir Singh* case and the *Jaipal* case indicate that the test for determining equality of work done is not dissociated from the nature of the work. It also depends on whether the two concerned persons are employed by the same employer, whether they are entrusted with similar responsibilities and whether they work under similar working conditions. It is submitted that this understanding of the concept of equal work is better than the understanding that is found in the *K.M. Bakshi* case, though the latter was decided by a Constitution Bench while the former were not.

The view taken in the *Randhir Singh* case and the *Jaipal* case has been further elaborated upon in recent decisions of the Supreme Court. For instance, in *Canteen Mazdoor Sabha* v. *Metallurgical Engineering Consultants (I) Ltd.*,[7] the issue was whether persons employed in a canteen were entitled to the same wages as persons employed in a VIP guest house and in a tea club run by and on the premises of the same employer. A 2-Judge Bench of the Supreme Court disallowed the claim and observed that similarity in the designation or quantum of work are not determinative of equality in the matter of pay scales and the factors to be considered in this regard were the source and mode of recruitment or appointment, the requisite qualifications, the nature of work, the value judgment involved, responsibilities, reliability, experience, confidentiality, functional need, etc.

It may be noted that Articles 14, 16 and 39(d) of the Constitution only come into play when the principle of equal pay for equal work is sought to be enforced against the State in its capacity as an employer and cannot be relied upon for enforcing the same against a private employer. A private employer is bound to observe the principle of equal pay for equal work only in its first form, i.e. he cannot pay remuneration to any worker employed by him in any establishment at rates less favourable than those at which remuneration is paid to workers of the opposite sex employed in that establishment for performing the same work or work of a similar nature.[8]

The manner in which the expression 'same work or work of a similar nature' is defined in the Equal Remuneration Act, 1976 also sheds some light on the concept of equal work. It is work in respect of which the skill, effort and responsibility required are the same, when performed under similar working conditions and the differences, if any, between the skill, effort and responsibility required are not of practical importance to the terms and conditions of employment.[9] This definition was explained in *Ashok Kumar Garg* v. *State of Rajasthan*[10] as clarifying that the question of equal work depends on various factors like responsibility, skill, efforts and condition of work.

Thus, the question of whether two persons are doing equal work is not as simple as it might appear to be at face value. The mere fact that two persons work for the same number of hours a day does not necessarily mean that they are doing equal work. In determining whether two persons are doing equal work, the following issues need to be looked into:

- Are the two persons recruited or appointed in the same manner?
- Are the two persons similarly qualified?
- Is the nature of the work carried out by the two persons similar?
- Are the two persons working in similar conditions?
- Are the two persons required to make similar value judgments?

[6] *Jaipal* v. *State of Haryana*, (1988) 3 SCC 354.
[7] *Canteen Mazdoor Sabha* v. *Metallurgical Engineering Consultants (I) Ltd.*, (2007) 7 SCC 710.
[8] Section 4(1) of the Equal Remuneration Act, 1976.
[9] Section 2(h) of the Equal Remuneration Act, 1976.
[10] *Ashok Kumar Garg* v. *State of Rajasthan*, 1993 INDLAW RAJ 55.

- Do the two persons have the same responsibilities?
- Are the two persons equally reliable?
- Do the two persons have the same experience?
- Are the two persons required to maintain similar levels of confidentiality?
- Is there a similar functional need for the two persons?
- Do the two persons have similar skill?
- Are the two persons required to put in similar efforts?

**EQUAL PAY**

The primary issue that arises in relation to the concept of equal pay is whether two persons doing the same work are also entitled to the same employment benefits. In order words, the question is whether 'equal pay' is wide enough to include not only wages but also other benefits associated with employment.

A private employer is obliged to pay the same remuneration for the same work irrespective of the gender of the employee.[11] The definition of 'remuneration' under the Equal Remuneration Act, 1976 sheds some light on the issue at hand. It is the basic wage or salary, and any additional emoluments whatsoever payable, either in cash or in kind, to a person employed in respect of employment or work done in such employment, if the terms of the contract of employment, express or implied, were fulfilled.[12] This indicates that the concept of 'equal pay' is wide enough to include not only wages bit also other benefits associated with employment.

In *Air India Cabin Crew Association* v. *Yeshawinee Merchant*,[13] the issue was whether the action of the State in fixing the retirement age for air hostesses at 50 years was violative of the principle of equal pay for equal work because the retirement age for their male counterparts was fixed at 58 years. A 2-Judge Bench of the Supreme Court allowed the claim and observed that fixing different retirement ages for persons doing equal work would violate the principle of equal pay for equal work because the person with the lower retirement age would be deprived of remuneration for a period equal to the difference between the two retirement ages.

It is submitted that the above understanding of the concept of 'equal pay' is a comprehensive one because it takes into account the fact that parity in basic wages alone is no parity at all if the other employment benefits are not the same. Thus, the question of whether two persons are receiving equal pay involves an analysis of the entire terms and conditions of employment of the two persons rather than a mere examination of their basic wages. The only restriction is that the said benefit must be in respect of employment or work done and must also be conditional upon employees fulfilling their obligations under the contract of employment. An employer cannot be allowed to evade the object and purpose of the principle of equal pay for equal work by simply paying the same basic wages but providing different employment benefits to persons doing equal work.

Another reason why the concept of 'equal pay' should encompass more than simply basic wages is to account for performance-linked bonuses. If two persons are doing equal work and one is doing the work better than the other, then giving them the same basic wages will, it is submitted, amount to treating unequal persons equally. On the other hand, if both the persons are entitled to a performance-linked bonus to be assessed on the same criteria, then this problem can be overcome.

In determining whether two persons are receiving equal pay, the following issues need to be looked into:

- Are the same basic wages being paid to both the persons?
- Are the two persons receiving the same employment benefits?

**MAKING EQUAL PAY FOR EQUAL WORK A REALITY**

The most frequent violation of the principle of equal pay for equal work occurs in cases where a man and a woman doing the same work are paid different wages, with the woman being paid lesser than the man. This is the manifestation of the aforementioned first form of the principle. This is largely due to the belief that women are less efficient than men. While it

[11] Section 4(1) of the Equal Remuneration Act, 1976.
[12] Section 2(g) of the Equal Remuneration Act, 1976.
[13] *Air India Cabin Crew Association* v. *Yeshawinee Merchant*, (2003) 6 SCC 277.

may be true that women are less efficient than men at performing certain tasks such as those involving extreme physical labour, there are several tasks which women perform more efficiently than men. For example, the plucking of tea leaves from bushes in tea plantations is a task performed completely by women. In any case, variance in efficiency can be accounted for by making provision for a performance-linked bonus. The same argument also applies against any other basis on which equal pay for equal work is sought to be denied such as caste, race, etc. Thus, there is no doubt that it is desirable to make the principle of equal pay for equal work a reality.

However, various hurdles arise when one sets out to implement the aforesaid principle. One of these hurdles is aptly demonstrated by a recent decision of the Supreme Court of the United States in *L.M. Ledbetter* v. *Goodyear Tire and Rubber Co., Inc.*[14] In that case, the plaintiff was a woman who had been employed at a factory belonging to the defendant in 1979. At the time, she was paid the same wages as her male colleagues. When she took early retirement in 1998, she was earning $500 less than the lowest paid man from among those who had been employed in 1979. She brought an action under Title VII of the Civil Rights Act, 1964 claiming violation of the principle of equal pay for equal work. The United States Supreme Court, by a split decision of 5 Judges against 4 Judges, dismissed the action on grounds of limitation. Alito, J., speaking for the majority, was of the opinion that the cause of action arose when the first discriminatory payment was made and an action under Title VII was required to be brought within 180 days of the cause of action having arisen. Ginsburg, J., speaking for the dissent, took the view that the cause of action was a continuing one that ceased only upon the plaintiff's retirement. Neither the majority nor the dissent expressed any opinion on whether there had been a violation of the principle of equal pay for equal work.

This decision highlights one of the unexpected hurdles that arise in making the aforesaid principle a reality – that of limitation. The primary reason why the strict application of the law of limitation by the majority in the *L.M. Ledbetter* case has been extensively criticized is because the wages of co-employees is not common knowledge and it may take an aggrieved person considerable time to realize that he or she is being discriminated against in respect of wages. This has prompted the enactment of the Lilly Ledbetter Fair Pay Restoration Act, 2009 to amend the Civil Right Act, 1964 in order to ensure that the decision of the majority in the *L.M. Ledbetter* case is no longer the law.

This problem of the law of limitation barring an action for enforcing the principle of equal pay for equal work would not arise in India. This is because an action for enforcing the principle of equal pay for equal work can be brought under either Article 226 or Article 32 of the Constitution in cases where Article 14 of the Constitution is infringed.[15] Since the law of limitation does not apply to writ proceedings, it cannot bar enforcement of equal pay for equal work. There is no limitation period that has been prescribed for approaching the appointed authority for a claim of discriminatory payment of wages under the Equal Remuneration Act, 1976.[16]

The inequality of bargaining power between employers and employees is perhaps one of the greatest challenges to making the principle of equal pay for equal work a reality. The employees' lack of access to information as to what their colleagues are being paid is only one of the ways in which this manifests itself. Many times, even an employee who realizes that his or her colleagues are being paid more would hesitate to bring an action for fear of annoying the employer. Ensuring that this inequality of bargaining power does not affect the implementation of the welfare policies directed at the amelioration of employees is one of the greatest challenges to the realization of equal pay for equal work.

## CONCLUSION

The principle of equal pay for equal work does not require that everyone be paid the same wages irrespective of what work they do, i.e. 'equal work' is not synonymous with 'equal time spent at work'. It takes into account a variety of factors that are related to the work done. These include the nature of the work involved, the working conditions, the duties undertaken, the responsibility owed, the skill required, the manner of appointment or recruitment and the qualifications required, to name a few. Thus, while the work done need not be identical in order to attract the principle of equal pay for equal work, they must be similar enough to justify the payment of the same wages in accordance with the above criteria.

The principle of equal pay for equal work does not merely require that everyone who does equal work should be paid the same basic wages, i.e. 'equal pay' is not synonymous with 'same salary'. It also requires that everyone who does equal work should be given the same employment benefits. The test for determining which employment benefits are included

[14] *Lilly M. Ledbetter* v. *Goodyear Tire and Rubber Co., Inc.*, 550 US 618 (2007).
[15] *Food Corporation of India Union* v. *Food Corporation of India*, AIR 1990 SC 2178.
[16] Section 7 of the Equal Remuneration Act, 1976.

within the ambit of the principle is a two-fold one – it must be in respect of employment or work done and it must also be contingent upon the fulfillment of the terms of the contract of employment. Thus, not only must those doing equal work have the same basic wages, they must also have the same employment benefits.

However, it is one thing to embody a principle in the Constitution and another to make it a reality. The policy of ensuring equal pay for equal work must be accompanied by an adequate mechanism for its implementation in order for it to be realized. The recent decision of the United States Supreme Court in the *L.M. Ledbetter* case highlights only one of the problems that could arise in this regard. The lesson that is to be learned lies in the prompt and effective legislative intervention in the United States seeking to address the issue.

**REFERENCES**

***Cases***

- India
  - *Air India Cabin Crew Association* v. *Yeshawinee Merchant*, (2003) 6 SCC 277.
  - *Ashok Kumar Garg* v. *State of Rajasthan*, 1993 INDLAW RAJ 55.
  - *Canteen Mazdoor Sabha* v. *Metallurgical Engineering Consultants (I) Ltd.*, (2007) 7 SCC 710.
  - *Food Corporation of India Union* v. *Food Corporation of India*, AIR 1990 SC 2178.
  - *Jaipal* v. *State of Haryana*, (1988) 3 SCC 354.
  - *Kishori Mohanlal Bakshi* v. *Union of India*, AIR 1962 SC 1139.
  - *Randhir Singh* v. *Union of India*, (1982) 1 SCC 618.
- United States
  - *Lilly M. Ledbetter* v. *Goodyear Tire and Rubber Co., Inc.*, 550 US 618 (2007).

***Statutes***

- India
  - Equal Remuneration Act, 1976.
- United States
  - Civil Rights Act, 1964.
  - Lilly Ledbetter Fair Pay Restoration Act, 2009.

***Miscellaneous***

- Constitution of India, 1950.
- Constitution of the International Labour Organization, 1945.