



EQUAL PAY FOR EQUAL WORK OR WORK OF EQUAL VALUE: CONCEPT AND APPLICATION

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Abstract:

The Constitution of the Republic of Serbia and its legal framework guarantee equal pay for equal work or work of equal value for the employee. Work of equal value refers to work that requires the same qualifications, i.e., education, knowledge, and skills, implying that equal work contribution corresponds with equal responsibility. In the paper, the authors, using the normative and comparative law method, deal with the concept, normative structure, and implementation of equal pay for equal work or work of equal value principle. It also investigates the term and legal nature of equal pay and work of equal value, as well as the rights to compensation, providing key examples of judicial practice.

Keywords:

pay, equal pay, equal work, work of equal value.

JEL Classification:

K2

INTRODUCTION

The general concept of the right to earnings, when considering employment, social security, and international employment laws, refers to earnings that may be expressed in money and determined by mutual agreement, national law, or other regulations. These earnings are paid by the employer to the employee based on the employment contract for work performed, services rendered, or future work or services to be provided (Lubarda, 2018).

An employee has the right to appropriate compensation, which consists of a salary for the work performed and time spent at work, a salary based on the employee's contribution to the business success of the employer (bonuses, rewards, etc.), and other earnings based on the employment relationship, in accordance with the general contract and employment contract (Article 105 of the Labour Law, 2005).

Article info:

Received: December 02, 2024

Correction: March 03, 2025

Accepted: March 25, 2025

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The term “appropriate salary” includes the basic salary, performance-based salary, and increased salary (Article 106 of the Labour Law, 2005). The base salary is determined by the conditions outlined in the employee's employment contract and the amount of time worked. This fixed part of the appropriate salary is calculated and paid based on the elements established by the employer's general act; the employment contract can determine a higher basic salary than the one based on the elements (Article 107, paragraphs 1, 3, and 4 of the Labour Law, 2005).

Work performance is assessed based on the quality and quantity of tasks completed, along with the employee's attitude towards its duties (work discipline). A collective bargaining agreement may specify that a portion of the salary tied to work performance is also influenced by the employee's contribution to the employer's business success, such as a share of profits, remuneration, bonuses, etc. (Jovanović, 2012). The higher salary is provided for work done on public holidays, night shifts, and shift work, if these are not considered when determining the base salary, as well as for overtime, based on the time worked during employment with the employer. The general act and employment contract can define other cases when the employee is entitled to an increased salary, such as the increased salary based on shift work (Article 108 of the Labour Law, 2005).

Salary is earned solely through work performance. In specific instances of work absence, salary compensation may be provided instead of the regular salary. Additional income can be earned under certain conditions and is not directly tied to work performance (Ivošević & Ivošević, 2007). The fundamental feature of employment is its onerousness, for gratuity is never assumed in a working relationship (Tintić, 1972).

The paper presents normative regulations and application of equal pay for equal work or work of equal value principle, as well as the concept and legal nature of equal work or work of equal value along with the key examples from judicial practice.

NORMATIVE REGULATION OF THE EQUAL PAY FOR EQUAL WORK OR WORK OF EQUAL VALUE PRINCIPLE

The equal pay for equal work concept has been designed to recognize and tackle the systematic undervaluation of women's work. Both employers and employees are often unaware that their pay structures are discriminatory.

In France, the principle of equal pay for work of equal value was introduced by the Labour Law in 1972, in Article L 140-2 which states that “all employers shall provide equal pay for equal work or work of equal value for both men and women.” In order to promote and enforce the principle of equal pay, the Law mandates that the text be displayed in all workplaces, establishes an individual's right to seek enforcement, grants investigative authority to the Labor Inspectorate, and sets out sanctions for employers who violate the equal pay provision (Kilpatrick, 2005).

In 1975, with the Equal Pay Directive (EPD), the European Union introduced the principle of equal pay for work of equal value which prohibits discrimination in payment, in all aspects, between men and women for equal work or work of equal value (Branković, 2012).

The Constitution of the Republic of Serbia (*The Official Gazette of RS*, no. 98/2006, 115/2021) prescribes the right to work as a basic human right according to Article 60. Provision of paragraph 4 of the same Article prescribes that everyone has the right to dignity at work, safe and healthy working conditions, necessary protection at work, limited working hours, daily and weekly rest, paid holidays, fair compensation for work, and legal protection in case of employment termination. No one can waive those rights. Equal pay means equal basic pay.



The right to fair remuneration for work is further elaborated by the Labour Law (*The Official Gazette of RS*, no. 24/2005, 61/2005, 54/2009, 32/2013, 75/2014, 13/2017 – decision of the Constitutional Court, 113/2017, 95/2018 – authentic interpretation) which stipulates in the provisions of the Article 104 that employees shall be guaranteed equal pay for equal work or work of equal value performed for the employer. Work of equal value refers to tasks that require the same level of professional training, including education, knowledge, and skills, where an equal contribution to the work is made with equal responsibility. Any decision or agreement made by the employer with the employee that does not comply with the aforementioned terms is considered null and void. In case of a rights violation, the employee is entitled to compensation for damages.

According to the Constitutional Court of Serbia's assessment, this provision of the Labour Law aligns with the constitutional principle of the right to fair compensation for work, as outlined in Article 60, paragraph 4 of the Constitution. It serves to concretize this principle and reflects the legislator's intent to clearly define the concept of work of equal value performed for an employer. The Constitutional Court also determined that the specified provision of the Labour Law does not violate Article 23, item 2 of the Universal Declaration of Human Rights or Article 7, paragraph a) subparagraph(s) of the International Covenant on Economic, Social, and Cultural Rights (*The Official Gazette of SFRY*, no. 7/1971), as it upholds international guarantees for the right to fair and equal remuneration for work of equal value, free from discrimination (Decision of the Constitutional Court of Serbia, IU number 187/2005, dated 23.6.2011).

As previously mentioned, an employee is entitled to fair remuneration, which includes a salary for the work performed and time spent at work, a salary based on the employee's contribution to the employer's business success (such as rewards, bonuses, etc.), and other payments arising from the employment relationship, in accordance with the general act and the employment contract (Article 105 of the Labour Law, 2005).

In addition, the Law on Gender Equality (*The Official Gazette of RS*, no. 52/2021) expressly prohibits unequal pay for equal work or work of equal value. Article 34 of the law ensures that employees receive equal pay for equal work or work of equal value, whether the compensation is fully in money or partly in money and partly in kind, in accordance with the law governing labour relations. Work of equal value refers to work that requires the same qualifications, i.e., education, knowledge, and skills, during which equal contribution is achieved with equal responsibility. When determining the amount of salary, the systematization of jobs, i.e., job positions, must be based on the same criteria for both women and men and structured in such a way as to exclude discrimination on the basis of gender, i.e., sex. For the first time, this law foresees punitive measures for employers and responsible persons who do not respect equality in pay for work of equal value for women and men. Namely, an obligation has been introduced for public authorities and employers to constantly record and monitor salaries and other compensations of employees and workers expressed in the average nominal amount and categorized by gender for executive roles and positions (Article 65 of the Law on Gender Equality, 2021). Furthermore, it is prescribed that an employer who is a legal entity shall be penalized for a misdemeanour if they act contrary to the prohibition set out in Article 34, i.e., fails to provide equal pay for work of equal value for women and men, with a fine ranging from 50,000 to 2,000,000 dinars (Article 67, paragraph 1, item 6, the Law on Gender Equality, 2021).

Gender Equality Strategy for the period from 2021 to 2030 (Gender Equality Strategy (2021-2030) has also been adopted as one of the measures “reducing the gender pay gap in the labour market across all sectors.” Specifically, the pay gap for 2018 was 8.8%, indicating how much less women were paid



compared to men in the Republic of Serbia. When the data is analysed by the level of education, the pay gap is much deeper. For women with no education or incomplete primary education, or those with only primary education, the gap amounts to 21.2%. When observed by occupation, the largest gender pay gap is found in the following professions: craftsmen (23.8%), experts and artists (19%), engineers, professional associates, and technicians (19.3%), and in simple occupations (15.4%). When observed by age, the deepest pay gap is for women aged 30 to 49. Even among young women and men aged 15 to 29 a pay gap accounts for 4.6% (Item 5.1.1.2, Gender Equality Strategy (2021-2030)).

The situation is not better in the USA either. Most Americans have heard of the gender pay gap and the statistic that women today earn an average of eighty cents for every dollar men earn. There is an even greater racial pay gap. Black and Latino men average only seventy-one cents, while white men earn a dollar (Bornstein, 2018).

Although the most important documents of the European Union foresee gender equality and set suppression of gender-based discrimination as one of the key tasks, the gender pay gap still exists in the EU member states. In Europe, the estimated gender pay gap in gross hourly wages between women and men performing similar jobs ranges from about 6% in Germany to 18% in Estonia (De Poli & Maier, 2022). In the EU, on average, women's gross hourly wage is about 11% lower than that of men performing similar work (De Poli & Maier, 2022). The term 'gender pay gap' refers to the difference in annual gross earnings between men and women (Misailović, 2019). The gender pay gap in the EU stands at 12.7 % in 2021 and has only changed minimally over the last decade. It means that women earn 13.0 % on average less per hour than men. In 2018, the gender overall earnings gap, which reflects the combined effects of average hourly earnings, the monthly average number of paid hours (before adjusting for part-time work), and the employment rate, was 36.7% (European Commission, 2022).

Table 1. The unadjusted gender pay gap

The unadjusted gender pay gap (the difference between average gross hourly earnings of male and female employees expressed as % of male gross earnings)		
State	%	Year
Serbia	8,8	2018
Germany	17,7	2022
Hungary	17,5	2022
Estonia	21,3	2022
Luxembourg	-0,7	2022
Romania	4,5	2022
Slovenia	8,2	2022
Poland	7,8	2022
Belgium	5	2022
Italy	4,3	2022
Greece	10,4	2018
EU	12,7	2022

Source: Authors according to https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Gender_pay_gap_statistics, 1.12.2024.



In addition, the majority of part-time employees in Serbia are women. When observed by working hours, women make up the majority (50%-62%) of part-time employees in all age groups. The most common reasons why women work part-time are care for children or dependent elderly persons (87%), family or personal reasons (61%), and illness or disability (51%). The most common reasons why men work part-time are the inability to find full-time employment (62%), education or training (61%), and other reasons (54%) (Item 5.1.1.2 Gender Equality Strategy (2021 - 2030)). In OECD countries, women represent nearly three out of every four part-time employees, which can contribute to pay disparities. Discrimination can be direct when the hourly rate for part-time work is lower than for full-time work or indirect when, for example, there are no limits on the wage level for work outside of the employment relationship (Oelz *et al.*, 2013).

The foundation of this employee right is rooted in the provisions of the Law on the Prohibition of Discrimination (*The Official Gazette of RS*, no. 22/2009, 52/2021), which prohibits discrimination in the labour sector, ensuring that all labour rights are enjoyed under equal conditions. This includes, among other things, the right to equal compensation for work of equal value. In addition, “protection against discrimination is enjoyed by a person in an employment relationship, a person performing temporary and occasional work or work under a contract for services or other type of contract, a person in secondary employment, a person performing a public function, a member of the military, a job seeker, a student or pupil in an internship, a person undergoing professional training and development without establishing an employment relationship, a volunteer, and any other person who participates in work on any basis.” (Article 16, paragraphs 1 and 2 of the Law on the Prohibition of Discrimination).

Although the principle of equal pay is primarily adopted so as to establish equality between men and women at work in terms of wages for equal work, it is not uncommon for wage disparities to exist even among individuals of the same sex due to violations of the provisions of the Labour Law (Misailović, 2019).

THE TERM EQUAL WORK OR WORK OF EQUAL VALUE AND THE APPLICATION OF THE PRINCIPLE

The EU Directive on Equal Pay does not provide any guidance on which mechanism should be used to determine whether two jobs are of equal value. Therefore, legal disputes are important for the development of “knowledge of equal value” at both the national and supranational levels (Kilpatrick, 2005). The Labour Law does not clarify the principle of equal pay. Thus, in explaining this principle, we draw on comparative legal solutions, according to which women and men must have equal access to all elements of work payment, which must be established according to identical standards for employees of both sexes. Each element of work payment must be considered individually, and equality must be ensured in each of these elements (Radovanović, 2014). The Labour Law defines work of equal value as work that requires the same level of qualifications, i.e., education, knowledge, and skills, in which equal work contribution is made with equal responsibility. The definition means that work of equal value primarily requires the same level of qualifications, i.e., education. The term “qualifications” replaced the term “professional qualifications” with the adoption of the Law on the National Qualifications Framework of the Republic of Serbia (hereinafter referred to as NQF, 2018). Qualification is the formal recognition of acquired competencies. An individual obtains a qualification when the competent body determines that they have achieved the learning outcomes at a certain level and according to a specified qualification standard, which is confirmed by an official document (diploma or certificate).



Qualifications in the NQF are classified into eight (8) levels and four (4) sub-levels. Qualifications can be acquired through formal and non-formal education, as well as through the process of recognizing prior learning (Articles 2, 8, and 9 of NQF). Depending on the qualification level requirements, jobs at a specific workplace are evaluated based on the level of expertise required. Therefore, employees who perform jobs and achieve the same level of qualification, i.e., education, are entitled to equal basic pay (along with equal contribution and equal responsibility). So is the court practice: "The claim for compensation for material damage in the amount of unpaid wages and the claim for payment of non-material damage due to reduced life activity were correctly rejected because the difference in his earnings was not a consequence of unjustified evaluation of the same work, but rather the result of a different value of work due to the fact that the plaintiff performed work with a level VI of qualification, which was level stipulated in the annex of the employment contract... All six employees employed as professional engineers do not have the same salary because there are differences in their qualifications, work experience, the responsibilities they hold in their positions, and the work results" (From the judgment of the Supreme Cassation Court, Rev2 2196/2015 from 26.5.2016.). Thus, "The Supreme Court of Cassation emphasized in its decision that regardless of the fact that the plaintiff was actually performing the duties of a tax collection inspector, this did not affect the adoption of the claim because, first and foremost, the legal requirements regarding the same level of qualifications, i.e., education, were not met. As a result, the work of equal value was not performed in accordance with the provisions of Article 104, paragraphs 2 and 3 of the Labour Law" (From the judgment of the Supreme Cassation Court, Rev2 3440/2022, date 2.3.2023).

In legal theory, the question arises: "Who will define the work contribution, and how will it be measured? Is it measured in the same way as work performance?" (Radovanov & Orelj, 2015).

Responsibility is measured by the importance of the job for the overall organization and functioning of the work process. More complex jobs are often more responsible, although this is not always the case, especially with porter jobs: the job is responsible, but it does not fall into the category of jobs that are complex to perform (Radovanov & Orelj, 2015).

A significant contribution to determining whether two jobs constitute equal work or work of equal value comes from case law.

Firstly, the Constitutional Court of Serbia has taken the position that the price of labour for equal work or work of equal value must be the same, regardless of which organizational part of the same legal entity the work is performed in, in accordance with the constitutional right to fair compensation for work (From the decision of the Constitutional Court of Serbia, Uo – 25/09, 9.6.2010).

The question arises as to the court practice is as follows: "As an element for calculating an employee's basic salary, the value of the working hour must be the same for all employees of the employer; otherwise, the imperative rule prescribed by Article 104, paragraphs 2 and 3 of the Labor Law on equal pay for equal work or work of equal value is violated" (From the judgment of the Appellate Court in Belgrade, Gž1 1569/21, 14.5.2021). "All employees in the position of welder with the same level of qualifications, who performed the same work but received different salaries, have had their right to equal pay violated. Of the three employees who performed the same work in the position of welder, only the plaintiff's work was valued lower and calculated with a lower coefficient compared to the other two employees. As a result, the ruling of the Appellate Court was reversed, and the decision of the Basic Court was confirmed" (By the ruling of the Supreme Court of Cassation no. Rev2 1833/17 from March 1, 2018, the judgment of the Appellate Court in Novi Sad no. Gž1-843/17 from April 3, 2017, was modified, and the judgment of the Basic Court in Novi Sad no. P1-1724/16 from January 17, 2017, was upheld).



“Namely, neither different financial results nor the scope of business operations of the defendant's profit-oriented organizations constitutes a basis that authorizes the defendant to act contrary to Article 104 of the Labor Law. Instead, employees in the defendant's profit-oriented organizations with better work results may be granted the right to other forms of compensation in addition to their basic salary - such as compensation for overtime work, special performance results, incentives, bonuses, or other forms of compensation (Article 105, paragraph 1 of the Labor Law)” (From the judgment of the Supreme Cassation Court, Rev2 3947/2019, 29.1.2020, from the judgement of the Supreme Cassation Court, Rev2 1644/2019, 10.6.2020.).

Secondly, the principle of equal pay for equal work or work of equal value must be respected even in the event of status changes, i.e., change of the employer. In the event of a status change, the successor employer takes over from the previous employer the general act and all employment contracts that are in effect on the day of the change of employer (Article 147 of the Labour Law, 2005). The successor employer is obligated to apply the general act of the previous employer for at least one year from the date of the change of employer, unless before the expiration of that period:

- 1) expires the term for which the collective agreement was concluded with the predecessor employer;
- 2) a new collective agreement is concluded with the successor employer (Article 150 of the Labour Law, 2005).

The question arises as to the court practice is as follows: “Employees of the merged company, without reasonable justification, in this specific case, were placed in an unequal position compared to other employees of the employer, thereby contrary to the provisions of Articles 18, 19, and 20 of the Labor Law, discriminating against them on the basis of their right to payment of wages, according to the value of the hourly wage determined for other employees” (From the judgment of the Appellate Court in Belgrade, Gž1 686/2021, 16.4.2021).

The term "equal work" should refer to the same jobs according to systematization or employment contracts, and the job titles need not necessarily be the same. Direct discrimination can also occur when an employee performs the same job with different job titles depending on the employee's gender. Jobs typically held by female employees often pay less than their “male” counterparts. For example, a male-dominated job: an information manager while a female-dominated counterpart could be a librarian or an assistant manager might be a male role whereas a manager assistant is typically female, or an administrator might be a male position, while a secretary is often female (Oelz *et al.*, 2013). Pay discrimination can also occur when women and men perform different jobs of equal value but are paid differently. Such discrimination can result from gender bias in job evaluation, job assessment methods, and systems. It arises due to the skills, effort, responsibility, and working conditions associated with typically female jobs being often unrecognized, or undervalued. Women tend to be ranked lower in job classifications and pay scales within a company. Women also experience more career breaks (pregnancy, maternity leave). This disadvantage is especially true when past work (work experience) is a component of the total salary (Oelz *et al.*, 2013).

However, the ILO Convention No. 100 on the right to equal remuneration for men and women for work of equal value defines "remuneration" to include ordinary, basic, or minimum wages or salaries and any additional allowances paid, directly or indirectly, whether in cash or in kind, by the employer to the employee and arising from the employment relationship (Oelz *et al.*, 2013). Job evaluation, which aims to measure the relative value of jobs based on the work to be performed, differs from performance appraisal. However, performance appraisal, which assesses an individual worker's performance, can



affect remuneration. If, for example, there are performance or productivity criteria that provide for bonuses, differences in total monthly earnings may be justified. This is not discriminatory provided that the performance and productivity criteria themselves are not discriminatory and everyone has the opportunity to benefit from these bonuses. If, for instance, part-time workers do not meet the criteria for a specific bonus and most part-time workers are women, this could lead to indirect discrimination in terms of wages (Oelz *et al.*, 2013).

The term equal pay includes not only the regular basic or minimum wage or salary but also all other allowances, whether in cash or in kind, that a worker receives directly or indirectly from the employer based on the employment relationship. It can be concluded from the case law of the Court of Justice that numerous dilemmas have arisen precisely with regard to the qualifications of various forms of benefits and allowances, not so much on the basis of immediate employment relationship, but rather after the termination of the employment relationship or from pension insurance. Benefits based on voluntary supplementary contributions by employers to pension funds are also considered as “pay” (Vukadinović, 1998).

The issue of job evaluation and remuneration of all employees performing the same work for an employer can also be viewed from the perspective of the work that the employee actually performs rather than solely from the standpoint of the work that the employee is contractually obligated to perform according to the employer's general act and the employment contract. In cases where the employee has *de facto* performed work at the employer's request (without a concluded annex to the employment contract) for which a salary specified is higher than the one the employee receives under the employment contract, the employee is entitled to the higher salary based on the actual work they performed (Misailović, 2019). So is the court practice: The Appellate Court in Novi Sad holds that the defendant, as the employer, is obligated to pay the plaintiff a salary corresponding to the work the plaintiff actually performed, in accordance with the employer's general acts. The plaintiff was employed by the defendant as an account officer. Upon the verbal instruction of the director, she performed the tasks of the head of finance for a certain period. However, the defendant calculated and paid the plaintiff's salary during the period in question by applying the coefficient determined for the duties of an account officer, rather than that of the head of finance, which the plaintiff actually performed (From the judgement of the Appellate Court in Novi Sad, Gž1 No. 2640/11, 3.5.2012).

THE RIGHT TO COMPENSATION FOR DAMAGES

Article 104 of the Labour Law stipulates that in the event of a violation of rights, an employee has the right to compensation for damages. This means that the employee has the right to request compensation for the difference in salary from the employer or to exercise the right to compensation for the lower salary paid through legal proceedings.

This is confirmed by case law. For example, the Appellate Court in Belgrade stated: “The defendant did not pay the plaintiffs wages according to the value of the working hour determined for employees in other organizational units but at a lower value. Therefore, the defendant is obligated to pay the plaintiffs the difference between the wage calculated according to the value of the working hours for employees in other business units of the defendant and the wages paid to the plaintiffs according to the value of the working hours for employees in branch ‘K’, the amount of which was determined by an expert appraisal conducted by an expert in the economic and financial field” (From the judgement of the Appellate Court in Belgrade, Gž1 4485/21, 4.11.2021).



CONCLUSION

The right to equal pay for equal work or work of equal value represents the concretization of the constitutional principle of the right to fair compensation for work, which stems from the fundamental human right – the right to work under Article 60, paragraph 4 of the Constitution of the Republic of Serbia. This concretization has been carried out through normative regulation of the principle in several laws, including the Labour Law, the Law on Gender Equality, and the Law on the Prohibition of Discrimination.

The principle of equal pay for work of equal value was adopted primarily with the aim of establishing equality between men and women at work in terms of wages for the same work they perform. However, in practice, wage disparities also exist between individuals of the same gender due to violations of the provisions of the Labour Law, which is why the consistent application of this principle is of great importance.

A key contribution to determining whether two jobs constitute the same work or work of equal value comes from case law, which has established certain rules.

First, the price of labour for equal work or work of equal value must be the same, regardless of the organizational unit of the same legal entity where the work is performed.

Second, the price of labour for equal work or work of equal value must be respected even in the event of status changes, i.e., a change of employer.

Additionally, the term "equal work" should be understood as referring to the same tasks outlined in the systematization regulations or the employment contract, even if the job titles are not identical. Furthermore, the evaluation of job positions and the remuneration for all employees performing the same work for an employer can also be considered from the perspective of the actual tasks the employee performs, rather than only from the viewpoint of the duties the employee is required to carry out according to the employer's general act and the employment contract.

The term equal pay includes not only the regular basic or minimum wage or salary but also all other remuneration, whether in cash or in kind, the employee receives directly or indirectly from the employer based on the employment relationship.

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JEDNAKA ZARADA ZA JEDNAK RAD ILI RAD JEDNAKE VREDNOSTI: KONCEPCIJA I PRIMENA

Rezime:

Ustav Republike Srbije i njegov pravni okvir garantuju jednaku platu za jednak rad ili rad jednake vrednosti za zaposlenog. Rad jednake vrednosti se odnosi na rad koji zahteva iste kvalifikacije, odnosno obrazovanje, znanje i veštine, što podrazumeva da jednak doprinos u radu odgovara jednakoj odgovornosti. U radu se autori, primenom normativnog i uporednopravnog metoda, bave pojmom, normativnom strukturom i primenom principa jednake plate za jednak rad ili rad jednake vrednosti. Takođe se istražuje pojam i pravna priroda jednake plate i rada jednake vrednosti, kao i prava na naknadu, dajući ključne primere iz sudske prakse.

Ključne reči:

plata,
jednaka plata,
jednak rad,
rad jednake vrednosti.

JEL klasifikacija:

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