

SEX DISCRIMINATION IN EMPLOYMENT

by

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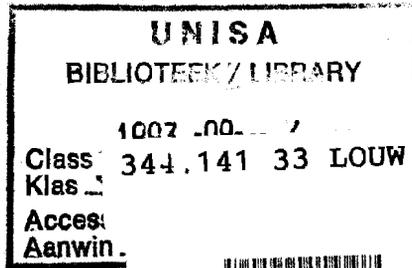
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SUMMARY

This work deals with sex discrimination in employment. It traces the origins of discrimination and considers the meaning of equality and the role which the law can play in attaining equality in the work place. International and regional norms, as well as the British and American legal systems, are analysed. The position in South Africa is then considered against that background, and reforms are proposed. These include the formulation of comprehensive anti-discrimination legislation which draws upon the American and British systems, but is adapted to suit local needs. The establishment of an independent administrative body to monitor the legislation, as well as a specialised judicial body through which the legislation is to be enforced, is also proposed.



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CHAPTER ONE

INTRODUCTION

The focus of this work is sex discrimination in employment. Gender based inequality in education, taxation, social security and family law will not receive detailed consideration, and will be touched upon only in so far as they relate to inequality in employment. Pregnancy and maternity too will be considered only in the context of employment discrimination.

Discrimination implies differential treatment. The concept "discrimination" is neutral, but the term "discrimination" has a negative connotation in normal usage, especially when used in connection with sex, race and certain social traits.¹ Sex discrimination encompasses differential treatment because of a person's sex and includes rules and actions which treat men and women differently on the basis of their sex. While the concept sex is neutral in itself, sex discrimination usually refers to the female sex, and refers to discrimination against an individual woman or against women as a group.²

Little has been written on the subject of employment discrimination in South Africa, making a comparison with foreign legal principles necessary.³ Comparative law has

1 Ramm 17 states: "In English usage, the word "discrimination" has two meanings: in the first and neutral sense of the word, to discriminate means to make or observe a difference or a distinction. In this sense it is a compliment to describe someone as "discriminating"; it means that someone is able to perceive fine distinctions. However, discrimination is also used in a second, pejorative sense to mean an unfair difference in the legal, social, or economic treatment of persons." See also Cameron, Cheadle and Thompson 161; Bourne and Whitmore 15-16.

2 Dahl *Women's Law* 37.

a significant role to play in respect of the overall development of the theory of law and in individual disciplines, particularly in the area of labour law. In this area it is also important in its applied sense, as the experience of one country may be beneficial to another when drafting legislation. Not only is there an acquaintance with the law of foreign countries, but also a better understanding of the law in one's own country in that an assessment of its positive aspects and shortcomings can be made.⁴

The significance of comparative law has been described in the following manner:

"To appreciate its significance, it is perhaps useful to distinguish between three purposes pursued by those who use foreign patterns of law in the process of law making. Foreign legal systems may be considered first, with the object of preparing the international unification of the law, secondly, with the object of giving adequate legal effect to a social change shared by the foreign country with one's own country, and thirdly, with the object of promoting at home a social change which foreign law is designed either to express or to produce" (own emphasis).⁵

The third objective of comparative law expressed here is central to this study, namely, to attempt to promote change with regard to the treatment of women in the

3 A broad discussion of the discipline of comparative law is beyond the scope of this study. Its significance, for present purposes, is highlighted in the ensuing paragraphs. For a discussion of significant principles of comparative law, see Watson 1- 106, particularly the succinct reflections at 95- 101.

4 Watson *Comparative Law* 317 explains the utility of comparative law: "[T]he utility [of comparative law] is the improvement which is made possible in one legal system as a result of the knowledge of the rules and structures in another system. This improvement may occur in various ways. A lawyer pleading in court may urge that on a disputed point a foreign rule provides a satisfactory solution and should be adopted. A textbook writer may do the same. A body established to propose reforms may examine foreign systems and consequently offer suggestions for alterations in the domestic system. A legislature, influenced by foreign law, may pass a reforming statute. A nation may adopt a foreign code or use it as a model." The writer has also expressed the view that the law reformer looking at foreign systems should seek an *idea* which can be transferred into the domestic system, thereby making a "systematic knowledge of the law or political structure of the donor system" unnecessary (Watson *Legal Transplants* 79). See McDonough 504- 530 for comparative analysis of the approaches of Kahn-freund and Watson to the utility of comparative law, and problems associated with transferability in the context of labour law. See also Ivanov 370- 372.

5 Kahn-Freund 2.

work place.⁶ The significance of comparative in the field of labour law is also emphasised:

"Clearly there is no field of human endeavour in which it is more important to set up international standards and to transplant institutions and principles from more to less developed countries [than in the field of labour law]. Not only is it important -- the impressive achievement of the International Labour Organisation shows that it is possible. Here, if anywhere, we see the comparative method in action, in successful action."⁷

In this work, principles contained in international instruments as well as selected domestic legislatures are analysed.

Principles contained in the ILO's Equal Remuneration Convention 100 of 1951 and the Discrimination (Employment and Occupation) Convention 111 of 1958 have been incorporated into national laws through legislation and court decisions. Although South Africa has not been a member of the ILO since 1964, and has not ratified the anti-discrimination conventions, the Industrial Court has on occasion considered principles contained in ILO conventions and recommendations.⁸ In the

6 With regard to bringing about social change in his own country (the United Kingdom) through comparative law, Kahn-Freund 5 cites the "suppression of racial discrimination" through the Race Relations Act 1968, where the influence of the American Civil Rights Act 1964 was evident, as an example. (It may be noted that the article was published in 1974 -- before the Sex Discrimination Act 1975 was law.)

7 Kahn-Freund 20. The author goes on to note: "In my opinion... individual labour law lends itself to transplantation very much more easily than... collective labour law. Standards of protection and rules on substantive terms of employment can be imitated -- rules on collective bargaining, on the closed shop, on trade unions, on strikes can not. If one looks at the corpus of Conventions and Recommendations made by the ILO in the course of more than half a century, one sees without surprise that most of it is designed to establish international standards of individual protection, and this accounts for much of the great success of this gigantic enterprise of transplantation" (21).

8 See, for example, *Metal and Allied Workers Union v Stobar Reinforcing (Pty) Ltd* (1983) 4 ILJ 84 (IC) 90- 91; *Van Zyl v O'Okiep Copper Company Ltd* (1983) 4 ILJ 125 (IC) 135; *Lefu v Western Arcas Gold Mining Company Ltd* (1985) 6 ILJ 307 (IC) 313; *National Union of Mineworkers v Kloof Gold Mining Company* (1986) 7 ILJ 375 (IC) 383 (these decisions all dealt with termination of employment and referred to the Termination of Employment Recommendation 119 of 1963); *SA Chemical Workers Union v Sentrachem Ltd* (1988) 9 ILJ 410 (IC) 429, where the court referred to the Discrimination (Employment and Occupation) Conven-

European Economic Community, the anti-discrimination provisions contained in Article 119 of the Treaty of Rome and the supporting Directives have had a profound effect on the national laws of member states. Control procedures of the Commission of the European Communities and the European Court of Justice ensure compliance with European norms by member states, resulting in a uniform approach to equality in employment in those countries. International principles espoused by the United Nations, by its specialised agency, the International Labour Organisation, and by the European Economic Community are considered in this study.

The Industrial Court has also accepted the persuasive influence of foreign legal systems in the exercise of its unfair labour practice jurisdiction.⁹ In this study the systems of the United States and the United Kingdom will be analysed. The system of the United States has been included because discrimination against minority groups and women has been a central issue of public policy in that country since the 1960's: before that became the case in any other country. Anti-discrimination law in the United States is often regarded as an issue of constitutional law or of fundamental rights, rather than a branch of labour law. Public sector employees may rely on the guarantees contained in Fifth and Fourteenth Amendments to the constitution to enforce equal treatment in employment. Discrimination in private employment is prohibited on a federal level by Title VII of the Civil Rights Act 1964. That Act has

tion 111 of 1958; *Mineworkers Union v East Rand Gold and Uranium Company Limited* (1990) 11 ILJ 1070 (IC), where the court referred to the Collective Bargaining Recommendation 163 of 1981; and *National Union of Metalworkers of SA v Metkor Industries* (1990) 11 ILJ 1116 (IC), where the court referred to the Termination of Employment Recommendation 166 of 1982.

9 For example, in *Mahlangu v CIM Deltak* (1986) 7 ILJ 346 (IC) the court referred to the decisions of American and Canadian Courts regarding the acceptance of lie detector tests in the work place. In *Media Workers Association of SA v Perskor* (1989) 10 ILJ 441 (IC) the court referred to ILO principles and to American, Canadian and Austrian law -- the decision was taken on review to the Supreme Court, which commended the Industrial Court's approach (*Perskor v Schoeman NO* (1989) 19 ILJ 659 (T)).

been called "the most important civil rights legislation of this century", and Title VII "its most important part".¹⁰ The emphasis on the discussion of American law in this study will be on the latter statute because most of the anti-discrimination principles which have evolved in the United States have occurred in the context of interpretation thereof. The development of principles within the context of constitutional law will be dealt with where necessary.

The British system is important for several reasons. Anti-discrimination legislation was first adopted over two decades ago and has been the subject of extensive scrutiny by tribunals and courts, as well as by legal writers. It incorporates principles of American law, initially adopted by the legislature, and also reflects subsequent developments within the European Economic Community.

Not only are the British and American systems accessible to the legislature and to a court interpreting legislative provisions, but, together with the influence of European law, they provide a fair indication of the Western legal approach to sex discrimination in employment.

As stated, initial developments in the United Kingdom reflected those in the United States. The definition of discrimination in the British Sex Discrimination Act 1975 was modelled on the concept of discrimination developed in the United States by statute and case law. Although the Sex Discrimination Act 1975 contains no explicit reference to direct and indirect discrimination, it does prohibit both forms of discrimination. Section 1(1)(a), which prohibits less favourable treatment on the ground of sex (that is, direct discrimination), is similar in content to section 703 of Title VII of the Civil Rights Act. Section 1(1)(b) sets out the adverse or disparate

¹⁰ Schlei and Grossman vii.

impact theory of discrimination (that is, indirect discrimination), developed by the United States Supreme Court in *Griggs v Duke Power Company*.¹¹

The creation in the United Kingdom of the Equal Opportunities Commission under the Sex Discrimination Act 1975 (and the Commission on Racial Equality under the Race Relations Act 1976), as independent enforcement agencies, was influenced largely by the United States model, the Equal Employment Opportunities Commission. The British and American models do, however, differ in a significant respect. In the United Kingdom individuals have direct access to industrial tribunals, while the Equal Opportunities Commission (and the Commission for Racial Equality) control strategic enforcement regarding, for example, discriminatory practices, instructions to discriminate, pressure to discriminate and persistent discrimination. In the United States, enforcement of equal employment legislation occurs through federal courts and lies in the hands of the Equal Employment Opportunities Commission. An individual has no access to court unless the Commission has relinquished its right to sue.

In the United Kingdom, equal pay and equality of opportunity in other areas of employment are dealt with in two separate statutes, namely, the Equal Pay Act 1970 and the Sex Discrimination Act 1975. The initial purpose of the Equal Pay Act was not only to address equality in a specific area of employment. It also formed part of a fair labour standards legislative package, which sought to introduce minimum wage legislation. A similar pattern was found in the United States. The principle of equal pay was introduced in 1963 by way of an amendment to the Fair Labour Standards Act 1938, which was originally passed to establish a national minimum wage. The prohibition of sex discrimination in other areas of employment was

11 401 US 424 (1971).

introduced in 1964 in Title VII of the Civil Rights Act 1964.

British law also reflects European principles. Britain became a member state of the European Economic Community in 1973. As a member state it is obliged to incorporate legal principles contained in European instruments into its own legal system. These include principles regarding equality of treatment in employment, contained in Article 119 of the Treaty of Rome and the supporting Directives. While the influence of the European Economic Community on the initial structure of British anti-discrimination legislation was not as great as that of the United States, subsequent developments have extended the concept of equality beyond that recognised in the United States. A significant example is the principle of equal pay for work of equal value (referred to as comparable worth in the United States), which was implemented in Europe through Article 119 of the Treaty of Rome and the Equal Pay Directive 1975, and subsequently in the British Equal Pay Act 1970.

This study analyses international principles, as well as salient aspects of the British and American systems. Thereafter, current and prospective South African principles are considered. First, however, it is necessary to consider the origins of and reasons for sex discrimination in employment, the meaning of equality and the role of the law in bringing about equality in employment.

CHAPTER TWO

EQUAL EMPLOYMENT ISSUES

A Origins of Sex Discrimination

While concern for discrimination is a relatively new legal phenomenon, sex discrimination itself is not a new phenomenon. It has been said that:

"Sexual discrimination as a specific legal concern is a novelty; it is an anachronism to see it, in the modern self-conscious sense, in any earlier period. In so far as expectations are involved in discrimination, one can argue that, where expectations appear to have been largely satisfied, what the historian sees are the structures of discrimination rather than the experience of it. Nevertheless, even if largely unquestioned, disadvantage on the grounds of gender was certainly prevalent. The mere (involuntary) membership of a particular group, the female sex, put people into an inferior position, and one that was described as inferior, with the widespread use of terms such as 'frailty', 'weakness', and so on, to justify it."¹

South Africa has been described as a patriarchal society.² In a patriarchal society men and women have definite and different roles. Paid work generally is regarded as the domain of men, while women are assigned a domestic role. This culture is to be found in both the Western and the African component of the South African society.

Traditionally, in Western culture, men and women have had specific and exclusive roles. The role of women has been a domestic one, running a household and bearing and raising children, while men have been regarded as breadwinners. Unfortunately, separation has led to subordination.³

1 Robinson in McLean and Burrows (eds) 40.

2 Lemmer 31.

3 As Robinson points out, while it may be difficult to discern the innate inferiority of the

The traditionally subordinate role of Western women can be traced back to Roman times.⁴ Roman social structures greatly influenced European legal culture. The domestic role of women can be traced back to early Roman times, where the majority of women performed domestic as opposed to commercial work. This included spinning and weaving, cooking and healing, and agricultural work.⁵ If one considers Roman social structures it becomes apparent that Rome was a patriarchal society. The family model was the agnatic family with the senior male, the *paterfamilias*, at its head. The agnatic family was transmitted only through the male line, a system which is reflected in the use of surnames in modern Western societies. Upon the death of the *paterfamilias* paternal power over the children ended and they became independent. Each son became a *paterfamilias*, irrespective of his age, while a daughter could not exercise any family power, despite being independent of her deceased father's power. She did, however, have normal proprietary capacity.⁶

A woman was a citizen and was able to use legal procedures reserved for citizens. In legal theory she had only private rights and no public rights, although there is evidence of her actual participation in politics. She inherited her social status from her father, and later from her husband if that was higher. In early Roman law the predominant form of marriage was one whereby the wife passed into the power of her husband and stood in a similar relationship to him as their children did. This form of marriage later disappeared and was replaced by the free marriage whereby

domestic role, it has nonetheless been regarded in that light in all societies throughout history (Robinson in McLean and Burrows (eds) 41).

4 { The rise of the Roman empire commenced with the legendary founding of Rome by Romulus in approximately 753 BC and ended with the fall of the empire in 476 AD. After the fall of the empire in the west, Roman law continued to develop in the east, particularly under the reign of the emperor Justinian from 527 to 565 AD. For a summary of the critical periods in the development of Roman law, see Thomas 13 - 14.

5 Robinson 161.

6 Robinson in McLean and Burrows (eds) 41- 43; Thomas 161- 162.

the woman remained in the power of her *paterfamilias*. Marriage was created by the consent of the two parties and their *paterfamilias* if there was one. Initially, the wife had the same freedom as the husband to end the marriage. Later, after the acceptance of Christianity as the official religion of the Roman Empire (during the fourth century), divorce became restricted. It has been observed that fear of female infidelity explained the social standards which a husband was entitled to demand from his wife, since the (male-created) law saw him as having a right to control her personal behaviour in his interests.⁷

An independent woman could appear in court on her own behalf, but could not appear on behalf of others. She was incapable of acting as a judge, a *judex*, in civil procedure. She could give evidence in court, but could not be formal witness to acts in law such as making a will. In Roman law, public prosecution was unknown. Criminal charges were laid by private citizens. Unless she was directly affected, a woman had no power to bring a criminal accusation. Adultery was regarded as a criminal offence and a husband could lay a charge against his wife. A wife, however, could not lay a criminal charge of adultery against her husband. A man could also suffer outrage or *iniuria* for an insult to his wife or children, but a woman did not have an action for outrage to her husband. The underlying reasoning was that wives should be defended by their husbands, but not vice versa.⁸

Although the principal division in the law of persons was between free persons and slaves, and the next major division was between those in power and those who were independent,⁹ Rome was a patriarchal society. *De jure*, women were regarded as

7 Robinson in McLean and Burrows (eds) 43- 44, 51; Thomas 161, 167.

8 Robinson in McLean and Burrows (eds) 51- 52.

9 Robinson 144 - 145.

the weaker sex, although formal legal constraints on their capacity were steadily removed in the thousand years between the Twelve Tables (450 BC) and the reign of the Emperor Justinian (AD 527 - 65). By Justinian's time, for example, there were few formal legal principles pronouncing the frailty of women, but their frailty and their special need for protection were still socially accepted. Theoretical equality of the sexes in private law was achieved, but the operation of legal rules was based on the assumption of female inferiority, even where the rules themselves appeared gender neutral.¹⁰ Although women under the reign of Justinian achieved a large measure of formal equality in private law, they still played no part in the government of the state or public law generally, while social conventions and economic circumstances meant that women remained subordinate to men.¹¹

A second source of Western culture is to be found in the social structures of the Germanic invaders of western Europe, following the fall of the Roman empire in the west. The Germanic invaders of western Europe did not encounter the relatively equal treatment of Justinian's law. The Germanic Visigoths, Ostrogoths, Franks, Burgundians and Anglo-Saxons settled within the Roman empire before the legal reforms brought about by Justinian. Germanic customs blended well with the prevailing law. A wife was subject to the marital power of her husband and much of her property fell under his control. The dependence of a Roman woman on her father was shifted in Germanic law to her husband. Thus until the end of the nineteenth century, in private law throughout Europe, the primary legal distinction was not between men and women but between men and unmarried women on the one hand and married women on the other. Female inferiority was, however, an accepted social fact.¹²

10 Robinson in McLean and Burrows (eds) 41, 54.

11 Robinson 143.

12 Robinson in McLean and Burrows (eds) 54- 55. For an account of the historical development

The role of the Church on Western culture -- both the sacred texts and the interpretation thereof -- cannot be overlooked. It has been observed that in society one of the main impediments to sexual equality has been, and remains, prevailing social attitudes.¹³ The Church has had a pervasive influence on social attitudes and also the law. The Bible reflects social and cultural standards of the time and reinforces the traditional superiority of the male. As Christian theology developed it reflected a male obsession with the sin of lust and perceived evils of the flesh. This is reflected in the development of the Roman law on divorce, for instance, after the acceptance of Christianity. It has been pointed out that the Biblical perception of women takes three forms, namely, that of harlot -- to tempt man to sin, that of wife -- his property and bearer of his children, and that of virgin -- a spiritualised ideal.¹⁴ The Old Testament introduces woman as a companion to man. The creation of woman from the rib of man, as explained in the book of Genesis, has been taken to imply that God intended man to be superior to woman.¹⁵ In the New Testament women were made spiritually equal to men, but through Paul, Jesus placed women in a supportive role within the traditional Christian family. It has been said that:

"The Judaic-Christian tradition has been patriarchal down through the millennia, although sometimes this has been modified or disguised. The Bible reflected the oppressed condition of women in ancient times. In the Decalogue of the Old Testament a man's wife is listed amongst his possessions, along with his ox and his ass. The biblical story of Eve's birth, which has been called the hoax of the ages, fixed women's place in the universe. The story of the Fall of Adam and Eve perpetuated

of the law relating to women in the United Kingdom, see Atkins and Hoggett 9- 24. Cleveland 3ff gives an interesting account of the legal position of women in England from the landing of the Saxons in 450 AD to 1896.

13 Wilson 221.

14 Wilson 227. See also Kovarsky 97, where these perceptions are explained.

15 Ellis 10.

the myth of feminine evil, giving a powerful image of woman as a temptress -- a dominant theme in western culture for thousands of years. In the new Testament, the Apostle Paul put women in their place: veiled, silent and subordinate. In the early centuries of Christianity the Fathers of the Church classified women as fickle, shallow, garrulous, weak and unstable. In the Middle Ages, Thomas Aquinas decreed that they are misbegotten males, and theologians dutifully taught this for centuries.¹⁶

Given the significant role of the Church in society, it was seen as natural for the law to reflect this difference. Religion has greatly influenced the attitudes of western civilisation towards women. In the three most widespread religions in western society -- Catholic, Protestant and Jewish -- the vast majority of religious leaders are men. That a male viewpoint should prevail is inevitable.¹⁷

Female inferiority was not only a social fact, but also occurred in paid employment. Under the feudal system, which had been established by the thirteenth century, a man's power was based on land-holding and inheritance. The role of women was the provision of legitimate heirs. During the fourteenth century the feudal system came under threat due to a shortage of labour, and it became necessary to pass legislation to preserve the system. In England, for example, legislation was passed to preserve the availability of cheap labour on which the feudal system depended.¹⁸

16 Daley 335- 336. The author also notes that in the more modern era, "popes and theologians greeted the first wave of feminism with the double-talk of the feminine mystique: women should be equal but subordinate.... Today some liberal Catholic and Protestant theologians admit that sexism exists in the churches but show little inclination to do anything about it. All this, of course, is in blatant contradiction to Christian teaching about the worth and dignity of every human person" (336).

17 Wilson 228. Ruetter 277 writes that: "All the major historical religions -- not only Christianity, but also Islam, Judaism, Buddhism, and Hinduism -- have been male dominated in religious leadership and have promoted systems of religious law and symbolism that marginalise women." Fiorenza 264 states: "The Bible is not only written in the words of men but also serves to legitimate patriarchal power and oppression in so far as it renders God male and determines ultimate reality in male terms, which make women invisible or marginal." Hamblin 86- 88 analyses the subversive effect of Christianity, Judaism, Islam, Hinduism and Buddhism on women and concludes that "the traditional religious impact on cultural prescriptions for female behaviour has been somewhat oppressive endorsing a subservient status" (88).

18 The Statute of Labourers 1388.

National agricultural wages were set. Women's rates were set regardless of occupation or degree of skill, while men's rates, which were all higher, varied according to skill. Although limited to agricultural work, the principle which affected female wages thereafter was established, and continued into the nineteenth century.¹⁹

Legal intervention increased during the nineteenth century, particularly in the form of legislation which provided special protection for female workers. Prior to the industrial revolution women could carry out their tasks as home maker and worker under one roof, as work typically involved spinning, weaving, caring for the sick and educating children. The industrial revolution drew large numbers of women to factories, where they worked under arduous conditions.²⁰ It was deemed necessary to protect women from those conditions and from excessive hours of work. In England, for example, women were excluded from underground mining, and their hours of work in factories were regulated.²¹ It has been suggested that it was not only hard work from which the legislature sought to protect women during this, the Victorian era, but also the close proximity to men in both mines and factories. Concern was also expressed at the fact that married women should leave their homes and families and neglect their domestic duties.²² Women were thus given primary responsibility for the welfare of the family, not only in family law but also in the context of employment law.

The second world war again saw an influx of women into the job market. It has

19 Atkins and Hoggett 10.

20 Hamblin 94 refers to the "nineteenth century transition from homecraft queen to factory slave", while Lupri (ed) 3 states that of "the manifold changes brought about by the Industrial Revolution, none is more ubiquitous than the separation of home and work."

21 The applicable Acts were the Mines and Collieries Act 1842 and the Factory Act 1844.

22 Atkins and Hoggett 12. See also Schmidt (ed) 28.

been observed that that constituted an opportunity for women, but a threat for men.²³ Laws affecting women in the work place were still of a protective nature. Principles relating to equality in the work place first appeared in the 1950's in the two conventions of the International Labour Organisation which provided for equal pay for men and women for equal work, and prohibited discrimination, inter alia, on the ground of sex.²⁴ The 1960's and early 1970's saw the emergence of the women's liberation movement which sought to redefine the traditional role of women. In 1964 the prohibition of sex discrimination in the work place was included in Title VII of the American Civil Rights Act 1964. American principles were later utilised in drafting anti-discrimination legislation in the United Kingdom in the 1970's.²⁵

In South Africa one finds not only Western, but also African cultures and social structures. Traditionally, African women, like their Western counterparts, were assigned a different role to males in society. It has been observed that throughout sub-Saharan Africa women are expected to defer to men. Freedoms, such as speech, movement and association, are qualified by the respect due to all senior men.²⁶ Marriage and the family occupy a focal point in African customary law. The African marriage relationship, unlike its Western counterpart, is a communal as opposed to an individual one. Marriage is seen as an alliance between two groups (families) with consequences beyond the union of the particular husband and wife. The interests of the group are more important than those of the individual -- and in the patriarchal African society, group interests are structured in favour of men.²⁷

23 Hamblin 95.

24 The Equal Remuneration Convention No 100 of 1951 and the Discrimination (Employment and Occupation) Convention No 111 of 1958, respectively.

25 Legislation in the United Kingdom included the Equal Pay Act 1970 and the Sex Discrimination Act 1975.

26 Bennet 23.

27 Nhalapo 137. Lemmer 32 explains: "Traditionally black women in South Africa were sub-

Women are the means by which the goals of the group are achieved. Examples abound -- because of the emphasis which is placed on the need to procreate (which was economically necessary in times of reliance on subsistence agriculture), a younger sister may be required to take the place of a woman who is unable to bear children, and a man who dies may have children fathered for him by a relative; rights which men acquire over women and children in marriage are secured by the movement of cattle, and result in perpetual minority for women including subjection to chastisement.²⁸ The traditional position of the African woman in the family may be summed up as follows:

"We can now hazard an answer to the question: 'what is it about custom that is inimical to woman's rights?' It is everything that emanates from an attitude to women in marriage and in the family which sees them solely as adjuncts to the group, means to the anachronistic end of clan survival, rather than as valuable in themselves and deserving of recognition for their human worth on the same terms as men."²⁹

Under the traditional division of labour in agricultural systems, men and women were allotted different tasks. Men performed heavier tasks, such as ploughing, while women were responsible for sowing, weeding and harvesting. Women were also responsible for domestic tasks, such as gathering wood, fetching water and preparing food. The introduction of implements which reduced the reliance on physical energy emphasised the traditional division of labour, as it was generally men and not women who learned to use the new tools. Colonialism further reduced rural women's standing as it was (incorrectly) accepted that agriculture was the

ordinate to men within a wider kinship system with the chief as the controlling male.... Among modern Blacks, patriarchy remains the dominant ideology as regards gender relationships...."

28 Nhlapo 138; Bennet 23.

29 Nhlapo 139. The author goes on to say that as long as customary law seeks to preserve the traditional view of marriage, the rights of women as a group cannot receive consideration (139 note 14).

male's domain and new technologies were taught only to men. The emphasis also shifted from subsistence farming (that is, crops to be consumed by those who grew them) to cash crops. Women were required to attend their husbands' cash crops, but did not share in the profits. Under colonialism women were also disadvantaged in respect of land ownership. In traditional societies common land could be used by everyone. But, following colonialism, that was no longer the case. As a result of their ever diminishing status in agriculture women tended to withdraw from farming into their domestic environment or to move to cities.³⁰

The position of Black women has been complicated by the effects of industrialisation and urbanisation. A factor which had a significant effect on Black women's participation in the labour force was their lack of mobility. Black men migrated to cities in search of cash employment. Women remained behind to care for dependent family members. As a result, men became involved in industrialised employment, while women were responsible for the family and domestic chores, as well as subsistence agriculture. The latter remained important because male wages were often inadequate to meet the basic needs of the entire family. Due to domestic responsibilities women wishing to work outside the home were obliged to seek employment close to home and to accept the type of work and wages available locally.³¹ The policy of influx control, which was in effect until 1986, prevented Black women from joining their husbands in White areas. It had a detrimental effect on family life and on potential development of Black women in the work force. As a result of these patterns the majority of Black women employed in South Africa are employed in the service and agricultural sectors in the lowest paid and least secure jobs.³² Black women working outside of the home remain responsible

30 *Women and Development* 6-7. See also Lemmer 32; Dhalamini 7.

31 Ahmed 80 explains that "women's role in reproduction (both biological and social) is thus crucial in determining the sexual division of labour in production."

for the bulk of domestic work at home.³³

It is apparent that both Western and African societies have a tradition of patriarchy. In South Africa there is also a tradition of authoritarianism. It has been said that:

"South African society represents a patchwork of patriarchies... in which different forms of patriarchy within ethnic groups are sustained, modified and entrenched. Moreover it is posited that the patriarchal nature of South African society is intensified by the presence of strong authoritarian norms... which are linked to a more rigid sex-role differentiation.... Authoritarian attitudes among Afrikaans speaking Whites were among the highest recorded in literature.... South African Blacks also showed high authoritarian attitudes as a result of a firm patriarchal upbringing.... English-speaking South Africans also revealed fairly authoritarian attitudes...."³⁴

In summary, it may be said that, following the industrial revolution, women entered paid employment under arduous conditions. Protective legislation was introduced to attempt to ease their burden. It sought to make working conditions more pleasant and to ensure that women could remain responsible for domestic functions. Following the second world war, during which many women took up paid employment, measures aimed at the prevention of discrimination in the work place were introduced on an international level. Legislation seeking to prevent discrimination in employment was introduced in Western countries during the 1960's and 1970's. That did not occur in South Africa until 1979.³⁵ Until then South African women,

32 Pillay 25- 26; Lemmer 32.

33 Lemmer 32. Ahmed 81 sums the position up: "Aside from constraints to physical mobility there is also customary or traditional stereotyping of jobs, with the consequence that women may have a more limited choice of occupations and may be debarred from those offering more security and higher remuneration. Examples of this occupational limitation are abundant in rural societies. Even where women work as wage earners, they are concentrated in the least permanent and worst paid activities, particularly since their involvement in production is viewed as secondary to their role in reproduction and not as a primary source of family income."

34 Lemmer 32. The author concludes that the patriarchal and authoritarian nature of South African society is consistent with the position of South African women, whose role is largely defined by men.

35 The introduction of the unfair labour practice concept in 1979 into the Labour Relations Act

who live in a traditionally patriarchal society, were affected only by protective legislation and by legislation which permitted discrimination against female employees. The subordinate position of Black women was exacerbated by the combined effect of colonialism and racism.

B Reasons for Sex Discrimination

Four distinctive features of women's employment have been identified.³⁶ The first is the growing number of women in the labour market. Women now constitute over one third of the world's economically active population. Actual figures differ for various countries and regions. The number of working women tends to be greater in Western Europe, the United States and Canada, while numbers tend to be smaller in the developing countries of Asia, Africa and Latin America.³⁷ But it must be remembered that rural women in the latter countries tend to engage in a wide range of income generating activities which contribute to the survival of their households. It has been estimated that they contribute approximately half of their time to economic activities which are not reflected in labour force statistics.³⁸ In South Africa,

28 of 1956, made an allegation of sex discrimination in employment possible in respect of those employees covered by the Act. Sex discrimination was specifically mentioned for the first time in 1988, in the unfair labour practice definition which was substituted in the principal Act by the Labour Relations Amendment Act 83 of 1988.

- ³⁶ See Townshend-Smith 1- 8; Schmidt 123. Conaghan 381, commenting on the position in the United Kingdom, notes that the combined effect of women's private commitments and the existence of established structural discrimination in the workplace ensures that women workers remain in low-paid, routine and much-exploited jobs. She also notes that despite the existence of equal pay and sex discrimination legislation, women's average pay is still less than two thirds of men's and women are still underrepresented in professional and high-powered positions.
- ³⁷ Ivanov 367. The author points out that the economic role of women depends on the political, economic, social and cultural conditions in various countries. Their economic as well as their social role are affected by long-standing traditions which adversely affect both their participation and their role in labour relations. These traditions are reflected in views, customs and legal norms which determine the status of women in the family.
- ³⁸ Ahmed 72. Because of the rural emphasis, constraints on women's work in these countries differs from those in Western countries and tends to be subject to three major constraints,

statistics have revealed that about 40% of the labour force is female.³⁹

The second distinctive feature of women's employment is that women tend to perform different jobs to those performed by men, and that those are generally low paid jobs or jobs which bring in less pay than those usually performed by men.⁴⁰ In developing countries the majority of women are concentrated in agriculture.⁴¹ In South Africa in 1980, for example, approximately 24% of persons engaged in agriculture were women, and of those 92% were Black.⁴² In developed countries about a quarter to a third of women workers are employed in industry. Men tend to predominate in mining, construction and processing industries, while women are concentrated in manufacturing, specifically, textiles, clothing and foodstuffs. In 1980, 55% of all female employment in manufacturing in South Africa was concentrated in these sectors.⁴³ Women tend to constitute a large proportion of the lib-

namely, limited access to land and related resources, lack of control by women over their own labour and the fruits thereof, and lack of mobility due to family responsibilities and social and cultural restrictions (73).

39 Currently about 40% of the South African labour force is female, compared to 35,5% in 1970 and 19,8% in 1951, and women occupy 17,4% of managerial executive and administrative posts (*Financial Mail* 13 July 1990 22). Pillay 7- 17 examines the role of women in the South African economy, and has drawn up an instructive series of tables depicting, inter alia, the percentage of women in the South African labour force, women as a percentage of the labour force in each industrial sector, occupational distribution, income and unemployment rate. Jain and Sloane 2- 21 present a detailed analysis of female participation in the labour market in the United States, Canada and the United Kingdom.

40 It has been said that: "All human societies today have some sort of division of labour along sex lines; that is to say, all of them have arranged matters so that there are some tasks men are supposed to perform regularly, and others that fall into the category of women's work" (Leibowitz 45). Ashton 127 observes that: "Although most women do now work, contradictions are firmly embedded in the present ideology of women and work; whilst it appears acceptable for women to work, they remain in subordinate generally "feminine" positions in the workplace and are still expected to shoulder the bulk of domestic duties outside of it."

41 The numbers may be as high as 90% in certain African countries, while less than 10% are employed in agriculture in industrialised nations.

42 Pillay 25.

43 Pillay 25.

eral and technical professions, largely due to their preponderance in education and public health. Amongst professional workers teachers and nurses constituted 75% of female employees in South Africa in 1980.⁴⁴ There are very few female directors or senior executives, but numerous female clerical and commercial workers.⁴⁵ Segmentation has been brought about by direct and indirect discrimination against women. Differing education and training play an important role, and the effect of special protective measures for female employees cannot be overlooked.⁴⁶

The third feature of women's employment is the concentration of women performing casual or part-time work, and work which offers little stability and few career opportunities. Women may accept that type of work because it is all that they can cope with in conjunction with family responsibilities, or because the structure of the employment market allows them no other choice. Part-time work, which is work performed on a regular basis for a smaller number of hours than the hours worked by full time workers, is predominant in industrialised countries. Part time work tends to be concentrated in the services sector, which accounts for about 60% of total employment in industrial economies, and part time workers generally occupy the lowest grade jobs. That reinforces the association of part time work with the lowest skill levels.⁴⁷ It has been said that:

44 Pillay 26.

45 Seguret 296- 297.

46 Leibowitz 67 explains that patterns such as these were perpetuated from generation to generation: "The sexual division of labour not only designates which productive tasks men and women pursue, it allocates the responsibilities for socializing youngsters into those tasks to both men and women. The division, when fully articulated, calls for recognising early on who will be a "mother" and who will not, deciding which set of skills a youngster is likely to use as an adult, and training the youngsters accordingly. Girls and boys as well as women and men are distinguished from each other. Girls learn their skills from women, boys from men."

47 Robinson *Part-time Employment* 58-59.

"...women who desire to work part-time have very little choice about the work they will be hired to do. Traditional full-time "women's work" tends to be underpaid and undervalued; part-time work in these fields, with its lack of benefits, limited opportunities for promotion, and weaker job security appears even less attractive."⁴⁸

A sample survey conducted by the European Economic Community in nine European countries about a decade ago revealed approximately 9.2 million part-time workers, of which about 8 million were female. They constituted approximately 25% of the female economically active population and 85% were married.⁴⁹

A fourth feature of female employment is that women's average pay is lower than that of men. Women's earnings are lower than men's in almost all countries and in most sectors and occupations -- in industrialised countries women's earnings in real terms may vary from 55- 80% of men's earnings.⁵⁰ The growing number of women in the labour market as a whole, gives added importance to the question of why the last three features characterise women's employment. But consideration of the issue is not for that reason alone. Female employees must be protected against discrimination irrespective of the percentage of their work force participation, and irrespective of whether their share in the work force is growing.

It has been observed:

"Discrimination is a phenomenon which is so pervasive in all human societies that there is no doubt at all that it exists. It is not, however, a unitary phenomenon but a complex of a number of related forms of human behaviour, and this makes it not only

48 Hassberg 247.

49 Seguret 297.

50 Seguret 301- 303. In South Africa women as a rule earn 80% - 90% of what a man earns for the same work (*Financial Mail* 13 July 1990 23).

hard to define but frequently difficult to comprehend fully.⁵¹

As this quotation implies, there are many reasons for the existence of discriminatory features of women's employment. Broadly speaking a distinction can be drawn between factors which influence the demand side of labour, such as personal characteristics and the preferences of employers, and those which influence the supply side, including the preferences of employees themselves and their availability for particular jobs. While discrimination emanates largely from the demand side of the labour market, the feedback effects which influence supply cannot be ignored.

The extent of the problem is encapsulated in the following passage:

"Are the roots of the sexual division of labor and the subordination of women located in the sphere of production, in religious and cultural institutions, or in familial structures and the unequal division of household labor? Do they reflect unequal distribution of resources, income and power between women and men or a mutually supportive and interrelated system of institutions that perpetuate the subordination of women? Does the sexual division of labor form the basis of women's subordination, or is the sexual division of labor only a manifestation of women's subordination?"

Scholars differ widely on the origins of the male-favored sexual division of labor. Some claim its origins are biologically based and rooted in prehistoric cultures; but the heterogeneity of the sexual division of labor across time and space, cultures regions and classes within the same society refutes the case for biological determinism. Others argue that the subordination of women by men is the basis on which early civilization was formed and that the sexual division of labor has maintained a reciprocal state of dependency between the sexes.... [Others] attribute the origins of women's subordination to the emergence of social differentiation and patriarchy caused by shifts in models of production.⁵²

Several reasons, based on traditional role division between the sexes, have been advanced in an attempt to explain unequal treatment of men and women by the law.

51 Jain and Sloane 26.

52 Mazumdar and Sharma 185. For a discussion of the effects of property, class society and the state on women's subordination, see Coontz and Henderson 108- 155. Leibowitz 43- 75 discusses the origins of the sexual division of labour in the context of the development of the first human societies.

One is a cultural explanation. The argument here is that the human race is organised so as to allot different functions to the two sexes, and that the law reflects this difference.⁵³ Unfortunately the acceptance of role division between the sexes is naturally extended to include discrimination between the sexes, and the acceptance of women as subordinate to, and dependent upon, men.⁵⁴ Social policy, which advocates that mothers should be discouraged from working outside of the home, due to the alleged physical and psychological detriment to the well-being of their children, has also been advanced as a reason for differentiation by the law.⁵⁵ It has also been suggested that men derive specific material advantages from limiting the rights of women. It is said that in the past material concerns influenced male attitudes towards sex equality,⁵⁶ and continue to do so today. For example, during periods of high unemployment men have a material interest in preserving scarce jobs. It is also probable that increased demands in terms of domestic responsibility and child care will be made if wives go out to work.⁵⁷ The material advantage explanation, like the cultural explanation, is based on the stereotyped view of role division between the sexes, and male superiority in economic terms. Adherence to this stereotype is a significant cause of discrimination in employment and has led to the participation of

53 Ellis 6; Leibowitz 43.

54 Ashton 117 explains that: "The social origins [of inequality] were rooted in the family, in the social relationships between men and women and in the wielding of patriarchal power to male advantage."

55 Ellis 9.

56 Ellis 7. The author the author points out that it has been suggested that matrimonial community of property developed in order to finance commercial enterprise before the days of corporations; and that the resistance in the Victorian era of the entry of middle class women into public and professional life was to protect men's interests by ensuring that their wives remained home as housekeepers (8).

57 Mazumdar and Sharma 187 explain the view held by Marxist feminists, namely, "that domestic labor helps the capitalist to accrue surplus by not having to pay for the reproduction and maintenance of labor power. Women's domestic work, according to this argument, is an integral component of the process of capitalist development and though formally outside the capitalist mode of production could therefore be regarded as productive labor."

men and women in the work force on very different terms. For the vast majority of women child-bearing and -rearing, as well as other domestic commitments, do determine the course of their working lives.

The role of education cannot be overlooked. Education and training provide the keys to occupational equality. As differences in education between men and women prior to entering the job market and differences in training within the employment context are the rule rather than the exception, occupational segregation is inevitable. It has been estimated that differences in education account for approximately 75% of the occupational differences between men and women in South Africa.⁵⁸ The South African problem is further complicated by differences in education between the Black and White population groups. A survey into levels of education conducted about a decade ago revealed that 0,7% of Black women in South Africa had a standard ten plus education in comparison to 1,2% of Black men.⁵⁹ The same survey revealed that 28,4% of White women had a standard ten plus education compared to 32,6% of White men.⁶⁰ It is not only the level of education which is different for men and women. The nature of education also differs. Girls selecting a field of study at school tend to prefer the humanities or more literary branches to the sciences or more technical fields. But employment within the latter areas (for example, engineers, chemists and technicians) would help to raise women to a higher level within the occupational hierarchy. Therefore girls at secondary school level need to select alternatives to the humanities in order to contribute to establishing an occupational balance. But women who did not make the right choice at school, and therefore do not have the skills needed to compete with

58 *Financial Mail* 13 July 1990 23.

59 The actual figures were 59 880 women and 107 740 men (Pillay 34).

60 The actual figures were 644 700 women and 737 600 men (Pillay 34).

men for jobs in areas of science and technology, should not be seen as a lost cause. A commitment to "on the job" training by employers, in areas usually set aside for men, would help to rectify the situation.⁶¹

The need to reorganise education and training in order to contribute to equality in employment has been a central issue in Europe for the last two decades. A resolution emphasising the necessity of full access to all forms of education in order to attain equal opportunity was adopted in 1976. In the training sphere, the European Economic Community adopted two resolutions in 1983, urging member states to promote measures to encourage the participation of women in training opportunities in order to facilitate access to skilled jobs, and to encourage training in new technology to assist women who wish to return to work after a period of absence related, for example, to pregnancy or maternity.⁶² On a national level member states of the European Economic Community have taken steps to equalise education and training. In the United Kingdom, for example, the Sex Discrimination Act 1975 prohibits discrimination, *inter alia*, in education. Member states have also taken steps to inform girls of the consequences of making traditional choices (Germany and Denmark), introduced new curricula combining sciences and humanities (Denmark), introduced mandatory technical courses at secondary school

61 For a discussion of the impact of technological change on women, and related perspectives regarding education, see Bourque and Warren 83- 100. The authors explain, *inter alia*, that educational issues must be seen against the broader background of institutional inequality: "Clearly, neither technology nor education is an independent force for modernization. Rather, both are better understood as clusters of economic, institutional, and ideological relations that shape and are shaped by power relations in national and international spheres. Thus neither technology nor education is a unilateral solution to the problems of underdevelopment or of women's continued marginalization in processes of change. In both cases -- as attention is paid to the contexts of the production of ideas, skills, tools and commodities -- one realizes how much technology and education are bearers of social relations marked by gender. Access is not enough to change these gendered assymetries, though it is clearly crucial to change in the forms of education and in the uses of technology" (100).

62 *Women of Europe - 10 years* 37.

level (Italy), and introduced retraining courses to correct errors in orientation (Denmark).⁶³

In the United States Title IX of the Civil Rights Act 1964 prohibits sex based discrimination in education programmes.⁶⁴ An institution, such as a school or university, which violates this provision loses the federal financial assistance which it would normally receive. Title IX has brought about changes, *inter alia*, in high school vocational training programmes, which may no longer be sex segregated, and in college admission programmes which, prior to the prohibition, could discriminate by admitting fewer women and by imposing more stringent admission standards for women.⁶⁵

Stereotyped role division between the sexes has been reinforced in the work place by laws which provide special protective measures for female employees, on the basis of perceived frailty and traditional social functions. Those laws, first enacted during the nineteenth century, generally exempt women from certain jobs regarded as arduous or dangerous and from night work. The laws have been criticised on the ground that there are few occupations, if any, which are more dangerous or unhealthy for women than men, provided the necessary precautions are taken. Precautions should in fact be taken to ensure the safest and healthiest work place possible for both male and female employees. Night work is inconvenient for both men and women and if it cannot be avoided it should be organised in such a manner

63 *Women of Europe - 10 years* 36- 37.

64 The salient portion of Title IX provides: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education programme or activity receiving federal financial assistance."

65 Goldstein 542- 543. The author also refers to the impact of Title IX on high school and college sports programmes, and cites the number of females participating in inter college sports in 1972 (when Title IX was passed) -- 16 000 -- as compared to 1984 -- 150 000.

as to minimise the inconvenience for all affected employees. Attention has also been drawn to the fact that certain traditionally female occupations, such as nursing, demand night work, which means that women are treated differently according to the sector in which they are occupied.⁶⁶ Although the protective provisions are allegedly aimed at protecting female employees, they tend to operate in a discriminatory manner.⁶⁷ Legislative provisions regulating hours of work, and health and safety at work, should be enacted to protect both male and female employees. To distinguish between the protection afforded on the ground of an employee's sex, reinforces stereotyped sex roles and enables employers to justify differential treatment.⁶⁸

Certain economic theories of discrimination have also been developed in an attempt

66 Seguret 305. Millard 18 explains: "In many countries, however, legislation reflects this persistent tension between protection and equality. On the one hand, physiological differences between men and women are universally recognised. At the very least, women are different because it is they who perform the biological functions of pregnancy and childbirth, functions which are not individually necessary but which are socially necessary and must, therefore, be safeguarded by society... At the other extreme... women are viewed as biologically different from men not only in respect of their child-bearing functions but in other aspects as well; women are in some sense still viewed as biologically weaker than men: therefore they should be subject to certain job restrictions for their own protection. Furthermore there is an implied extension of this differential attitude to the social sphere, where women are seen as the linchpin of family life and where employment outside the home somehow threatens this crucial social function."

67 Legislation which restricted the hours of work of women, for example, was passed to accommodate perceived weaknesses and traditional expectations regarding domestic responsibilities. It enabled employers to restrict certain jobs to men, thereby contributing to occupational segregation. It also reinforced stereotypes concerning the allocation of domestic responsibilities. Legislation which attempted to make working conditions less unpleasant for women, such as measures providing for lower retirement ages, preventing women from handling dangerous machinery and providing for seating for female employees, reinforced stereotypes regarding women's frailty. Critics felt that working conditions should be as safe and as pleasant as possible for all employees (Prechal and Burrows 116-117). For a synopsis of the types of job restrictions regarding female employees in various countries, see Millard 22-24, 27-28.

68 One area in which special protection for female employees may be necessary is in respect of pregnancy - it is generally accepted that pregnant women require a certain degree of protection in the working environment. But the health and safety of male employees should not be neglected (Prechal and Burrows 117).

to explain the causes of inequality in employment.⁶⁹ One is the neo-classical theory, within which two trends can be distinguished. One approach advocates that women are crowded into certain occupations because employers have a taste for discrimination, that is, because of the distaste of employers for female employees.⁷⁰ Studies have revealed that the notion of personal prejudice or aversion is more likely to manifest itself among white collar workers, the reason being that that is the group which is in closest contact with management. Management is less likely to be concerned about the employment of women in blue collar occupations, other than in response to employee demands. It has also been found that smaller establishments, where relationships between managers and employees are close, are more likely to discriminate than large establishments with relatively impersonal labour relations. Discrimination is also more evident in establishments involving labour intensive production processes than those involving capital intensive processes with low levels of personal interaction.⁷¹ The theory does not explain the existence of occupational segregation adequately, as it fails to show why employers should have an aversion for female employees.

A second approach is based on the human capital theory. Here men and women are not regarded as perfect substitutes for one another. Every employee chooses how much time, effort and money to invest in education and training with a view to future employment. Because women anticipate working for a shorter proportion of

69 Although these theories, by and large, seek to explain discriminatory treatment of all disadvantaged minorities, the reference in this study will be to women.

70 Pillay 5; Townshend-Smith 11.

71 Jain and Sloane 28- 29. The authors consider whether discriminators benefit financially from discrimination or whether it costs them money to indulge their tastes. Certain studies indicate that national income is reduced by discrimination, and that both discriminators and those subject to discrimination are made worse off as a consequence. This is not conclusive, however, as it has been demonstrated that it is possible for a majority group to gain at the expense of a minority.

their working lives than men, they invest less. The traditional role of women in child-rearing and domestic involvement results in a different labour force involvement to that of men, and women consequently choose to exclude themselves from occupations requiring lengthy periods of general training, and are also excluded from on the job training programs by employers.⁷² In this regard, segmented labour market economists argue that sex inequality in fact takes the form of job discrimination⁷³ as opposed to wage discrimination.⁷⁴ They argue that the principle cause of wage inequality lies in the existence of a dual labour market which employs men and women in different, non-interchangeable jobs.⁷⁵ In order to achieve equality, women's employment must be diversified and new opportunities must be created for them.⁷⁶ The theory is useful as it emphasises the fact that discrimination is manifested primarily in job segregation, which is brought about by differences in education and training. Its shortfall is that it assumes that those differences are as a result of voluntary choices as to the quality and quantity of education.

In terms of the dual labour market approach the need for a stable labour force only

72 Townshend-Smith 12; Pillay 5.

73 Equally qualified groups of employees are not awarded equally remunerative jobs.

74 Equally qualified groups of workers are not paid equally for doing the same work.

75 Mazumdar and Sharma 186- 187 explain the essence of the theory as follows: "The human capital approach argues that the unique characteristics of women's educational background, skill development, and mobility patterns join the imperfections of the labour market and lead to the patterned hiring and subsequent overcrowding in stereotyped gender-specific occupations. Economists in this tradition attribute the root cause of such differential hiring to the differential investment in men's and women's education and training rather than addressing the structural reasons for women's concentration in low-skilled, low-paying, low-status jobs. Indeed, mounting evidence indicates that the requirements of profit maximization manipulate the sexual division of labor to exert pressure on the labor force itself, particularly where cheap labor is available and adaptable."

76 Janjic 149. The author states that one of the explanations for job segregation is the existence of protective legislation prohibiting women from doing certain kinds of work. She also notes that in times of need, for example when men have been called up for military service, women have been employed in industry and given jobs virtually closed to them before. There is thus "nothing inevitable" about the traditional division of labour (150- 151).

exists in certain types of jobs. Where stability is less important wages remain low, security of employment is not assured and promotion prospects are few. The latter type of job falls within the secondary sector, while the former constitutes the primary. Occupational segregation is evident, with men tending to be concentrated in the primary sector where jobs are relatively well-paid and secure, while women tend to work in a small number of occupations in the secondary sector where jobs are low-paid, insecure and demand less skill.⁷⁷ Women also tend to be employed in jobs which are seen as extensions of domestic tasks, for example, nursing, cooking and cleaning. Jobs of that nature are perceived as intrinsic to womanhood and therefore not necessary of being learned in the manner in which male skills at work need to be learned. The result is an understanding of what is meant by "skill" which is moulded by male perceptions. Typically women's jobs reflect (unpaid) domestic skills which are socially and economically undervalued, and fall within the secondary sector.⁷⁸ Not all women are confined to the secondary sector, nor can it be said that there is no upward mobility for female workers or that human capital has no value to them. However, there is a disproportionately high number of males in the primary market where the greatest value is derived from investments in schooling and training, and from which upward mobility occurs.⁷⁹

77 See Palmer and Poulton xxxvi- xxxvii where the reasons for sex discrimination in employment are briefly discussed. For a discussion of the differentiation between primary and secondary markets, see Townshend-Smith 17- 18.

78 Townshend-Smith 15- 17. England Chassic and McCormack 163 point out that although male occupations tend to involve manipulation of physical objects or wielding of power over people, while female jobs typically entail clerical or nurturant skills, male and female occupations average nearly equal demands for cognitive skills and formal schooling. These are the skills which affect earnings most positively, while doing manual work, in which men predominate, has a negative effect on earnings. Thus the skill differences between male and female occupations explain virtually none of the earning gap between the sexes. Female occupations in fact pay less than is predicted by their skill demands due to social perceptions. Jain and Sloane 31 hold that a significant reason for the relatively low pay of women is the fact that their exclusion from male jobs causes them to be overcrowded into a limited range of occupations, where the supply of labour tends to decrease productivity - the so-called "crowding hypothesis".

79 Jain and Sloane 51 point out that women (and other minorities) tend to be relegated to the secondary sector at the outset of their employment careers independently of their abilities and skills (due to real or perceived quality differences).

Closely linked to the dual labour market approach is the emphasis on the distinction between internal and external labour markets. In terms of the internal labour market phenomenon, certain jobs are filled exclusively from the internal market through well-defined promotion and up-grading ladders. The internal labour market has been defined as "an administrative unit within which the pricing and allocation of labour is governed by a set of administrative rules and procedures".⁸⁰ This is distinguished from the external labour market where wages are determined by market forces. The opportunity for advancement within a company is determined by the job for which the employee is first recruited, with primary sector jobs being the category within which and from which the greatest advancement is possible.⁸¹ Although the internal and external markets are linked at certain levels, the so-called "ports of entry to and exit from"⁸² the internal labour market, certain job levels can be reached only from the internal market by promotion or transfer. Employees in the external labour market may be unaware of jobs in the internal labour market, and may remain disadvantaged even if they do gain entry into the internal market because of lack of seniority. That implies that there may be a clash between seniority systems and equal employment opportunity, particularly where prejudice and stereotyping have affected employers' decisions regarding occupational assignments for men and women.⁸³ The clash between seniority and equal

80 Jain and Sloane 37.

81 Pillay 5; Conaghan 381. While the theory reveals the segmented nature of the labour market and the phenomenon of segregation in employment, it does not explain why women are exploited in this manner in the first place.

82 Jain and Sloane 37.

83 Pillay 6 points out that initial job assignments, that is, hiring of employees by an employer, tend to be based on real or perceived differences between male and female employees as a group without regard to individual differences. In so far as an individual female does not conform to this stereotype she will be the victim of discrimination.

opportunity also means that gains by female employees when the economy is buoyant could be lost in a recession, when employees with the greatest length of service are retained at the expense of those with less service.⁸⁴

The human capital theory has been criticised on two grounds. The first is that it fails to explain the inequality, that is, it does not explain why so many employers would have such bias against women in certain occupations. It does, however, appear as though status considerations are important, especially where women may be in a position to supervise men. Differences in experience also play a role -- most women experience interrupted employment due to family responsibilities, which influences their return to on-the-job training.⁸⁵ A second ground of criticism of the human capital theory is that it fails to explain why women invest less in the job market -- is it a free choice, made because of domestic duties, or is it because opportunities are denied due to occupational barriers? The theory seems to assume that choices are made freely.⁸⁶ But that is not entirely true as women tend not to choose jobs which they know are regarded as unsuitable for them. They are also unlikely to work in traditionally male preserves if they foresee the probability of conflict and stress. The coercive influence of a discriminatory environment cannot be overlooked. It has been argued that even in the absence of overt discrimination, women are channelled into different directions from their male counterparts by a network of incentives and discentives which constitute a so-called "discriminatory

84 Jain and Sloane 37. This situation, regarding minority groups in general, has led to inverse seniority clauses in certain US collective bargaining agreements, whereby senior employees are laid off first during a recession with financial compensation and protection of long term job security rights.

85 Jain and Sloane 28 note that differences in on-the-job experience may account for over 80% of the male/ female wage gap in the United States.

86 Townshend-Smith 13- 14.

environment".⁸⁷ In an employment environment women face a variety of barriers which do not confront men. These may include jokes, insults and other communications indicating disrespect or disinterest, as well as exclusion from conversation and informal learning experiences. In male-defined domains typically female characteristics tend to be devalued, while a woman who demonstrates that she is not typically female faces disapproval for her failure to meet role expectations of her as a woman. Women tend to collude with male-held stereotypes by "choosing" to go where they feel comfortable, and consequently their careers are invisibly shaped by their own expectations of women's roles.⁸⁸ It has been observed that productivity, motivation, and career success are determined largely by organisational structure and the nature of the social circumstances in which employees find themselves. For that reason differences in the behaviour and success of women and men in the work place often have as much to do with the employment environment as with inherent differences in ability or ambition.⁸⁹

It is apparent that the above arguments and theories can, at best, provide a partial explanation for sex discrimination in employment. While many of the arguments advanced can be brushed aside, certain points of distinction cannot be overlooked. One is the biological difference between men and women. Here the biological distinction of child-bearing is significant. But the role of child-bearing should not be confused with child-rearing. While women must bear children, no biological factor

87 Baber 57.

88 Baber 62.

89 Kanter 14 states that when "men and women were dealt similar cards and given similar places in the corporate game, they behaved in similar ways. The problem though was that men and women rarely were dealt similar cards." The author gives two reasons for differential treatment. The first is adherence to a set of sex-typed images; the second is that women tend to be concentrated in the jobs with lower opportunity for advancement, to have less access to power, and -- when they do enter upper levels within the company -- to be represented in such small numbers that they have the status of so-called tokens.

makes them solely responsible for rearing them. Women are also physically weaker than men. That fact offers no explanation for differential treatment where physical strength is not a relevant factor in the performance of a particular job. But based on biological differences society imposes a different role on women through cultural conditioning. Sex stereotyping begins in infancy. Parents play a role by encouraging interest in certain so-called boys' or girls' games, and also constitute role models for their children. These values are reinforced by the school system. The level of education attained and the nature of the education play a role in job discrimination. Young women are taught to believe that certain jobs are inappropriate and that paid work should not interfere with domesticity and child-rearing. Employees tend to assume that women will conform to this stereotype, and also assume that employees who are unable to conform to a traditional working model in terms of time for an entire working life are inadequate and unlikely to be successful employees. Conditions of employment have not been adapted to allow for a break for female employees for child-bearing, while lower pay structures for women tend to reinforce the stereotype by making it less costly for women to remain at home than for men to do so.

C The Quest for Equality

The concept of equality, which is the foundation of all anti-discrimination legislation, is one which lacks precision. It may be used descriptively, as a statement of fact that all persons are equal. It may also be used prescriptively as a statement of aims that all people should be equal. But day to day experience shows that all people are not always regarded as equal. One might therefore ask -- in what respects and contexts people are or should be regarded as equal, and to whom any person should be regarded as equal? The underlying query, of course, is what is

meant by equality?

The concept of equality underlies sex discrimination legislation. Can sexual equality be attained by adjusting and drafting legal rules, or does it require, as has been suggested, a social revolution?⁹⁰ The answer depends on what is understood by sexual equality. It has been observed that:

"Legislation in support of women's employment rights may have one of three assumptions or objectives. The first is to ensure equality of opportunity, the second to secure equality of result, and the third to modify the world of work based on the recognition of differences between men and women."⁹¹

The problem has also been formulated as follows:

"Should we... in both advocating the adoption of particular public policies and litigating the issue under the laws prohibiting sex discrimination, seek to minimise the differences between men and women and whenever possible draw analogies between men and women's biological characteristics and social circumstances? Or should we seek to emphasise the differences between men and women in order to ensure that a male standard is not accepted as the norm and that women are not penalised to the extent that they diverge from it? Or should we demand that women's different needs be recognised and accommodated without disadvantage?"⁹²

90 Townshend-Smith 21.

91 Townshend-Smith 21. Scales 1375- 1376 points out that there has been an attempt to formulate a theory of special rights for women in accordance with the non-stereotypical, real differences between the sexes. This she feels is a mistake as any attempt to arrive at a definitive list of differences encourages the law to "act upon a frozen slice of reality". Instead differences between the sexes should be regarded as emergent and infinite. The law she says should make differences "a cause for celebration, not classification."

92 Kenney 393. The author goes on to ask: "Is the goal of feminism to break down social distinctions between men and women, masculine and feminine, or is it about a revaluing of so-called women's characteristics and activities done in women's sphere -- or is it both? Is feminism about getting the best deal for women in the short term or eradicating sex differences in the long run? How do feminists guard against the danger that equality is used as a ruse for treating women even worse than they are treated presently and lowering standards for everyone? Is feminist's primary goal on this issue to protect the fetus? To protect women's rights to work? To reduce exposure for everyone? To eradicate differences between the sexes? To what extent are these goals in conflict with each other? How can they be reconciled?" (394). (Although these questions are asked in the context of reproductive hazards, it is felt that they are relevant to women in the workplace in general.)

There are chiefly two ideological approaches to sexual equality which underlie legal thought on the issue. On the one hand, the liberal human rights model views equality as equality *before* the law⁹³ and equates equality with equality of opportunity. It seeks to achieve equality of treatment in education, employment and market services.⁹⁴ On the other hand, the radical view of equality focuses on equality of outcome or result.⁹⁵ Its aim is to secure material equality, or equality *in* law. It regards equal application of a male orientated legal system as incapable of altering the disadvantaged position of women. It advocates scrutiny of legal rules to ascertain their actual effects, deviation from gender neutrality in certain circumstances, and positive action by government to ensure that the benefits which men and women reap from the law are equal, that is, actual equality as opposed to formal equality.⁹⁶

Both the liberal and radical theories of equality accept that direct as well as indirect discrimination must be prevented. The prohibition of direct discrimination

93 Schmidt (ed) 32; Curtin 19. The model is based on the fundamental belief that all human beings are equal. The ideal can be traced back to the time when liberty, equality and fraternity were the beliefs which inspired the French revolution. The French Declaration of Human Rights of 1789 stated that all men are and will be born free and equal before the law. For a discussion of the concepts "rights" and "human rights" see Wasserstrom 628- 641. The author identifies the well-being and freedom of each individual as basic human rights. As each person's well-being and freedom are seen as having equal intrinsic value, there can be no general and relevant principle for differentiating among persons as to these values and their rights to secure these values; if there are differences they are not in principle discoverable or measurable. See also Feinberg 641- 645.

94 Sheppard 197 observes that the liberal conception of equality in fact embodies three central features. It is individualistic, assuming that society is composed of autonomous individuals; it expects the State to be non-interventionist, interfering in social relations only when the acts of one individual violate the individual rights of another; it places great faith in the neutrality of the "rule of law". See also Boyd and Sheehy 294- 295.

95 Jewson and Mason 308. Sheppard 196 uses the phrase "post-liberal" as opposed to "radical".

96 Boyd and Sheehy 295. Curtin 20 explains that the approach requires: "...that laws themselves must take account of meaningful differences between persons: that persons who are in fact equal be treated equally, but that unequals in appropriate circumstances be treated differently".

eliminates intentional unequal treatment on an individualistic basis. The prohibition of indirect discrimination casts the net much wider. Indirect discrimination occurs when an employer applies a certain standard to a particular class of employee, for example, women or a disadvantaged minority, which standard applies or would apply equally to all employees, but which is such that the proportion of that particular group which can comply with it is considerably smaller than the proportion of employees as a whole, and which cannot be shown to be justifiable in the circumstances. An indirectly discriminatory practice is thus one which appears neutral, but which affects more women than men -- hence the terminology disparate effect or disparate impact in American law. An example is where an employer sets a minimum height requirement for prospective employees, which effectively excludes women and which is not relevant to the job to be performed.⁹⁷ Indirect discrimination may also occur in a less obvious manner and may be unintentional. It may occur as a result of social practices which had, or which have, a different impact on a particular group as compared to the remainder of the population. Examples include the absence of most women from technical employment positions due to inadequate or alternative employment, and the concentration of women in part time employment due to traditional domestic responsibilities.⁹⁸ Where indirect dis-

97 The point is illustrated by the American case of *Dothard v Rawlinson* 433 US 321 (1977). A female applicant for employment was excluded from a job as a prison guard by the Alabama Board of Corrections, on the basis of a minimum weight and height requirement which had been set for prospective employees. The requirement had the effect of excluding 41% of American women as opposed to 1% of men. The employer argued that the requirements ensured a level of physical strength required for the job. But it presented no evidence to support the assumption and did not explain why a direct strength test could not be substituted for the height and weight test. The court found the requirement to be discriminatory as it had the effect of excluding more men than women from the job of prison guard.

98 In *Bilka-Kaufhaus GmbH v Weber von Hartz* Case 170/84 (1986) ECR 1607/ (1986) IRLR 317 (European Ct) the European Court of Justice held that the provision of pension benefits for full time employees, but not for part time employees, amounted to indirect discrimination against female employees. The reason was that the majority of part time employees were women -- the exclusion of part timers thus affected a far greater number of women than men. Women were more likely than men to work part time due to socially imposed family obligations.

crimination results from social practices and involves class as opposed to individual discrimination it will probably be necessary to adopt a program of preferential treatment, or affirmative action as is it generally known, in order to remedy the situation. The aim of such a program would be to remedy the disadvantages of past discrimination by the provision of preferential treatment for the affected group.⁹⁹ Both the liberal and the radical notions of equality accept the necessity of affirmative action. From a liberal point of view affirmative action is seen as an interim measure designed to achieve equality by removing barriers to equal competition. Once these have been removed women are regarded as able to perform exactly like men. The radical view, on the other hand, advocates the implementation of more permanent measures to accommodate differences between men and women.

The traditional liberal view subscribes to an equal opportunities policy, the function of which is to devise fair procedures in order to enable all individuals to compete freely and equally. The aim is thus to remove unfair distortions to the labour market by institutionalising fair procedures.¹⁰⁰ The liberal concept of equality relies on the neutrality of the rule of law, which requires that persons be treated in the same manner by the law, that is, equality before the law.¹⁰¹ It thus requires equal treatment by the law and seeks to prohibit discrimination against women for any reason. Any notion that the law should recognise or tolerate intrinsic differences between men and women is rejected. In the area of pregnancy, for example, equal treatment proponents require a woman to be treated in exactly the same manner as

99 Towashend-Smith 22- 24; Schmidt (ed) 43.

100 Jewson and Mason 315.

101 Dicey 193 explains legal equality as the universal subjection to one law administered by the ordinary courts. Curtin 19- 20 explains that: "Equality before the law embraces the Aristotelean concept that equal persons should be treated equally and unequals unequally... Indeed such equality is sometimes derided as the emptiest of all ideals, signifying "the majestic equality that forbids the rich as well as the poor to sleep under bridges and to steal bread"."

a man who is subject to a temporary disability would be treated, with regard to time off work and disability benefits. They believe that special treatment emphasises the perception that issues such as child care and other family responsibilities are women's problems rather than the concern of society as a whole.¹⁰²

Another feature of the liberal notion of equality is that it is individualistic. It proceeds from the assumption that society is composed of autonomous individuals, in contrast to the group focus of the radical approach. It relies on individual initiation of complaints, utilisation of individual versus group remedies and the use of concepts which tend to reinforce stereotyped thinking.¹⁰³ Because it deals with individual cases of discrimination, rather than structural inequality, its utility is limited. Furthermore, anti-discrimination laws which ensure equal treatment in accordance with the liberal view of equality are seen as assisting a minority of women -- those who conform to a male model.¹⁰⁴

Where the liberal notion is held that sexual equality is synonymous with equality of

102 Hassberg 223. The author explains the problem in the following manner: "A corollary argument is that labeling certain concerns as "women's issues" denigrates the importance of these concerns precisely because of their label. Equal treatment proponents fear that issues such as the conflict between parental responsibilities and work life will not be adequately addressed by either employers or employees as long as they are viewed as women's problems."

103 Boyd and Sheehy 291. One such concept is "bona fide occupational qualification", which is usually held to justify differential treatment. Both the British and American systems permit a defence to an allegation of direct discrimination when sex is a bona fide occupational qualification. A broad interpretation of the defence would allow an employer to rely on stereotyped role division, for example, by allowing an employer to appoint only males where it regards work involving the carrying of a firearm as too dangerous for females. A narrow interpretation would limit application of the defence to cases where physical attributes are essential to proper performance of a job, for example, a male role in a film or play to be played by a male actor. (The defence is discussed fully below in the context of both the British and American systems).

104 Sheppard 212 explains that: "In practical terms, therefore, anti-discrimination laws often work to the advantage of a minority of women -- the "exceptional" women [who] have proven that they can be successful in the male defined and dominated world. For those women who fail to achieve male-defined success, it becomes their fault rather than the system's. The blame-the-victim tendency continues subtly but powerfully."

opportunity, a distinction is drawn between need and merit. Legislative intervention, in the form of anti-discrimination legislation, on the basis of need is held to be justified, after which all employees compete equally on merit.¹⁰⁵ Substantial emphasis is placed on merit, and distinctions on the basis of merit are accepted as legitimate. Merit is assumed to be objective and independent of an employee's sex. Criticism has been leveled at this approach for the emphasis which it allows to be placed on merit. The reason is that it overlooks the fact that characteristics encompassed by the concept of merit may themselves be affected by discrimination outside of the workplace. An example is educational achievement which has been affected by stereotyped views on gender. Another example is the evaluation of job performance which is likely to be influenced by factors to which men and women have unequal access, such as the ability to work long hours, or the manifestation of a characteristic such as aggression which, by virtue of stereotyped conditioning, is usually considered to be masculine.¹⁰⁶

The radical ideology emphasises equality of result or outcome, as opposed to equal-

105 O'Donovan and Szyszczak 3 state that the notion of equality which seems to underlie the United Kingdom legislation on sex discrimination and equal pay is equal opportunity. The White Paper which preceded the legislation stated the intention to "introduce effective measures to discourage discriminatory conduct and to promote genuine equality of opportunity for both sexes.

106 Townshend-Smith 26. Powell and Butterfield 395 observe that sex-role stereotypes have influenced individuals' standards and evaluations of behaviour. The belief that men and masculine characteristics are more highly valued than women and feminine characteristics has been pervasive. Studies have found agreement by men and women on socially desirable characteristics of adults as masculine; performance by women has been evaluated less favourably than the same performance by men; personal attributes rated as highly important in upper management levels were perceived as more likely to be found in men than women; male and female managers were found to agree on a masculine profile of the successful manager (see also 401- 403). Sheppard 213 explains: "The second way in which the demand for equal treatment inadvertently contributes to the continued subordination of women is by implicitly devaluing "female-associated" skills, activities, and values. Male-defined standards are left unchallenged; women simply claim an equal ability to conform to them. In the process of doing so, however, women's traditional work and values are devalued. The "career woman" is viewed as superior to the "housewife". Women are thereby divided and victimization takes deeper roots."

ity of opportunity. Proponents of the equality of outcome approach criticise equality of opportunity for being too procedural and too limited. The equal opportunities approach is criticised for assuming that the removal of barriers to competition by the creation of equal opportunities actually places women in a position to compete equally. The criticism against this assumption is that it fails to see persons in the context of their *de facto* unequal situations and ignores prior inequality and its effects. The radical conception of equality, with its focus on equality of outcome or "equality of condition",¹⁰⁷ recognises that for legislation to succeed by eliminating discrimination based on an employee's sex, male and female employees must have an equal starting point. This means that there must be no barriers regarding, for example, education, services or the labour market itself. Because such barriers do exist, differential treatment, which accommodates differences between the sexes is advocated. The idea is to create substantial equality as opposed to formal equality.¹⁰⁸

Proponents of the radical notion of equality seek more from the law than equal treatment. They believe that simply to grant women identical rights to those enjoyed by men will not lead to equality between the sexes, because men have been dominant in the construction of the broader social fabric, and women would simply be admitted into an environment in the establishment of which they had little or no say.¹⁰⁹ True equality can be attained only if differing needs are taken into account,

107 Sheppard 196.

108 O'Donovan and Szyszczyk 4- 5. The authors explain: "Equal opportunity as a concept is criticised for being concerned merely to ensure that the rules of entry into competition are the same for all. Equality of outcome as a concept looks to the results of competition and then raises questions about the rules of entry." See also Townsend-Smith 21- 22.

109 Ellis 13. Sheppard 198 observes that "treating those who are unequal in terms of their access to power and resources as though they are the same allows economic and social disparities to persist, while an illusion of fairness is created." A similar view is expressed by Loutfi 113: "Since in nearly every society, class, or socio-economic category women are at a relative disadvantage to men when it comes to income, assets, education, information and political influence, sexually "neutral" development policies have the effect, as numerous studies have

and it is acknowledged that equal treatment is not necessarily synonymous with identical treatment. A distinction has been drawn between equal treatment and treatment as an equal and it has been observed that:

"If treatment as an equal implies respect for others, avoidance of stereotypes and viewing the world from another's point of view, then pluralism goes further than equal treatment. For it allows for differences in persons, their situations, their needs."¹¹⁰

Reliance on a male model in the formulation of an anti-discrimination policy has been criticised in the following manner:

"A fundamental criticism of anti-discrimination law... is its dependence on a concept of equality with a male norm. Equality... conceals "the substantive way in which man has become the measure of all things". This critique is particularly pertinent in explaining the persistence of labour market disadvantage. Working patterns in the labour market are structured according to the expectation that workers will work full-time for a continuous period from school-leaving age to retirement. Many important benefits flow from conforming to this pattern, including pay increments, seniority rights, training and pension benefits; and any diversion from the pattern is heavily penalized in these respects."¹¹¹

shown, of weakening their economic and social position within their group -- in other words of marginalising them."

110 O'Donovan and Szyszczak 7. The distinction between equal treatment and treatment as an equal was drawn by Dworkin, who explained it as follows: "There are two different sorts of rights...The first is the right to equal treatment, which is the right to an equal distribution of some opportunity or resource or burden. Every citizen, for example, has a right to an equal vote in a democracy; that is the nerve of the Supreme Court's decision that one person must have one vote even if a different and more complex arrangement would better serve the collective welfare. The second is the right to treatment as an equal, which is the right, not to receive the same distribution of some burden or benefit, but to be treated with the same respect and concern as everyone else...In some circumstances the right to treatment as an equal will entail a right to equal treatment, but not, by any means, in all circumstances" (227).

111 Fredman 120. The author goes on to explain that: "The central assumption, then, is that domestic and family needs will be taken care of outside of the market. The paradigm worker is the married man whose wife works unpaid in the home, at least for part of her time, looking after children or the elderly and doing domestic work. Equality based on a male norm may be useful for women who are able to conform to the male norm. However, although most women are now under intense pressure to contribute, either solely or partly, to the family income, women remain primarily responsible for child-care or housework. The resulting mismatch between existing structures of the market and practical demands on women has meant that the penalties for divergence from the norm fall disproportionately on women. Thus it is the male norm itself which functions as an obstacle to the progress of women. Legislation framed in terms of equality based on a male norm is therefore fundamentally limited: it can assist the

It is argued that men and women act differently in the work place, especially when placed in a position of leadership. This division is not biological, but arose because of role division in family responsibilities and the type of work performed outside of the home.¹¹² Recognition of both male and female modes of operating in the work place is sought. Differential treatment in order to accommodate differences between the sexes is regarded as acceptable and necessary. An area in which this philosophy has been accepted in Europe, but not in the United States, is in respect of equal pay for work of equal value (and not only for work which is the same or substantially similar). The reasoning underlying the proposition that jobs which are of equal value to an employer should be remunerated equally is that occupational segregation is a common occurrence. Jobs which are typically performed by women (including part time work) are remunerated at a lower rate than so-called men's jobs. The problem can be addressed properly only if employers are required to remunerate employees equally for work which is of equal value to them in terms of skill, effort, responsibility and working conditions.

Special maternity benefits for female employees are also advocated. The idea is that pregnancy should not merely be accommodated in the same manner as any temporary physical disability would be, but that it should receive special treatment because it is a condition which is unique. But it must be borne in mind that the balance between the protection of pregnancy as a special condition on the one hand,

minority who are able to conform, but cannot reach or correct the structural underlying impediments" (121).

112 Fick 27- 28 refers to the approach of Betty Friedman in her book *The Second Stage*. Male and female modes of thought (termed Alpha and Beta modes, respectively,) are explained. The Alpha style is analytical, rational thinking and relies on hierarchical relations of authority. The Beta style, on the other hand, is based on "synthesizing, intuitive, qualitative thinking and a contextual, relational power style" (28).

and undesirable stereotyping on the other, is a delicate one. The difficulty in finding the balance between special treatment and negative stereotyping has been summed up as follows:

"One way to overcome the flaws in the concept of equality is to use legislation to protect differences between the sexes. However, it is deceptively simple to assume that equality and difference are the only two contenders for the field and that they are mutually exclusive. There are clearly situations in which failure to acknowledge difference could perpetuate disadvantage. On the other hand, permitting differential treatment may well legitimate stereotypes and entrench women's disadvantage. Pregnancy and maternity provide a good illustration of the problematic dichotomy of equality and difference. For example, a refusal to accord special benefits to pregnancy on the grounds that such benefits are unavailable to men ignores difference at the cost of entrenching disadvantage. However, there is a fine line between this and undesirable stereotyping. Thus giving rights in respect of child-care obligations to mothers rather than to both parents perpetuates women's primary responsibility for child-care."¹¹³

Because both men and women are essential to the continuation of human life and society, the interests of both sexes should influence the formulation of the rules upon which that society operates. Traditional and stereotyped gender roles should

113 Fredman 126. The author refers to European Economic Community law in order to illustrate the problem: "On which side of the line does EC law fall? Directive 76/207 (equal treatment) contains two express derogations. Firstly, the Directive is "without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity". Secondly, member States are entitled to exclude from the principle occupational activities for which the "sex of the worker constitutes a determining factor". The case-law reflects the complexity of the dichotomy.... In *Hofmann*, a father was refused entitlement to State maternity benefits, despite the fact that he had taken unpaid leave to look after the children while the mother worked. The ECJ held that this fell within the exception for pregnancy and maternity. The father had argued that the derogation only applied to a strictly biological condition; it could not be said that the mother was "naturally" better equipped to care for the children. However, the Court held that the derogation went further, to include protection of the "special relationship" between the mother and child after the birth. The judgment stated emphatically that the Equal Treatment Directive was not designed to settle questions concerned with the organization of the family or to alter the division of responsibility between parents. It was therefore held to be legitimate to reserve maternity leave to mothers. Yet this perpetuates both stereotypes and disadvantage. By making parental leave financially viable to women only, laws of the sort in question in *Hofmann* encourage women to stay at home with children during the early months at least, while men continue with their uninterrupted careers. This in turn leads to more emphasis being placed on the father's career while the mother's inevitably slows down. Moreover, the emphasis on a woman's special relationship with her child has worrying associations with the notion the women's child-care obligations are "natural" and unchangeable" (127).

be replaced by an environment in which either sex can be expected to play a role in child-rearing, family life and outside employment. But certain existing truisms cannot be ignored. The first point is that sex differentiation, unlike race differentiation, cannot in all practicality be eliminated entirely. An example is the cultural expectation of privacy which demands that men and women be segregated by the provision of separate facilities. A second point is that discrimination outside of the employment situation, such as education and social structures, and past discrimination, which have resulted in occupational segregation between men's and women's jobs, cannot be overlooked. There are also generally held opinions concerning women's qualities as employees. It is accepted that women have less physical strength and stamina than men, that they are absent from work more frequently, and that they are less interested in training opportunities and promotion. It is also assumed that they are better qualified for certain jobs, such as those involving care of others. These stereotypes, which are largely the result of past discrimination and factors outside of the employment sphere, must be eliminated. Thirdly, the irreversible difference between men and women, namely, that women must bear children cannot be overlooked. A notion of equality which recognises and accommodates these differences is therefore postulated. The aim of anti-discriminatory legislation should be to eliminate both direct and indirect discrimination in the workplace, by means of affirmative action where necessary, and also to recognise and accommodate the irreversible differences of pregnancy and child-bearing. The following standard appears to be apposite:

Implementation of a new employment policy is unacceptable if it serves to *reinforce gender stereotyping* among employers and employees. Reinforcement of these stereotypes includes maintaining a rigid separation between what is traditionally considered public and private spheres of life, thereby ignoring the impact on the work environment of societal gender roles outside the workplace. Furthermore, a new policy which challenges gender stereotypes is preferred over one which does not.⁻¹¹⁴

D The Role of the Law

There are many reasons for the development of gender inequality and discrimination, which may depend on political, economic, social or cultural differences. But discrimination is never more prevalent than when sanctioned by law. That occurs when women are accorded an inferior status by the law.¹¹⁵ In this regard it should be borne in mind that the position of women in the labour market is subject not only to the provisions of labour legislation but is also affected directly and indirectly by civil law generally. A country's policy regarding women and the family is therefore significant. Just as discrimination is prevalent when sanctioned by law, law can be an effective instrument in combating discrimination against women and ensuring equality.¹¹⁶ It has been said that the traditional approach of society to the status of women varies from one of outright oppression to one of disguised oppression, with a myriad of approaches in between, which vary in degree but not in substance.¹¹⁷ Law reform, while not a "panacea for all problems plaguing women", is viewed as a useful starting point for remedying inequality because equality before the law is an essen-

115 Sipila 10. The author points out that numerous studies which have attempted to identify the causes of inequality, have revealed that "one of the basic causes is women's inferior status under the law."

116 Ivanov 369 notes that while other instruments, such as collective agreements, are useful the use of legislation as a deterrent and a means of coercion is widely recognised. The international regulation of labour also plays a significant role in combatting discrimination against women.

117 Lee 4. As examples of outright and disguised oppression, the author quotes from two sources. He says: "The first is perhaps best expressed in Mao's 'Report on an Investigation of the Peasant Movement in Hunan', in which he said: A man in China is usually subjected to the domination of three systems of authority (political authority, clan authority and religious authority)...As for women, in addition to being dominated by these three systems of authority, they are also dominated by the men (the authority of the husband). These four authorities - political, clan, religious and masculine - are the embodiment of the whole feudal-patriarchal system, and are the four thick ropes binding the Chinese people, particularly the peasant..." Disguised oppression" is typified by the following passage concerning women's rights in the United States: "The law...has done little but perpetuate the myth of the helpless female best kept on her pedestal. In truth, however, the pedestal is a cage bound by a constricting system and hemmed in by layers of archaic and anti-feminist laws."

tial condition for the redress of those problems.¹¹⁸ Law and policy are inseparable, and the former must reflect the latter. A policy of sexual equality must be translated into enforceable laws, without which the policy would remain ineffectual.

Radical feminists have questioned the ability of law to combat discrimination against female employees. Their argument is that anti-discrimination legislation alone is ineffectual in the absence of a feminist jurisprudence. The argument can be summed up as follows:

"A feminist perspective on labour law must begin by recognising that power relations in the workplace reflect not just the conflict between capital and labour but also patriarchal attitudes and practices. It is this insight which justifies the pursuit of a specifically feminist approach to labour law and labour relations, an approach which takes women workers as its starting point and redefines the terrain of labour law, to take account of their particular interests."¹¹⁹

The aim of legal reformists generally has been to develop legal strategies to bring about social change in order to improve the position of women in education, marriage, politics and employment. But the "paucity of gains" for women arising out of law reform has led to the effectiveness thereof being questioned.¹²⁰ The dominant male role in the construction of the broader social and legal fabric is seen as one reason for the *de facto* inadequacy of anti-discrimination laws. Currently, in respect of employment and labour law it has been observed:

118 Lec 5.

119 Conaghan 389-390.

120 Smart 109, 114. In the United Kingdom, for example, obstacles in the way of actual gains for female employees include the complexity of equal pay legislation; a lack of support for women's claims and interests by trade unions; and the rise of mass unemployment which has had the effect of reinforcing job segregation. The need for pregnancy and maternity rights has also been seen by women, faced with the erosion of these rights, as more important than equal pay.

"Scanning the popular textbooks, browsing through the mainstream law journals I find little to convince me that women are in any way visible in labour law except in a few "recognised" areas i.e. sex discrimination law, equal pay legislation and the maternity provisions. These areas apart, labour law is a world made up of full-time male breadwinners and the legal rules reflect this conception of the worker. Moreover the models labour lawyers employ to analyse and evaluate the rules are generally blind in that they fail to recognise that for men and women experiences of work and the workplace may be very different.

As a result the particular nature of women's oppression in the production process is not revealed, and labour law, by rendering women invisible legitimates patriarchal conceptions of work and workers."¹²¹

The limits of legal reform are the result of social and economic factors and also the structure of the law itself. Law cannot be separated from politics, morals and other human activities. It is an "integral part of the web of social life".¹²² The argument of those seeking to develop a feminine jurisprudence has therefore been for a shift from the emphasis which has been placed on the content of laws and the method of implementation, towards a concern for the form of law within society as a whole. The current form of law is criticised because it operates on a so-called male model, judging equality by comparing women to men. It has been said that "women cannot expect help from a legal system that sees and treats women the way men see and treat women."¹²³ The argument is:

"...it is not so much that laws must be changed; it is patriarchy that must be changed. Actions taken within the legal system cannot by themselves eliminate patriarchy, which is a pervasive social phenomenon. Because law is one, but only one, locus of male supremacy, legal efforts to end women's subordinate status cannot effectively challenge or cripple patriarchy unless they are taken in the context of broader economic, social and cultural changes."¹²⁴

121 Conaghan 377.

122 Olsen 211.

123 Smart 122.

124 Polan 301- 302.

But legislation does have an important role to play in introducing the conditions under which changes can occur, and the failure to regulate an issue by means of legislation is likely to lead to that issue being seen as an insignificant one. Important activities in society are regulated by law. Therefore the absence of legal regulation implies that the particular issue is not important enough to merit regulation.¹²⁵ The significance of law as a tool to assist in bringing about equality in employment was recognised by the Wiehahn Commission. The commission expressed the opinion that although the success of policies aimed at anti-discrimination and equality did not lie solely within the provisions of constitutions, laws, regulations and the powers of courts, those provisions did constitute a "clear-cut and impressive statement of the national will, the importance of which [could] not easily be overstated".¹²⁶

While profound social, economic and cultural changes are necessary for true equality, anti-discrimination legislation, which is adequately drafted and interpreted, is an essential starting point for equality in employment. The following response of the law to inequality on the basis of sex has been suggested:

"Traditional law reform can change the formal language of power and offer particular individuals remedies against inequality. Attempting to expose the thoroughly gendered nature of the legal system and balance it with other perspectives can alter a monolithic conception of inequality. And understanding the relations of power and subordination endorsed by the law can suggest methods of reform that do not fall into the same trap."¹²⁷

125 Olsen 207. To demonstrate the point the author cites the tendency of the law to be absent from the domestic sphere - this leaves wives without a remedy against domination by their husbands, while on an ideological level it devalues women.

126 Part 5 of the *Report of the Commission of Inquiry into Labour Legislation*. The report also recognises that a "general social policy of non-discrimination and equality should form part of an overriding policy permeating... everyday life and society" (paragraph 4.127.6 of the commission's report).

127 Charlesworth 71.

When drafting such legislation it must be remembered that female employees may not always participate on a par with their male counterparts, as their employment will probably be interrupted for child-bearing. But periodic interruptions and stereotyped perceptions of female employees should not be allowed to lead to inadequate employment protection, and placement in low wage earning occupations. Equality must be sought, inter alia, through drafting equal employment laws which are capable of being applied to prevent discrimination against female employees and which accommodate differences resulting from education and the structure of the broader legal framework, including labour law, family law and tax law. The rights contained in the anti-discrimination laws must be capable of being exercised effectively. Effective exercise relates both to the method of enforcement and the remedies which ensure that the laws serve as a deterrent to discrimination by employers.

CHAPTER THREE

INTERNATIONAL INSTRUMENTS

A Introduction

International regulation plays a significant role in combating discrimination against female employees.¹ Efforts by the United Nations and its specialised agencies, the International Labour Organisation and the United Nations Education Scientific and Cultural Organisation, have yielded results in many policy issues pertaining to the social and economic position of women. Significant international instruments which have a bearing on equality in employment include the United Nations Charter, the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights adopted by the United Nations, as well as various international norms drawn up by the International Labour Organisation, including the Equal Remuneration Convention No 100 of 1951 and the Discrimination (Employment and Occupation) Convention No 111 of 1958. The conventions, which have been widely ratified, provide a general framework for national anti-discrimination legislation. On a more regional level, in Europe, instruments of the European Economic Community have affected equal treatment laws of member states. Of importance are Article 119 of the Treaty of Rome, the Equal Pay Directive 1975, the Equal Treatment Directive 1976 and the two Social Security Directives of 1979 and 1986.

1 Vogel-Polsky 3 explains: "International law has made an important and decisive contribution towards the elimination of all forms of discrimination in employment. International instruments recognized basic social rights long before similar recognition was accorded at national levels, especially in the areas of race and sex discrimination. Additionally, various international agencies have prompted the search for a means of effecting equality in the enjoyment of human rights. National legislatures have acknowledged these views as compulsory international norms."

In this discussion instruments of the United Nations will be referred to in order to illustrate the general policy of that organisation regarding gender equality. Conventions and recommendations of the International Labour Organisation which deal specifically with equality in the employment arena, and their effect on national laws, are discussed. The contents of the European Economic Community instruments dealing with equal treatment in employment are also discussed. They have had a significant effect on the national law of member states, which are required to align national law with the principles contained in the instruments.²

B The United Nations (UN)

1 United Nations Charter

The most widely ratified agreement which refers specifically to the rights of women is the United Nations Charter.³ The charter does not contain a list of fundamental human rights and freedoms, but introduces the principle of respect for basic human rights.⁴ The provisions dealing with the rights of women are formulated broadly. The preamble to the charter reaffirms the faith of its members in fundamental human rights, in the dignity and worth of the human person, and in equal rights of men and women. In terms of the charter, one of the aims of the UN is to promote and encourage respect for human rights and for fundamental freedoms for all without any distinction as to sex.⁵ All members pledge to take the necessary action

2 Instruments of the United Nations discussed below are reproduced in Lillich; conventions and recommendations of the International Labour Organisation up to 1981 are reproduced in *International Labour Conventions and Recommendations*; directives of the European Economic Community are reproduced in McCrudden (ed) 217-234.

3 The charter was signed on 26 June 1945 and entered into force on 24 October 1945. It has been ratified by approximately 159 states (Halberstam and Delfeis 19).

4 Daes 3 paragraph 29.

5 Article 1 and article 56.

to achieve this aim,⁶ and the General Assembly of the UN is directed to initiate studies and make recommendations to assist in the realisation thereof.⁷

2 *Universal Declaration of Human Rights*⁸

The declaration deals with a broad spectrum of human rights.⁹ In terms of the declaration all human beings are born free and equal in dignity and rights.¹⁰ Everyone is entitled to the rights and freedoms set out in the declaration without any distinction as to sex.¹¹ In the thirty articles of the declaration, economic rights are among the many enumerated. In this regard it is stated that everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment. Further, everyone has the right to equal pay for equal work. As its name implies, the declaration does not purport to be law, but sets out an ideal towards which society and the individuals therein should strive. The belief of the General Assembly of the UN, that human rights should be encompassed in a document which would have the force of law, led to the adoption in 1966 of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.¹² The latter covenant is

6 Article 56.

7 Article 13.

8 Adopted and proclaimed by the UN General Assembly on 10 December 1948.

9 The declaration is a comprehensive document, with its eight paragraph preamble and thirty articles. It has been observed that if each right implicit therein were to be itemised, the list would run into a few hundred distinguishable rights (Ziskind 132).

10 Article 1.

11 Article 2. Other grounds of distinction which are regarded as impermissible include race, colour, language, religion, political or other opinion, national or social origin, property, birth or other status.

12 Dacs 5 paragraphs 44- 47.

of relevance here.

*3 International Covenant on Economic, Social and Cultural Rights*¹³

The covenant is a charter of basic rights in the economic, social and cultural areas. The parties recognise, inter alia, the right to work, which includes the right to be allowed to choose and accept work freely,¹⁴ and the right to just and favourable conditions of work.¹⁵ Two provisions are particularly significant to women's rights. One is the general provision which requires party states to undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set out in the covenant,¹⁶ and to guarantee that the rights will be exercised without any discrimination as to sex.¹⁷ The other is the provision dealing with wages, which requires equal remuneration for work of equal value without distinction of any kind, and with women in particular being guaranteed conditions of work which are not inferior to those enjoyed by men.¹⁸

13 Adopted and opened for signature, ratification and accession on 16 December 1966; entered into force on 3 January 1976 in accordance with article 27.

14 Article 6.

15 Article 7.

16 Article 3.

17 Article 2(2). Other impermissible grounds include race, colour, language, religion, political or other opinion, national or social origin, property, birth or other status.

18 Article 7(a).

4 Declaration on the Elimination of Discrimination Against Women¹⁹ and Convention on the Elimination of All forms of Discrimination Against Women²⁰

The declaration notes that, despite the principle of non-discrimination contained in the United Nations Charter, the Universal Declaration of Human Rights and various other instruments of the United Nations and its specialised agencies, discrimination against women continues. It states the necessity of ensuring the universal recognition in law and in fact of the principle of equality of men and women, and proclaims discrimination against women fundamentally unjust and an offence against human dignity.²¹ A broad range of rights including political, economic, educational, social and cultural rights is encompassed in the declaration. In the economic and social field equal rights are to be accorded to married and unmarried women and men, including the right to work, to free choice of profession and employment and to advancement therein, and to equality of treatment and equal remuneration for work of equal value.²² In order to prevent discrimination against women on the grounds of marriage or maternity, and to ensure their effective right to work, measures are necessary to prevent their dismissal in the event of marriage or maternity and to provide paid maternity leave, with the guarantee of returning to former employment. Social services, including child-care facilities are also necessary.²³

19 Proclaimed by the General Assembly of the UN on 1 November 1967.

20 Adopted and opened for signature, ratification and accession by the UN General Assembly on 18 December 1979; entered into force on 3 September 1981 in accordance with article 27.

21 Article 1.

22 Article 10(1).

23 Article 10(2).

The aim of the convention is to implement the principles contained in the declaration. The convention is comprehensive and has been referred to as a "Women's Bill of Rights".²⁴ Unlike the declaration which is a statement of policy and is not legally binding, provisions of the convention become binding on states which ratify it.²⁵

The convention defines the term "discrimination against women" as:

"any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."²⁶

State parties are directed to take all appropriate measures to eliminate discrimination against women in the field of employment, and to ensure equal rights for men and women. Specific rights enumerated include the right to work; the right to the same employment opportunities; the right to free choice of profession and employment, to promotion and job security, and to vocational training and retraining; and the right to equal remuneration including benefits and to equal treatment for work of equal value.²⁷ It is thus apparent that discrimination generally, as well as equality in employment, are formulated broadly to encompass virtually every possibility.

In order to prevent discrimination on the grounds of marriage or maternity, thereby ensuring the effective right to work, state parties are directed to prohibit, subject to the imposition of sanctions, dismissal on the grounds of marital status, pregnancy or

24 Guggenheim 244.

25 Sipila 38. The convention has been ratified by approximately 64 states (Halberstam and Defeis 32).

26 Article I.

27 Article 11(1).

maternity leave. Female employees are to be granted maternity leave with pay or comparable social benefits without loss of seniority. Supporting social services, especially a network of child-care facilities, are to be established to enable parents to combine family obligations with work responsibilities and participation in public life.²⁸ The biological child-bearing role of women is thus recognised, as is the need for a support network in respect of child-rearing, in order to allow female employees to participate on an equal footing with their male counterparts.

The convention states that all state parties are to pursue a policy of eliminating discrimination against women and are to embody the principle of equality in their national constitutions or national legislation.²⁹ They are to adopt appropriate legislative and other measures including sanctions.³⁰ States are to establish legal protection of women's rights and to ensure effective protection of women against any form of discrimination through competent national tribunals or other public institutions.³¹ Existing laws, regulations, customs and practices which constitute discrimination against women are to be abolished or modified by any means suitable.³² States are thus to translate the policy of non-discrimination and equality into enforceable laws, reinforced by legal sanctions where necessary. Discriminatory practices must be modified in order to bring about actual equality, and competent tribunals are to monitor the situation.

The adoption of special measures aimed at accelerating actual equality between

28 Article 11(2).

29 Article 2(a).

30 Article 2(b).

31 Article 2(c).

32 Article 2(f).

men and women is not viewed as discrimination as defined in the convention. But unequal standards are not to be maintained when the objectives of equality of opportunity and treatment have been met.³³ The need for affirmative action to remedy the effects of past discrimination is thus recognised, provided that such action is temporary in nature, and is abandoned once its aims have been met.³⁴

5 Concluding Remarks

It has been said that employment equality for men and women is linked to a recognition of their right to work, and that equality begins with a recognition of their equal right to work.³⁵ This right is embodied in the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the Convention on the Elimination of All Forms of Discrimination Against Women.

The UN has recognised that despite the existence of international instruments such as those referred to above, profound changes are still necessary to ensure that women's employment does not remain concentrated in areas characterised by lower skills, lower wages and minimum job security. It estimates that while women's labour input in the formal and informal sectors will surpass that of men by the year 2000, they will continue to receive a smaller share of the world's assets and income.³⁶ One of the fundamental obstacles to equality in employment is the actual

33 Article 4.

34 Vogel-Polsky 5 explains that: "This is the first clear statement ever made in an international and universally applicable legal instrument declaring that positive action neither constitutes discrimination nor derogates from the principle of equality (provided that the measures adopted are temporary and are aimed at correcting inequality where it has actually occurred)."

35 Ivanov 373.

36 Report of the World Conference 12.

difference in status of men and women as a result of social, political, economic and cultural factors. Measures which directly affect female employees and their employers are necessary, as well as measures which are designed to make society as a whole less obstructive.³⁷ Equality of male and female employees in accordance with the principles outlined in the above documents thus requires, first, equality before the law in every aspect of their lives. Secondly, institutions must be established to monitor the *de facto* situation and assist in removing all discrimination. Thirdly, obstacles in the way of equality, including stereotypes, perceptions and attitudes must be eradicated, not only by means of legislation, but also by means of a comprehensive campaign to educate the population.³⁸

The UN has urged all governments which have not yet done so to sign the above instruments and to ensure that national legislation is brought in line with the principles contained therein. It has observed that human rights and freedoms in general gain greater significance when included in a national constitution which is the primary source of law in a particular country.³⁹ It has also observed that while human rights and freedoms may be protected at national level by constitutions and laws, their existence truly depends on the way in which those constitutions and laws are administered.⁴⁰ *De jure* equality does not guarantee *de facto* equality.

37 Report of the World Conference 17.

38 Report of the World Conference 19.

39 Daes 172 paragraphs 917- 920.

40 Daes 144 paragraph 524.

C The International Labour Organisation (ILO)

The ILO, like the League of Nations (later called the United Nations), was established in 1919 in terms of the Treaty of Versailles.⁴¹ Part XIII of the Treaty contained the constitution of the ILO. The principles and purposes of the ILO were restated in 1944 in the Declaration Concerning the Aims and Purposes of the International Organisation, which was adopted by the General Conference of the ILO in Philadelphia. In 1946 the Declaration of Philadelphia, as it is generally referred to, was embodied in the constitution of the ILO.

The preamble to the constitution of the ILO states that universal and lasting peace can be established only if based upon social justice. It is acknowledged that while unfair labour conditions involving injustice, hardship and privation to large numbers of people do exist, those conditions may be improved by the use of various measures to raise employment standards. One strategy which is specifically mentioned in the preamble is the recognition of the principle of equal remuneration. The Declaration of Philadelphia, referring to the principle that lasting peace can be established only if it is based on social justice, affirms that all human beings irrespective of sex have the right to pursue their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity.⁴² The necessity of making provision for child welfare and maternity protection are also recognised.⁴³

41 For the steps leading to the establishment of the ILO, see *International Labour Standards* 3-7; Johnston 5-15.

42 Paragraph II(a). The declaration also refers to the grounds of race and creed. Daes 3 paragraph 27 states that this principle affirms the welfare of the individual in society as being of primary importance.

43 Paragraph III(h).

Equality of opportunity and treatment have been the subject of various conventions and recommendations of the ILO. Two of these conventions provide a general framework for anti-discriminatory legislation which has been adopted by countries that have ratified the instruments. They are the Convention Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value No 100 of 1951, and the Discrimination (Employment and Occupation) Convention No 111 of 1958.⁴⁴ The ILO's concern for equality of opportunity and treatment of male and female employees is also evident from the Declaration on Equality of Opportunity and Treatment for Women Workers, adopted by the International Labour Conference at its 60th session in 1975. The importance of this declaration was recalled in 1985 by the Resolution on Equal Opportunities and Equal treatment for Men and Women in Employment. An ILO Plan of Action on Equality of Opportunity and Treatment of Men and Women in Employment was adopted by the Governing Body in 1987 to give effect to the resolution.⁴⁵

Before considering the provisions of the above conventions in more detail, it is apposite to give a brief explanation of the structure of the ILO and the manner in which international labour conventions are adopted and monitored.

44 Other ILO instruments in the field of equality include the Equality of Treatment (Social Security) Convention No 118 of 1962; the Minimum Age Convention No 138 of 1973 and Recommendation No 146 of 1973; the Paid Educational Leave Convention No 140 of 1974 and Recommendation No 148 of 1974; the Rural Workers Organisations Convention No 141 of 1975 and Recommendation No 149 of 1975; the Human Resources Development Convention No 142 of 1975 and Recommendation No 150 of 1975; the Migrant Workers Convention No 143 of 1975 and Recommendation No 151 of 1975; the Labour Relations (Public Service) Convention No 151 of 1978; the Older Workers Recommendation No 162 of 1980; the Workers with Family Responsibilities Convention No 156 of 1981 and Recommendation No 165 of 1981; the Termination of Employment Recommendation No 119 of 1963 and Recommendation No 166 of 1982 and Convention No 158 of 1982; the Vocational Rehabilitation and Employment (Disabled Persons) Convention No 159 of 1983; and the Employment Policy (Supplementary Provisions) Recommendation No 169 of 1984.

45 *Equality in Employment and Occupation* 5. South Africa ceased to be a member of the ILO on 11 March 1966, and has not ratified either of the conventions referred to (*Equality in Employment and Occupation* 6).

1 Structure

The ILO is composed of three bodies. They are the International Labour Conference, which is a general assembly which meets every year; the Governing Body, which is the executive council; and a permanent secretariat, the International Labour Office.⁴⁶

The International Labour Conference is the principal organ of the ILO. It frames and adopts conventions and recommendations, decides on the admission of new member states,⁴⁷ elects the Governing Body and adopts the ILO's budget.⁴⁸ The Conference is attended by member states of the ILO, which each appoint two government delegates, one employers' delegate and one employees' delegate, together with advisers.⁴⁹

The Governing Body is the executive council of the ILO and is elected every three years at the conference. It meets three times a year and is responsible for co-ordinating all the activities of the ILO and for convening the various meetings. It examines the conclusions reached at meetings and decides what effect should be given to them. Finally, it has important financial and administrative functions and also directs the activities of the International Labour Office.⁵⁰

46 *International Labour Standards* 7.

47 Except in the case of automatic admission of members of the UN.

48 *International Labour Standards* 10; Valticos 36.

49 Joyce 1149; Valticos 35.

50 Valticos 36. *International Labour Standards* 8 states that the Governing Body is, "so to speak, the hub of the wheel around which all ILO activities revolve".

The functions of the International Labour Office in Geneva, which is the permanent secretariat of the ILO, include the technical preparation of work of the International Labour Conference and of the Governing Body and the collection and publication of information on labour problems.⁵¹ Regarding the adoption of international labour standards, the office prepares the reports on the various items on the agenda of the International Labour Conference.⁵²

2 Procedure for the Adoption of International Labour Conventions

The procedure for the adoption of conventions and recommendations by the ILO involves two stages. These are, first, the inclusion thereof as an item on the agenda of the International Labour Conference and, secondly, discussion and adoption thereof by the Conference.⁵³ The decision to include the adoption of a convention or a recommendation as an item on the agenda of the Conference is normally taken by the Governing Body of the ILO in the light of proposals submitted by the Director-General of the International Labour Office. The Governing Body must also consider suggestions made by governments or by representative organisations of employers and employees or by any public international organisation. The Conference may also decide itself, by a majority of two thirds, to place an item on the agenda of the next Conference. The proposed convention or recommendation is then discussed at two consecutive annual sessions of the Conference. A majority of two thirds of the votes of the delegates attending the Conference is required for adoption.

51 The functions of the International Labour Office are described in general terms by the article 10 of the constitution of the ILO.

52 *International Labour Standards* 8; *Valticos* 37.

53 For a discussion of the adoption of the adoption procedure, see *Valticos* 46-48.

3 *The Binding Nature of International Labour Conventions*

International labour conventions are treaties by which states accept obligations toward each other and towards the ILO⁵⁴ and are legally binding on a member state only when ratified by the government of the state concerned.⁵⁵ International labour conventions differ from recommendations in that conventions are designed to create international obligations for the states which ratify them, while recommendations are designed merely to provide guidelines for governmental action.⁵⁶

Countries that have not ratified a convention are nevertheless bound under the constitution of the ILO to supply reports, as requested by the Governing Body, indicating the position in their law regarding matters dealt with in the convention, showing the extent to which effect has been given to the provisions of the convention and stating difficulties which prevent or delay its ratification.⁵⁷ This procedure is a method of supervising the extent to which states do in fact recognise and apply the principles referred to in the constitution and defined in the conventions.

4 *Supervision of the Implementation of International Labour Standards*

Quasi judicial bodies supervise the implementation of international labour

54 Valticos 45 refers to the question of whether conventions are of a contractual or a legislative nature, and concludes that international labour conventions represent a compromise between the notions of contract-making treaties and law-making treaties.

55 Joyce 1149; Valticos 45.

56 Valticos 44. It is noted in *International Labour Standards* 25 that it is essentially due to this distinction that employees' delegates to the International Labour Conference often press for the adoption of a convention, while employers' delegates are more in favour of recommendations.

57 Joyce 1149; *International Labour Standards* 47-48.

standards. A body of case law has been built up as they have had to reach conclusions regarding the precise scope and meaning of ILO conventions.⁵⁸ The main supervisory body, from a legal point of view, is the Committee of Experts on the Application of Conventions and Recommendations. It is composed of competent experts who are independent of governments. They are appointed in their personal capacity by the Governing Body on the proposal of the Director General of the International Labour Office.⁵⁹ The function of the Committee of Experts comprises three aspects, namely, the examination of governments' reports on the situation in national law and practice regarding unratified conventions and recommendations, the examination of governments' reports on the application of ratified conventions, and the examination of information supplied by governments regarding the submission of newly adopted conventions and recommendations to the competent authorities.⁶⁰ The aim is to ensure the observance by governments of their obligations in the above respects.⁶¹

The above is a brief exposition of the structure of the ILO and the procedure regarding implementation and supervision of international labour standards. The provisions of the Equal Remuneration Convention and the Discrimination (Employment and Occupation) Convention will now be examined in more detail, particularly the substantive provisions thereof.

58 Valticos 61.

59 Valticos 240. A second supervisory body, the Committee on the Application of Conventions and Recommendations is set up by the International Labour Conference at each of its annual sessions. It consists of representatives of governments and of national organisations of employers and employees. For a more detailed discussion of this committee, see Valticos 242.

60 *International Labour Standards* 56- 57.

61 For a general discussion on the establishment and operation of the Committee of Experts, see Johnston 99- 103.

5 Equal Remuneration Convention No 100 of 1951 and Recommendation No 90 of 1951

Only one ground of discrimination falls within the ambit of the Equal Remuneration Convention⁶², namely, an employee's sex. It provides for equal remuneration for work of equal value by male and female employees.⁶³ Each member state of the ILO is directed to promote and ensure the application to all workers of the principle of equal remuneration for men and women workers for work of equal value.⁶⁴ It is apparent from this provision that the convention does not limit equal pay to cases where the same or similar work is being performed by male and female employees. Instead, the comparison is to be based on the value of the work being performed. No indication is provided of how the value of the work is to be determined, but those persons responsible for the determination of the rates of remuneration are directed to take measures to promote the objective appraisal of jobs on the basis of the work which is performed.⁶⁵ The adoption of a technique by member states to measure and compare the relative value of work performed is, by implication, necessary. This is intended to make it possible to determine whether jobs involving different work may have the same value for the purpose of remuneration. It has been observed that remunerating jobs with regard to content, as opposed to the personal characteristics of the person performing the job, is "critical to eliminating gender pay discrimination",⁶⁶ as men and women traditionally perform different jobs.

62 The full title of the convention is the Convention Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value. It was adopted by the ILO on 29 June 1951 and came into force on 23 May 1953. It has been ratified by approximately 107 states.

63 Article 1(b).

64 Article 2(1).

65 Article 3(1) and (2).

66 Ben-Israel 15.

Differential rates of pay which are determined by an objective appraisal of the work performed, without regard to the sex of a worker, are permissible.⁶⁷ The term "remuneration" is broadly defined in the convention and includes not only an employee's basic salary, but all additional benefits procured by virtue of the position held.⁶⁸

In some countries an international convention, such as the one referred to above, automatically constitutes the law of the country upon ratification, and has to be applied by the competent courts and authorities. But in most countries international conventions are not regarded as self-executing, and the provisions of such a convention have to be incorporated into national law by statute.⁶⁹ The Equal Remuneration Convention provides for possible methods of implementation of its provisions. In terms of the convention the principle of equal pay for work of equal value may be applied by means of national laws or regulations, by means of legally established or recognised machinery for wage determination, or by means of collective agreements concluded between employers and employees.⁷⁰

The Equal Remuneration Convention is supported by the Equal Remuneration Recommendation.⁷¹ The main purpose of the recommendation is to provide for the

67 Article 2(3). Johnston 161 points out that Convention 100 is based on three substantive provisions: first, members are to promote and ensure the principle of equal remuneration for work of equal value; secondly, it provides for an objective appraisal of jobs on the basis of work actually performed; thirdly, differences in pay by virtue of an objective appraisal of the work performed, irrespective of the sex of the employee, are not regarded as contrary to the principle of equal pay.

68 Article 1(b) defines "remuneration" as including "the ordinary, basic or minimum wage or salary 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 workers employment".

69 Schmidt 139.

70 Article 2(2)(a),(b) and (c).

71 The full title of the recommendation is the Recommendation Concerning Equal Remuneration for Men and Women Workers for Work of Equal Value.

progressive application by member states of the principles contained in the convention, having due regard to methods of application which have been found to be satisfactory in countries in which they have already been applied. It provides for, *inter alia*, equivalent facilities for vocational guidance and training for male and female employees;⁷² social and welfare services to meet the needs of female employees, particularly those with family responsibilities;⁷³ and equality with regard to access to occupations.⁷⁴ The promotion of public understanding is also emphasised.⁷⁵

It is apparent from the provisions of the recommendation that the difficulties encountered in achieving equal remuneration, which are linked to the general status of women in society and employment, have been recognised. The recommendation therefore adopts a broad perspective and provides for equality in access to employment and in occupational training. It also recognises the importance of providing the necessary social services.

Various regional instruments have adopted the principle of equal pay contained in the ILO convention. When the European Community was created under the Treaty of Rome in 1957, the principle of equal pay was incorporated therein.⁷⁶ The treaty provides for equal pay for "equal work", which is a far narrower concept than "work of equal value". However, a wider principle has been adopted by the EEC in a series of directives passed by its council, particularly the Equal Pay Directive⁷⁷ and

72 Article 6(a) and (b).

73 Article 6(c).

74 Article 6(d).

75 Article 7.

76 Article 119 of the Treaty Establishing the European Community, which is generally referred to as the Treaty of Rome.

77 Directive 75/117 of 1975.

the Equal Treatment Directive.⁷⁸ The principle of equal pay was also adopted by the European Social Charter of 1963.⁷⁹ The American Declaration of the Rights and Duties of Man refers in general terms to equality of rights without distinction as to sex⁸⁰ and to the right to fair remuneration,⁸¹ while the African Charter on Human and People's Rights, 1981 guarantees equal pay for equal work.⁸²

6 Discrimination (Employment and Occupation) Convention 111 of 1958 and Recommendation 111 of 1958

The scope of the Discrimination Convention is far broader than that of the Equal Remuneration Convention.⁸³ It outlaws discrimination on the grounds of an employee's sex, as well as on the six other grounds listed. The grounds refer to individual qualities and attributes which are immutable, such as sex, race and colour, and to grounds which stem from personal choice and social categorisation, such as political opinion or religion.

In terms of the convention, discrimination includes any distinction, exclusion or preference which is made on the basis of, inter alia, an employee's sex, and which has the effect of impairing or nullifying equality of opportunity or treatment in

78 Directive 76/207 of 1976.

79 Article 4(3).

80 Article II.

81 Article XIV.

82 Article 15.

83 See Valticos 104- 111 for a general discussion of the provisions of the convention. The convention has been ratified by approximately 108 countries, making it one of the most widely ratified conventions of the ILO.

employment or occupation.⁸⁴ The purpose of the convention is thus to eliminate unequal treatment and to promote equality of opportunity.⁸⁵ In referring to "the effect" of a distinction, exclusion or preference, the convention implies the use of an objective measure as a criterion. It is therefore necessary that countries incorporating the principles of the convention into their legal systems should prohibit both direct and indirect discrimination on any of the guaranteed grounds, including an employee's sex. Indirect discrimination refers to situations where apparently neutral policies which are applied uniformly result in actual discrimination against certain classes of persons. It may be intentional or unintentional. Because certain distinctions, exclusions and preferences, which may have their origin in both law and in practice, lead to discrimination against certain classes of persons, it is also necessary that measures should be adopted to promote actual equality, that is, an affirmative action programme should be adopted to counter the effects of past discrimination.

Any distinction, exclusion or preference in respect of a particular job which is based on the inherent requirements of the particular job is not regarded as discrimination for the purposes of the convention.⁸⁶ This exception should be narrowly interpreted as it is capable of being abused. This is particularly so in the case of sex-based discrimination, where the threat of a discriminatory policy based on the apparent inherent requirements of the job is great due to entrenched expectations and practices of society. It may also be noted that the Equal Remuneration Convention, which addresses only sex-based disparity, contains no exception of this nature.

84 Article 1(1). It is noted in *Equality in Employment and Occupation* 18 that the definition consists of three elements: the first is a factual element, namely the existence of a distinction, exclusion or preference; the second is a ground on which the difference of treatment is based, for example the employee's sex; the third is the objective result of the difference in treatment, the nullification or impairment of equality.

85 Ben-Israel 6-7.

86 Article 1(2).

The terms "employment" and "occupation" are referred to in a general way in the convention, and there is no limitation regarding either individuals or occupations. The convention specifically provides that the terms include access to employment and to particular occupations, access to vocational training, and terms and conditions of employment.⁸⁷ Protection against discrimination is thus applicable to all stages of employment.

The recommendation supplements the convention and defines the areas in which a policy of non-discrimination is to be applied⁸⁸ and the principles which are to be followed. Members are directed to formulate a national policy for the prevention of discrimination in employment and occupation, and to apply such policy, inter alia, by means of legislative measures and collective agreements.⁸⁹ The recommendation also provides for the establishment of agencies which would promote the policy of non-discrimination and educate the public in that regard,⁹⁰ and which would examine complaints and, where possible, rectify discriminatory practices through conciliation.⁹¹

The ILO has thus recognised that equality of treatment and opportunity in employment depends on the removal of practices, policies and laws which establish or tolerate discrimination, and the institution of promotional and educational action designed to change entrenched attitudes and to combat ignorance, intolerance and prejudice.⁹²

87 Article 1(3).

88 Article 3.

89 Article 2.

90 Article 4(a).

91 Article 4(b) (c).

92 *The ILO and Human Rights* 52.

7 Concluding Remarks

The ILO has acknowledged that equality in employment cannot be achieved in a general context of inequality. Inequality in social status leads to unequal treatment and unequal employment opportunities.⁹³ The promotion of equality in employment requires not only legislative measures, but also continuous action to enlighten the population and to promote *de facto* equality.

Equality in employment also requires equality in education, access to jobs and vocational training. In the field of education great significance must be attached to the Convention Against Discrimination in Education adopted by the United Nations Education Scientific and Cultural Organisation in 1960.⁹⁴ The convention outlaws all inequality of treatment in education on the basis of sex.⁹⁵ Education refers to all types and levels of education, and includes access to education, the standard and quality of education, and the conditions under which it is given.⁹⁶ In the field of employment, the Vocational Training Recommendation No 117 of 1962 provides that training should be free from any form of discrimination on the grounds of an employee's sex.⁹⁷ The ILO has also recognised that a major obstacle in the way of equality in employment is the fact that family responsibilities still tend to lie with women. This led to the adoption of the Workers With Family Responsibilities Con-

93 *Equality in Employment and Occupation* 244.

94 The convention was adopted on 14 December 1960 and entered into force 22 May 1962.

95 Article 1(1). Other impermissible grounds include race, colour, language, religion, political or other opinion, national or social origin, or economic condition or birth.

96 Article 1(2).

97 Article 2(4). Other grounds include race, colour, religion, political opinion, national extraction and social origin.

vention No 156 and its supporting Recommendation No 165 in 1981. These instruments provide for certain measures concerning conditions and methods of employment of workers with family responsibilities.

Finally mention should be made of special protective measures pertaining to female employees. The Discrimination (Employment and Occupation) Convention provides that special measures of protection or assistance provided for in other conventions or recommendations adopted by the ILO are not to be regarded as discriminatory in terms of the convention.⁹⁸ The problem which arises with regard to these protective measures is that of reconciling them with the principle of equality of opportunity. The purpose of the protective measures is to restrict the employment of women in work regarded as harmful to their health and safety,⁹⁹ to restrict night work¹⁰⁰ and to provide for maternity protection.¹⁰¹ Although these measures aim to protect female employees, they may in fact place them at a disadvantage as regards employment opportunities where employers see the recruitment of men, who are not covered by the provisions, as less costly and inconvenient. They also reinforce stereotypes about women's role in society. Three measures have been proposed in order to counteract these disadvantages. The first is to ensure that the protection envisaged is really justified; the second involves continued revision of the

98 Article 5(2).

99 The arduous character of underground work and abuse in the employment of women in mines led to the adoption of the Underground Work (Women) Convention No 45 of 1935. Other instruments contain provisions concerning the risks which certain occupations would involve for women, for example the Lead Poisoning (Women and Children) Recommendation 4 of 1919; the White Lead (Painting) Convention No 13 of 1921; and the Radiation Protection Recommendation No 114 of 1960.

100 The Night Work (Women) Convention No 4 of 1919; the Night Work (Women) Convention (Revised) No 41 of 1934 and No 89 of 1948.

101 Two conventions deal specifically with maternity protection, namely, the Maternity Protection Convention No 3 of 1919 and the Maternity Protection Convention (Revised) No 103 of 1952.

provisions as circumstances change; the third involves nullifying the potential negative effects of the protective measures.¹⁰² The revision of provisions in accordance with changing circumstances is reflected in the 1990 Protocol to the Night Work (Women) Convention No 89 of 1948, and in the Night Work Convention No 171 of 1990 which applies to all employees. In terms of the Protocol, the prohibition on night work for women may be lifted provided that certain conditions are satisfied. Those conditions pertain largely to the provision of adequate protection during pregnancy and maternity. Broadly, the protective measures include a prohibition on night work around the time of confinement, a prohibition on the dismissal of a woman because she is pregnant, and a guarantee that the income of a woman will be maintained at a level which permits her and her child to enjoy a suitable standard of living.¹⁰³ The 1990 convention seeks to ensure that measures are provided on a national level to protect the health of *all* employees engaged in night work, to assist those employees in meeting family and social responsibilities, and to provide for occupational advancement and appropriate compensation.¹⁰⁴

D The European Economic Community (EEC)

The EEC was created by the Treaty of Rome in 1957.¹⁰⁵ The most significant European law dealing with equal treatment in employment is contained in Article 119 of the Treaty of Rome and in the supplementary directives. The European Commis-

102 *The ILO and Human Rights* 72- 73.

103 Benjamin 477. The author explains that the performance of night work by women is also subject to agreement on that point by employers' and employees' organisations concerned. He discusses the significance of the principles contained in the Protocol in the context of the South African Mines and Works Amendment Act 13 of 1991.

104 Benjamin 478.

105 The EEC was formed in 1957 by Belgium, France, the Federal Republic of Germany, Italy, Luxembourg and the Netherlands. Denmark, Ireland and the United Kingdom joined in 1973. Greece joined in 1981, and Portugal and Spain in 1986.

sion monitors whether member states are fulfilling their obligations under the Treaty. If it is of the opinion that a state has failed to implement the provisions of a directive, an attempt is made to settle the matter through negotiation. If informal attempts at settlement are unsuccessful, formal infringement proceedings are instituted.¹⁰⁶ The European Court of Justice (ECJ), which is responsible for interpreting EEC law, passes the final judgment.¹⁰⁷ The judgment is in the form of a declaration. If the court finds that a member state has failed to implement a provision of community law, the Treaty requires the state to rectify the violation.¹⁰⁸ The court may also be required to interpret community law for the benefit of a national court.¹⁰⁹ Under those circumstances the national court stays proceedings, pending the decision of the ECJ. Once the ECJ has given its decision, proceedings are resumed and the national court applies the law in the light of the ECJ's interpretation.

Community law may be incorporated into the national law of member states through legislation. In the United Kingdom, for example, the Social Security Act 1989 was passed in order to implement the provisions of the Social Security Directive 1986.¹¹⁰ Community law may also be implemented through statutory instrument, for example, regulation. A mechanism for implementation in this manner is

106 In terms of section 169, the commission refers the case to the Court of Justice if a state fails to react favourably to the action recommended by the commission. For a discussion of the role of EEC institutions, see *The European Dimension: 1 2-9*.

107 Article 164 of the Treaty of Rome provides for a Court of Justice which has the task of ensuring that community law is observed in the interpretation and application of the Treaty.

108 Article 171 of the Treaty of Rome.

109 In terms of Article 177 of the Treaty of Rome, the highest national court of a member state is required to refer cases involving interpretation of community law to the Court of Justice for authoritative interpretation.

110 Directive 86/378.

provided in the United Kingdom in terms of the European Communities Act 1972. The relevant minister is given the power to make regulations for this purpose.¹¹¹ An example of implementation in this manner is the Equal Pay (Amendment) Regulations 1972, which amended the Equal Pay Act 1970 to incorporate the concept of equal value into that statute. The amendment was necessary in order to bring United Kingdom law in line with the provisions of Article 119 of the Treaty of Rome and the Equal Pay Directive 1975.¹¹²

Community law which is not incorporated into domestic legislation may none the less have a direct effect on that law. That implies that a provision of Community law creates individual rights enforceable in national courts in member states. A provision must be unconditional and sufficiently precise in order to have a direct effect. That means that the authority implementing the provision should not have a discretion to choose between various solutions when applying the provision.¹¹³ Article 119 of the Treaty of Rome, which provides that men and women should receive equal pay for equal work, can be invoked directly before national courts, independently of national implementing legislation. The reason is that sex based pay discrimination can be ascertained by reference only to the criteria laid down in the article, namely, equal pay for equal work. In *Defrenne v Sabena* (No 2)¹¹⁴ the Court of Justice held that Article 119 could be invoked by individuals in national courts against state authorities (that is, public sector employers) as well as against private employers. But Article 119 does not have a direct effect where the discrimination complained of is indirect and cannot be ascertained by reference to the article itself.

111 Section 2(2) of the European Communities Act 1972.

112 Directive 75/117.

113 Prechal and Burrows 28; Wyatt 202-204.

114 Case 43/74 (1976) ECR 455 (European Ct).

This may be inferred from the decision in *Macarthys v Smith*,¹¹⁵ where the Court of Justice found that, although Article 119 extended to cases where a woman alleged that she received less pay than she would have received had she been a man, it could not be applied directly in those circumstances. Determination of the issue required a comparison with a hypothetical man. The alleged discrimination was classed as disguised as it required an elaboration of the criteria of assessment contained in Article 119 (namely, equal pay for equal work) by the national court.

As stated, Article 119 may be invoked against both a public and a private sector employer. This is referred to as the vertical and horizontal direct effect, respectively.¹¹⁶ A provision in a Directive, which is unconditional and sufficiently precise, has a vertical direct effect, but not a horizontal direct effect. It may thus be invoked against the State, that is, a public sector employer, but not against a private sector employer.¹¹⁷

Community law enjoys supremacy over national law. It cannot be overridden by provisions of domestic legislation or by administrative or judicial practice. As a result, directly effective provisions of community law prevail over provisions of domestic law, irrespective of whether the domestic provision was legislated before or after the date of the community provision. The purpose of this principle is to

115 Case 129/70 (1980) ECR 1275/ (1980) IRLR 209 (European Ct).

116 The vertical and horizontal direct effect of the Treaty were confirmed by the Court of Justice in *Van Gend en Loos v Nederlandse Administratie der Belastingen* Case 26/62 (1963) ECR 1 (European Ct).

117 This was established in *Marshall v Southampton and South-West Hampshire Area Health Authority* Case 152/84 (1986) ECR 723/ (1986) IRLR 140 (European Ct). The meaning of "state" was broadly interpreted to include the Health Board. The anomaly which could be created by allowing public, but not private, sector employees to rely on a Directive, can be removed by incorporating the provisions of a Directive into national legislation. For a discussion of the evolution of the ECJ's approach to the direct effect of directives, see Morris (I) 233- 245 and Morris (II) 309- 320.

ensure unity and effective operation of community law within the EEC.¹¹⁸ Community provisions also have an indirect effect. That implies that national courts are required to interpret domestic law in accordance with community law. Where a national court is confronted with apparently conflicting provisions of domestic and community law (and community law is not directly applicable), it will try to interpret the domestic law in such a way as to concur with community law.¹¹⁹

1 The Treaty of Rome

The section of the Treaty entitled "Social Policy" seeks to harmonise, inter alia, conditions of employment at European level. In terms of Article 117, member states agree upon the need to promote improved working conditions and an improved standard of living for workers. Article 118 provides for the promotion of close co-operation by the Commission between member states in the social field. Emphasis is placed, inter alia, on employment, labour law and working conditions, vocational training and social security. Article 118A requires member states to seek to encourage improvements in the working environment, particularly as regards health and safety. Article 118B requires the Commission to endeavour to develop dialogue between management and labour at European level.

The most significant provision contained in the section on "Social Policy", for the

118 Prechal and Burrows 31- 33.

119 Prechal and Burrows 34. In the English case of *Garland v British Railway Engineering* (1982) *IRLR* 257 (HL), the House of Lords interpreted an apparently conflicting provision of the Sex Discrimination Act 1975 (section 6(4) dealing with death and retirement) in accordance with Article 119. It was held that the words of a national statute were to be construed in accordance with the Treaty if they were reasonably capable of bearing such a meaning. In *Pickstone v Freemans plc* (1988) *IRLR* 357 (HL) the House of Lords relied on the intention of Parliament to interpret the Equal Pay Act 1970 (section 1(2)(c)) in accordance with the Equal Pay Directive, in order to allow a woman an unqualified right to claim equal pay for work of equal value.

purpose of this discussion, is Article 119, which provides for equal pay for men and women for equal work.¹²⁰ The reason for including the equal pay requirement in the Treaty was twofold. It was based not only on social considerations, but also on economic considerations, as it ensured that no member of the EEC could compete unfairly by relying on a pool of cheap labour, namely, women.¹²¹

The definition of "pay" is similar to that contained in the Equal Remuneration Convention 100 of 1951. It includes 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 her employment from her employer. A question which the ECJ has had to consider on more than one occasion is whether retirement benefits fall within the meaning of "pay" in Article 119. In *Defrenne v Belgium* (No 1),¹²² for example, the court found that a retirement pension, financed by contribu-

120 The Treaty prohibits discrimination on only two grounds, namely, nationality (Articles 7, 48, 52 and 59) and sex (Article 119). The full text of Article 119 reads as follows:

"Each Member State shall during the first stage ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work.

For the purpose of this Article "pay" means 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 employment from his employer.

Equal pay without discrimination based on sex means:

(a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement;

(b) that pay for work at time rates shall be the same for the same job."

121 Flournoy 264 explains that Article 119 "was designed to achieve both economic and social objectives. The economic goal is to ensure that Member States which implement the equality principle are not placed at a disadvantage vis-a-vis those States which continue to discriminate. The social goal is to achieve "social progress" and to "improve... living and working conditions" for all EEC citizens." Curral 20- 21 comments on the dual protection against discrimination on the grounds of nationality and sex contained in the Treaty: "The original reasons for including these subjects in the EEC Treaty were economic. The economic justification for the free movement of workers... is the optimization of production. It allows the most efficient labour force to gravitate to where the best conditions of employment exist. Similarly, Article 119 was put in the Treaty because in 1957 only one Member State had implemented equal pay for men and women, and this Member State did not want unfair competition from other Member States in which cheaper female labour was used."

122 Case 80/70 1971 ECR 445 (European C1).

tions from workers, employers and the State, constituted remuneration which an employee received indirectly from her employer in respect of her employment. The court has also held that sums paid by an employer in the name of an employee, to a retirement benefit scheme by way of an addition to the employee's gross salary, amount to pay under article 119.¹²³

The ECJ has also been required to decide the issue of contemporaneity. In *Macarthy's Ltd v Smith*¹²⁴ the ECJ held that an employee could compare her pay with that of a man who had been engaged in like work prior to her appointment. The principle that men and women should receive equal pay for equal work was not confined to situations in which men and women were contemporaneously doing equal work for the same employer.

Part time workers have also been the focus of attention of the ECJ. In *Jenkins v Kingsgate (Clothing Productions) Ltd*¹²⁵ the court held that a difference in pay between full time and part time workers would not amount to discrimination unless it was, in fact, an indirect way of reducing the pay of part time workers on the ground that the group was composed exclusively or predominantly of women.

Despite an enlightened approach by the Court of Justice, problems were still encountered by member states in applying the principle of equal pay. Problems related, for example, to the definition of equal pay in respect of social security benefits, the concept of "head of household", which was traditionally assigned to a man,

123 *Worringham v Lloyds Bank Ltd* Case 69/80 (1981) ECR 767/ (1981) IRLR 178 (European Ct).

124 Case 129/70 (1979) ECR 1275/ (1980) IRLR 209 European Ct. The matter came before the court by way of a preliminary reference from the English Court of Appeal.

125 Case 96/80 (1981) ECR 911/ (1981) IRLR 228 (European Ct). The case was referred to the ECJ by the English Employment Appeal Tribunal.

and the fact that higher wages were paid to men whose job descriptions required them to do night work or shift work which they did not in fact do, or which women were prevented from doing due to the provisions of domestic protective legislation.¹²⁶ Problems were also encountered in respect of the application of the concept of equal pay to work of equal value.¹²⁷ A number of directives was adopted in order to clarify the position.

2 The Equal Pay Directive 75/117 of 1975

The Directive was adopted to indicate to member states the manner in which the principle of equal pay contained in Article 119 should be realised.¹²⁸ It defines the concept of equality in remuneration to include equal pay for work of equal value.¹²⁹ The Court of Justice has held that the concept of pay or remuneration is in fact the same in both Article 119 and the Directive. The latter explains the concept outlined in Article 119 and does not alter the scope thereof.¹³⁰ The equality provisions contained in Article 119, read with the Directive, thus align European law with the provisions contained in the Equal Remuneration Convention No 100 of 1951.

126 *Community Law and Women* (1) 7.

127 In *Commission v The United Kingdom* Case 61/81 (1982) ECR 2601/ (1982) IRLR 333 European Ct, the ECJ held that the British Equal Pay Act 1970 did not reflect European law accurately as it did not include the concept of equal pay for work of equal value.

128 Prechal and Burrows 82. The Directive was made under article 100 of the Treaty of Rome which provides for the approximation of laws which directly affect the functioning of the common market.

129 Article 1 of the Directive provides: "The principle of equal pay for men and women outlined in Article 119 of the Treaty, hereinafter called "principle of equal pay", means, for the same work or for work to which equal value is attributed, the elimination of all discrimination on grounds of sex with regard to all aspects and conditions of remuneration. In particular, where a job classification system is used for determining pay, it must be based on the same criteria for both men and women and so drawn up as to exclude any discrimination on grounds of sex."

130 *Worringham v Lloyds Bank Ltd* Case 69/80 (1981) ECR 767/ (1981) IRLR 178 (European Ct); *Jenkins v Kingsgate (Clothing Productions) Ltd* Case 96/80 (1981) ECR 911/ (1981) IRLR 228 (European Ct).

3 The Equal Treatment Directive 76/207 of 1976

The preamble to the Directive recognises that equality between men and women in employment cannot be achieved by ensuring equal pay unless there is also equality as regards access to employment, promotion, vocational training and working conditions. The purpose of the Directive is to initiate community action to ensure equal treatment in these areas.¹³¹

Both direct and indirect discrimination on the ground of sex and marital status are prohibited.¹³² Direct discrimination implies less favourable treatment of a person because she is a woman, or because of a characteristic related only to women, such as pregnancy. Indirect discrimination occurs when an apparently neutral criterion is applied, which in fact results in less favourable treatment of women.¹³³ The Directive also requires the removal of so-called protective legislation which appears discriminatory and is no longer well-founded.¹³⁴ Conflict can arise in this regard as member states may have ratified ILO conventions dealing with protective legislation.

131 Article 1. The Directive was made under article 235 of the Treaty of Rome which enables the Council to take appropriate measures which are necessary to attain one of the objectives of the Community. The reasoning was that equal treatment was necessary to realise the objectives contained in articles 117 and 119 of the Treaty, because equal pay could not be achieved unless occupational segregation was removed (Hepple *The Law of the European Communities* 1200).

132 Article 2(1).

133 The test for indirect discrimination was first formulated by the Court of Justice in *Bilka-Kaufhaus GmbH v Weber Von Hartz* Case 170/84 (1986) ECR 1607/ (1986) IRLR 317 (European Ct). Prechal and Burrows 107 explain the test as follows:

"* does the use of a neutral criterion (for example, part-time workers) affect in effect a larger number of women than men?
 * can the use of the criterion be objectively justified?
 * has the principle of proportionality been respected?"

134 Article 3(2)(c) and article 5(2)(c) require member states to revise provisions concerning special working conditions for women, when the concern which originally inspired them is no longer well founded.

The Directive contains three exceptions to the general principle of equal treatment. It permits member states to exempt occupational activities for which the sex of the worker constitutes a determining factor.¹³⁵ That would be the case where the work to be performed is closely linked to the physical characteristics of one of the sexes, such as an actor or actress, or fashion model. In the United Kingdom, for example, the Sex Discrimination Act 1975 permits a defence to an allegation of sex discrimination where the physical nature of a job, in dramatic performances or other entertainment, calls for a man for reasons of authenticity.¹³⁶ A second exception concerns provisions for the protection of women "particularly as regards pregnancy and maternity".¹³⁷ Although it appears that the exception is intended to protect a physical condition, the ECJ has broadened its ambit by holding that it protects the special relationship which exists between a mother and her child.¹³⁸ Finally, the Directive provides for the possibility of positive action.¹³⁹ In this regard it allows measures to be taken by member states to promote equal opportunities for men and women, by removing existing inequalities which affect women's opportunities.

135 Article 2(2).

136 Section 7(2)(a) of the Sex Discrimination Act 1975.

137 Article 2(3).

138 In *Hofmann v Barmer Ersatzkasse* Case 184/83 (1984) ECR 3047, the ECJ held that the denial of maternity leave to a father under the same conditions that it would have been granted to a mother was legitimate. The decision is criticised by Curtin 81 who states that: "The exclusion of men, as a sex, from caring for their children after a suitable convalescence period after childbirth has expired, is based, it is submitted, on the discriminatory and erroneous belief that women by virtue of their sex have an innate capacity for parenthood which is denied to a man and the lack of which renders a man unsuitable to care for his very young children." See also Fredman 127 for criticism of this decision. In *Johnston v The Chief Constable of the Royal Ulster Constabulary* Case 222/84 (1986) ECR 1651/ (1986) IRLR 263 (European Ct), however, the ECJ held that the exception in article 2(3) of the Directive did not permit women to be excluded from employment because public opinion demanded that women be given greater protection from risks (such as carrying a firearm) that affect men and women in the same way.

139 Article 2(4).

4 The Social Security Directive 79/7 of 1979

The purpose of Directive 79/7 is to ensure the implementation by member states of the principle of equal treatment for men and women in matters of social security. The Directive was adopted in view of the exclusion of statutory social security schemes from the meaning of "pay" in Article 119 of the Treaty by the Court of Justice.¹⁴⁰ The court regarded only occupational social security schemes as "pay" for the purposes of Article 119. The reason is that statutory schemes are not dependent on the employment relationship in the manner that occupational schemes are. While the employer may share in the financing of the scheme, it does not do so by means of a direct or indirect payment to the employee. Employees obtain benefits if they meet the statutory requirements for the grant of benefits.¹⁴¹

The Directive applies to statutory schemes which provide protection against illness, disablement, old age, accidents at work and occupational diseases, unemployment, and to social assistance in so far as it replaces one of the schemes mentioned.¹⁴² A statutory scheme is one which applies to a person because of her status as a worker, and not because she is employed by a particular employer. It is directly governed by legislation, and does not involve any element of agreement between the employer and employee.¹⁴³

The Directive prohibits direct and indirect discrimination on the ground of sex or marital status. It specifically forbids discrimination with regard to the scope of

140 *Defrenne v Belgium* (No 1) Case 80/70 (1971) ECR 445 (European Ct).

141 Laurent 374.

142 Article 3(1).

143 *Prechal and Burrows* 169. These characteristics were indicated by the Court of Justice in *Defrenne v Belgium* No 1 Case 80/70 (1971) ECR 445 (European Ct).

schemes and conditions of access thereto, the obligation to contribute and the calculation of contributions, and the calculation of benefits.¹⁴⁴ But it permits member states to set different retirement ages for men and women for the purposes of granting old age and retirement pensions.¹⁴⁵

5 The Social Security Directive 86/378 of 1986

A second Social Security Directive was adopted to extend the principle of equal treatment for men and women, laid down for statutory social security schemes in terms of the 1979 Directive, to occupational social security schemes.¹⁴⁶ The second Directive, like the first, does not require equality as regards the retirement age of men and women,¹⁴⁷ and permits member states to defer its application to actuarial calculations.¹⁴⁸ Deferment to actuarial calculations based on the sex of an employee rests on the assumption that women as a group live longer than men and therefore stand to obtain benefits for a longer period than men, and that their pension fund contributions and benefits should be adjusted accordingly. The principle has been criticised in the following manner:

"The use of sex-based actuarial data is at first sight incompatible with the principle of equal treatment since the sex of the person concerned becomes a criterion for the calculation of benefits. The next question is, however, whether such unequal treatment cannot be justified on the ground that there is a difference in, for example, life expectancy between the statistically average man and woman. And that is exactly what the Directive accepts. The consequence is that certain characteristics of the whole group become a factor, often the sole one, in determining the individual case: a

144 Article 4(1).

145 Article 7(1)(a).

146 Article 1.

147 Article 9(a).

148 Article 9(c). Deferment is permitted for a period of 13 years.

female worker receives a lower pension than a male even if she dies much earlier, because women as a category seem to live longer. It is hard to accept this justification.¹⁴⁹

Sex related actuarial data have been criticised because, for example, differences in life expectancy between different occupational groups of male employees are not taken into account, other risk factors such as obesity, smoking and the use of alcohol are not taken into account, and the life expectancy of female employees is not necessarily the same as that of the entire female population, which is used as the basis of calculation of longevity.¹⁵⁰

The exclusions in the Directive relating to retirement age and actuarial calculation appear to limit the application of Article 119, in terms of which occupational pension benefits are regarded as pay.¹⁵¹ But the policy of the EEC is that no provision, adopted either by the Community or in terms of national legislation, can limit the protection of Article 119.¹⁵² The reason is that Article 119 is a primary source of community law and takes precedence over secondary legislation, such as directives. As explained above, it also enjoys supremacy over national legislation. This principle was reiterated by the ECJ in 1990 in the decision of *Barber v Guardian Royal Exchange Assurance Group*,¹⁵³ which held that a pension paid under a private

149 Prechal and Burrows 281.

150 Laurent *The Elimination of Sex Discrimination in Occupational Social Security Schemes* 681-682; Prechal and Burrows 281-282. The use of sex based actuarial data has been rejected by the US Supreme Court (*Arizona Governing Committee v Norris* 463 US 1073 (1983); *Los Angeles Department of Water and Power v Manhart* 435 US 702 (1978)).

151 In *Bilka-Kaufhaus GmbH v Weber von Hartz* Case 170/84 (1986) ECR I607 and in *Defrenne v Belgium* Case 80/70 (1971) ECR 445, the Court of Justice found that occupational pension schemes were covered by the concept of pay in Article 119 of the Treaty of Rome.

152 This was established by the ECJ in *Defrenne v Sabena* (No 2) Case 43/74 (1976) ECR 455 (European Ct). See also McCrudden (ed) 4-5.

153 Case 262/88 (1990) JRLR 240 (European Ct).

occupational scheme constituted remuneration and was therefore subject to the equal pay requirements of Article 119 of the Treaty of Rome.

6 Concluding Remarks

Community law establishes rights and obligations for member states and for individuals. It operates on two levels, namely, that of the community (through infringement proceedings against member states), and that of individual member states (through preliminary rulings in cases pending before national courts). Because it takes precedence over national law, member states are required to ensure that Article 119 is applied and that the objectives of the directives are achieved.

The sole reference to sex discrimination in the Treaty of Rome is contained in Article 119. This seemingly inauspicious foundation for equal treatment in employment has been supplemented by several directives seeking to ensure the implementation of the principle of equal treatment by member states. The European Court of Justice plays a dual role by ruling on the alleged failure of member states to fulfill an obligation arising out of their membership of the European Community, and by giving authoritative interpretations of community law for national courts. The body of community rules dealing with sex discrimination has been likened to "a form of

constitutional control over the laws of Member States."¹⁵⁴

154 Curral 27. The author explains that: "Although the Community rules against discrimination in employment were originally included in the EEC Treaty for economic reasons, the case law of the Court of Justice has turned them into superior rules of law in that they override any provisions of national law in Member States which may be inconsistent with them. If their terms so require or allow, and the instrument in which they appear so allows, they may also bind individuals (in this case, private employers) in the Member States, in place of any inconsistent national rule which those individuals may have been applying. Moreover, they can be enforced not only through classic international procedures (Court action by an international organization, in this case the European Commission, against an infringing Member State) but also by the suit of an individual, before any national court in the Member States which has jurisdiction over questions of employment law" (26). Docksey *The Principle of Equality Between Women and Men* 258 ff discusses the principle of equality in European law. He explains that: "The principle of equality enjoys a special status under Community law. The Court of Justice has developed the principle of equality into a fundamental right under Community law, and the Community legislator has made that right available through a wide-ranging legislative code. The consequences of the special status accorded to the principle of equality may be seen mainly through the case law relating to equal treatment in terms and conditions of employment.... Other principles and rights have been recognized by the Court which either conflict with, and must be reconciled with, the principle of equality or are compared and contrasted with it. The result is a constitutional code which controls both national provisions on equality and even other Community provisions.... it raises the challenging constitutional concept of a unique entrenched right against which even statute cannot stand" (258).

CHAPTER FOUR

THE UNITED STATES OF AMERICA

A Introduction

The United States Constitution is an important source of protection against gender discrimination for public sector employees. The first ten amendments to the United States Constitution, the "Bill of Rights", limit federal power. The Fifth Amendment limits the power of the federal government by guaranteeing that no person may be deprived of life, liberty or property without due process of the law, while the Fourteenth Amendment limits the power of state governments in a similar manner.¹ The equal protection clause has been relied on in sex discrimination suits where it has been alleged that certain statutes or governmental actions constitute a denial of equal protection. It was initially assumed that public employment was a privilege not a right, and could therefore be made subject to conditions that would be impermissible if imposed on a member of the general public. But in 1968 the Supreme Court found that public sector employees do not waive the right to assert constitutional protection by accepting public employment.² Sex based classifications will fall foul of the equal protection clause unless they are found to serve important governmental objectives and are substantially related to the achievement of those objectives.³

1 The Fifth Amendment provides: "no person shall... be deprived of life liberty or property, without due process of law..." The Fourteenth Amendment provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny any person within its jurisdiction equal protection of the laws."

2 *Pickering v Board of Education* 391 US 563 (1968).

3 This was the test enunciated in *Craig v Boren* 429 US 190 (1976), where the court found a

Employment discrimination on the basis of sex is also prohibited under numerous federal and most state laws. Title VII of the Civil Rights Act of 1964 is the primary federal law that protects employees against discrimination based on sex.⁴ The Act covers private businesses with 15 or more employees, state and local governments, and educational institutions. Labour organisations may be charged with a failure to represent members in a non-discriminatory manner. Employment agencies may not refuse to refer applicants for employment because of their membership of a protected class. The Equal Employment Opportunity Commission (EEOC) was established in terms of Title VII. From its establishment in 1964 until 1972 the role of the commission was regulatory in nature. Enforcement was the domain of the Department of Justice and individuals who filed charges under the Act. In 1972 the Act was amended to grant the commission enforcement powers. These powers provide the EEOC with the authority to file actions in federal district courts on behalf of employees who are believed to have been the victims of discriminatory acts. Individuals retain a private right of action, even in instances where the EEOC investigates a charge and determines that no violation has occurred.⁵

statute which prohibited the sale of beer to males under the age of twenty-one and to females under the age of eighteen to be unconstitutional because it violated the equal protection clause. Wagner 364 states that the test asks two questions regarding statutes which discriminate on the basis of sex. First, is the purpose of the statute important? Second, are the means created by the statute substantially related to the objective?

- 4 Title VII protects employees against discrimination on the grounds of race, colour, religion and national origin, as well as sex. In this study reference will be made only to discrimination on the ground of an employee's sex. Although both male and female employees are protected, this discussion will focus on discrimination against female employees. The prohibition of sex as a basis for employment discrimination was added to Title VII two days prior to the initial passage of the Civil Rights Act in 1964. It is ironic that it was added in an attempt to derail Title VII by extending the prohibitions contained therein (see Gregory and Katz 546- 549; Donohue 1337- 1338).
- 5 Three means of enforcement of Title VII are possible, namely, administrative enforcement by the EEOC, private action by aggrieved individuals, and class action suits where an individual who alleges that she has been the victim of discrimination by her employer, claims to represent a class of persons who have suffered the same injury (see Terrell 292).

The Equal Pay Act of 1963 (EPA), which is also a federal statute, prohibits discrimination based on sex with regard to the payment of wages.⁶ Title VII is broader than the EPA as it prohibits any form of discrimination in the workplace including wage discrepancies. Thus while a violation of the EPA is also a violation of Title VII, the converse is not true. Title VII encompasses hiring, promotion, firing and all conditions of employment. The EPA does not apply to certain businesses engaged in retail sales, fishing, agriculture and newspaper publishing which are covered by Title VII. The most significant difference regarding the scope of application of the two statutes pertains to the minimum number of employees requirement. Under the EPA only two employees, one male and one female, are required for court jurisdiction, while Title VII requires a minimum of 15 employees. The two employees need not be employed simultaneously, but may precede or follow one another. Enforcement of the EPA is the domain of the EEOC.⁷

On the federal level, in addition to the above legislation, a series of Executive Orders has been adopted to regulate the employment practices of employers who do business with the United States government. This series of Executive Orders is generally referred to as the programme adopted under Executive Order 11246.⁸ Discrimination based, *inter alia*, on the sex of an employee is prohibited.⁹ Require-

6 Other grounds of discrimination, such as race, colour, national origin and religion, do not fall within the scope of the Act.

7 In addition to Title VII of the Civil Rights Act of 1964 and the Equal Pay Act of 1963, other federal statutes prohibit gender based employment discrimination. These include the Civil Rights Act of 1871, which prevents persons from acting under the auspices of state laws to deprive others of federally protected rights which include employment rights, the State and Local Federal Assistance Act of 1972 (generally referred to as the Revenue Sharing Act), which prohibits any state or local government receiving federal revenues from discriminating *inter alia* on the ground of sex, and the Civil Rights Act of 1991. The emphasis in this study will be on the provisions of Title VII and the Equal Pay Act, as those are the primary statutory sources of employment discrimination law.

8 Goldman 122.

9 Other prohibited grounds are race, religion, national origin and age.

ments similar to those imposed by Title VII and the Equal Pay Act are imposed. Federal contractors and federally assisted contractors are also required to take positive steps to hire, train and promote qualified or qualifiable minorities and women. The Office of Federal Contract Compliance Programmes of the US Department of Labour is the agency responsible for administering affirmative action programmes under the Presidential Executive Orders.¹⁰

In addition to the above federal laws, many states have enacted fair employment laws. These state laws are comparable to federal legislation in two respects. First, they tend to protect the same groups and to prohibit the same types of discrimination, but do so on a broader basis. They tend, for example, to cover small businesses with fewer than 15 employees (the minimum required for Title VII protection). State law is thus an important source of protection for employees of small employers who are not covered by federal law. Secondly, certain state laws cover additional groups and prohibit, for example, discrimination on the ground of marital status and sexual preference.¹¹ Title VII does not pre-empt the application of state law that is consistent with or expands upon rights granted by Title VII. But state law may not curb the rights granted by Title VII.¹²

This study will consider the federal laws referred to above, which prohibit gender based discrimination in employment.¹³ As the Title VII of the Civil Rights Act is

10 Jain and Sloane 81.

11 For a discussion of the problems and prospects relating to state fair employment laws, see Leap and Grigsby 808- 815.

12 Section 708 of Title VII provides: "Nothing in this title shall be deemed to exempt or relieve any person from any liability, penalty, or punishment provided by any present or future law of any State or political sub-division of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this title.

13 As this study will consider only federal legislation, court decisions will generally be limited to federal decisions. The federal court system consists of three main divisions, namely, the

the primary statute under which employment discrimination principles have been formulated, the emphasis will be on that statute. Constitutional law is an independently recognised subject and will not be considered within the limited bounds of this study. The vast area of state fair employment laws is also beyond the scope of this study.

B Title VII of the Civil Rights Act 1964

1 Coverage and Scope

Title VII provides for equality of rights of men and women both prior to employment (that is, applicants for employment) and during employment. Its purpose is to ensure that all persons are given equal opportunity to acquire employment, and that individuals retain and advance in their jobs in an atmosphere free of sexual bias.

Title VII applies to employers, labour organisations and employment agencies. An employer is defined as a person whose business affects commerce and who employs fifteen or more employees working each day for twenty weeks in the current or preceding year.¹⁴ Employee is defined simply as an individual employed by an employer.¹⁵ The effect of this definition is to exclude independent contractors.¹⁶

Supreme Court (the highest court), the Courts of Appeals (intermediate courts), and the District Courts (courts of original jurisdiction). For an illustration of the United States court system, see Jacobson and Mersky 39.

14 Section 701(b).

15 Section 701(f).

16 Maikovich and Brown 11-12 explain that the test to determine whether or not an individual is an employee is a combination of the "right to control" test, which focuses on the employer's right to determine the manner in which work is to be completed, and the "economic realities" test, which considers the degree of economic independence maintained by a worker. These tests have been combined to create a "totality of the circumstances" test, consisting of twelve factors, namely, 1) the right to control the worker's performance; 2) the type of occupation involved; 3) the skill required by the occupation; 4) the place of work and the person who

Title VII contains few employer exceptions. The only express exclusions from the definition of employer are bona fide private membership clubs and Indian tribes.¹⁷ Religious organisations with the requisite fifteen employees are defined as employers and may not discriminate on any of the defined grounds. They may, however, elect to employ only individuals of a particular religion.¹⁸ Federal employers, except for those specifically enumerated, are excluded from the provisions of the Act.¹⁹ State and local governments are not excluded. Thus a state or local government will be regarded as an employer, provided that it has fifteen or more employees. High level employees, such as supervisors, managers and professionals are not excluded from statutory protection. However, certain positions which are inherently not those of an employee, such as a corporate director, will fall

furnishes the equipment; 5) the length of time worked by the individual; 6) whether payment is by time or by job; 7) the manner in which the relationship is to be terminated; 8) whether annual leave is given; 9) whether the work is an integral part of the "employer's" business; 10) whether the worker accumulates retirement benefits; 11) whether the "employer" pays social security taxes; and 12) the intention of the parties.

- 17 Section 710(b). The EEOC accepted Webster's Dictionary definition of "club" and the definition of the court in *Quijano v University Federal Credit Union* 617 F.2d 129 (5th Cir 1980), which defined it as: "...an association of persons for social and recreational purposes or for the promotion of some common object (as literature, science, political activity) usually jointly supported and meeting periodically, membership in social clubs usually being conferred by ballot and carrying the privilege of the use of club property." *Player 210* states that the exclusion of Indian tribes pertains to semi-sovereign entities of indigenous Americans recognised by federal law. The term "Indian tribe" is not defined by Title VII.
- 18 Section 702 provides: "This title shall not apply... to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activity.
- 19 Although federal employers are excluded from the definition of employer in section 701(b), section 717(a) prohibits employment discrimination in military departments, executive agencies, the United States Postal Service and Postal Rate Commission, the government of the District of Columbia in positions subject to the civil service, units of the legislative and judicial branches subject to the competitive civil service, and the library of congress. Furthermore, public sector employees retain all constitutional rights. Gender classifications in particular are subject to scrutiny by the courts and are permissible only if they bear a close relationship to important governmental objectives.

outside the scope of Title VII.

Title VII makes it unlawful for an employer to discriminate against any individual because of the individual's sex, regarding hire or discharge, or with respect to compensation, terms, conditions or privileges of employment. An employer may not limit, segregate or classify its employees on the basis of sex in any manner which would affect their employment opportunities or status adversely.²⁰

Title VII also makes it unlawful for a labour organisation to discriminate against individuals.²¹ The definition of labour organisation is broad and includes virtually any organisation which deals with employers concerning grievances, labour disputes, wages, hours or other terms and conditions of employment.²² A labour organisation may not expel or exclude any individual from its membership on the basis of the individual's sex; nor may it limit, segregate or classify its membership or refuse to refer any individual for employment in any manner which would deprive that individual of employment opportunities. Finally, it is unlawful for a labour organisation to cause or attempt to cause an employer to violate the Act.²³ An organisation with fifteen or more employees will be regarded as an employer.

In terms of Title VII, employment agencies may not fail or refuse to refer any individual for employment or classify or discriminate in any manner against an individual because of the sex of the individual.²⁴ An agency may not initiate its own dis-

20 Section 703(a).

21 Section 703(c).

22 Section 701(d). Player 217 notes that the two key elements for coverage of most unions will be, first, whether the organisation has fifteen members and, secondly, whether it is certified as a bargaining representative under the labour statutes or, alternatively, whether it is chartered by a parent organisation seeking to represent employees of an employer (see section 701(e)).

23 Section 703(c).

criminary referrals nor honour discriminatory requests made by employers.²⁵

2 Enforcement Procedures

It has been stated that the effectiveness of equal employment opportunity laws, such as Title VII, "depends not just upon their passage, but also upon their continuing, successful mobilisation."²⁶ Title VII is administered and enforced (indirectly, through federal courts) by the EEOC.²⁷ An aggrieved individual may institute a claim in a federal court once the commission has relinquished its right to sue.²⁸ The following mission statement by the commission sums up its thinking with regard to its responsibilities:

"(The EEOC will) ensure equality of opportunity by vigorously enforcing federal legislation prohibiting discrimination in employment through investigation, conciliation, litigation, coordination, regulation in the federal sector, and through education, policy, research, and provision of technical assistance"²⁹

The EEOC has three major functions.³⁰ The first is to investigate and attempt to conciliate alleged violations of the Act. A complainant must invoke the investiga-

24 Section 703(h).

25 Player 222.

26 Burnstein and Monaghan 355.

27 The EEOC also administers the Age Discrimination in Employment Act 1967, the Equal Pay Act 1963 and section 501 of the Rehabilitation Act 1973.

28 Sections 706 and 707 of the Act provide a complicated array of administrative pre-trial steps which must be taken by an aggrieved party on both state and federal level within the statutory time periods. A detailed discussion of these steps can be found in Player 470- 504, and in Shulman and Abernathy 7-3 - 8-83. Lynch 94- 97 provides a useful synopsis.

29 Cited in Webb 387.

30 The powers of the EEOC are enumerated in section 705(g). They are discussed by Player 200.

tory and conciliatory machinery of the EEOC.³¹ If the EEOC finds reasonable cause to believe that discrimination has occurred, it attempts to resolve the matter through informal negotiation and conciliation.³² If conciliation is unsuccessful the commission may institute a civil action. If it does not do so, for example, because it does not reasonably believe that discrimination has occurred, the complaining party is informed of her right to bring a private judicial action.³³ No such right exists until the EEOC has relinquished its right to sue. The procedure ensures that all private claims are subjected to the commission's attempts at investigation and conciliation.

The second important function of the EEOC is enforcement. The commission may file a civil suit in its own name in a federal district court to terminate unlawful employment discrimination, and to secure relief for the victim(s) of such discrimination.³⁴ Where numerous employees allegedly suffer a common or similar wrong at the hands of their employer, the commission may institute an action on behalf of the class. The EEOC has no direct enforcement power.

The third major function of the EEOC is an interpretative one. It issues official guidelines which interpret significant provisions of Title VII.³⁵ These guidelines do not have the force of law, but are considered by the courts.³⁶ The courts will not

31 Section 706 sets out the steps which are to be followed.

32 Section 706(b).

33 Section 706(f).

34 Section 706(f).

35 These include guidelines, for example, on Sex Discrimination (29 CFR Part 1604); Testing and Employee Selection (29 CFR Part 1607); and Affirmative Action (29 CFR Part 1608).

36 For example, in *Griggs v Duke Power Company* 401 US 424 (1971) and in *Abernethy v Moody* 422 US 405 (1975), the Supreme Court followed the commission's guidelines on testing. Shulman and Abernathy 1-22 observe that the courts' 'deference to the commission's rule making efforts has at times been high, sometimes virtually absolute'.

consider guidelines which are inconsistent with Title VII or which do not reflect the original meaning of the Act.³⁷

Class actions provide an effective method of enforcing Title VII and may be instituted by an individual or by the EEOC.³⁸ An aggrieved individual must satisfy four requirements in order to be certified as a class representative. She may sue her employer as a representative of a class, first, if the class is so numerous that the joinder of all members is impracticable. Secondly, questions of law or fact must be common to the class. Thirdly, her claim must be typical of the claims of the class. Finally, she must fairly and adequately protect the interests of the class.³⁹ In addition to the class representative meeting these criteria, her action must fall into one of three categories. In the first instance, separate actions by individual members of the class should create a risk of inconsistent adjudications. Secondly, the employer should have acted on grounds generally applicable to the class, making relief with respect to the class as a whole appropriate. Thirdly, questions of law or fact common to members of the class should predominate over questions affecting individual members.⁴⁰ The Supreme Court has held that the EEOC may seek class wide relief without being certified as a class representative in the manner outlined above.⁴¹

Finally, it may be mentioned that the Civil Rights Act 1991 encourages alternative dispute resolution in discrimination cases. Measures proposed include negotiation, conciliation, mediation and arbitration.⁴²

37 *General Electric Company v Gilbert* 429 US 125 (1976).

38 Class action suits are governed by Rule 23 of the Federal Rules of Civil Procedure.

39 Section (a) of Rule 23.

40 Section (b) of Rule 23.

41 *General Telephone Company v EEOC* 446 US 318 (1980).

42 Weir 6.

3 What is Discrimination?

The term discrimination is not defined in the Act. Section 703(a) provides:

"It shall be an unlawful employment practice for an employer-

- (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's... sex...; or
- (2) to limit, segregate or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's... sex...."

In terms of the section, two elements are required to establish discrimination. The first is an act which discriminates in some manner, and could involve a refusal to hire, a discharge or some other action which limits, segregates or classifies. Secondly, it must be proved that the act occurred "because of" membership of a protected class. The courts have interpreted the latter requirement in such a manner that it can be satisfied by proving disparate treatment of employees within the protected class, or by establishing that an employment practice has a disparate impact on a specified class of employees.⁴³ In *International Brotherhood of Teamsters v United States*⁴⁴ the Supreme Court defined disparate treatment and disparate impact discrimination as follows:

"Disparate treatment" such as is alleged in the present case is the most easily

43 The disparate treatment and disparate impact models were originally formulated by the courts in cases decided under Title VII. Although the Act prohibits discrimination by employers, trade unions and employment agencies, the majority of cases have dealt with discrimination by employers. It should, however, be borne in mind that the principles discussed are applicable in cases of discrimination by any of the three entities (see Brierton 160; Cox 9-1).

44 431 US 324 (1977).

understood type of discrimination. The employer simply treats some people less favourably than others because of their... sex.... Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment.... Undoubtedly disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII....

Claims of disparate treatment may be distinguished from claims which stress "disparate impact." The latter involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity.... Proof of discriminatory motive, we have held, is not required under a disparate impact theory.... Either theory may, of course, be applied to a particular set of facts."

These two theories of discrimination will now be discussed.

a Disparate Treatment

Disparate treatment occurs when an employer intentionally treats an employee differently because that employee is a member of a protected group, such as the female sex.⁴⁵ The disparate treatment model consists of three elements, namely unfavourable treatment (the discriminatory act), impermissible motive (the discriminatory motive), and causation. With regard to the first element, it has been suggested that the treatment need not be unfavourable, but need only be different.⁴⁶ This argument conflicts with the definition of disparate treatment formulated in *International Brotherhood of Teamsters v United States*⁴⁷, where the court specifically stated that disparate treatment occurs where an employer treats some people less favourably than others. It is most improbable, in any event, that an employee who is treated differently but favourably by her employer would charge the employer with discrimination.

45 Cox 6-5 explains that the model encompasses a narrow category of employer conduct which treats an employee differently than that employee would be treated "but for" the employee's sex.

46 Brooks 221.

47 431 US 324 (1977).

An employee complaining of disparate treatment must prove intent in the sense that the employer's motive was to discriminate. She may do so by showing that the employer was motivated by a desire to bring about the (discriminatory) consequences of its actions, or that those consequences were the natural, probable, foreseeable or inevitable consequences of a particular action.⁴⁸ The most obvious form of disparate treatment occurs where an employer has one rule or standard for male employees and another for female employees. Overt distinctions of this nature are commonly referred to as facial distinctions.⁴⁹ In *Phillips v Martin Marietta Corporation*,⁵⁰ for example, the employer's policy was not to hire women with pre-school age children, while the rule was not applied to men. The court held that the policy constituted an unlawful employment practice, as an employer could not have one hiring policy for women and another for men.⁵¹ Disparate treatment may be covert. An action based on a rule which appears neutral, such as a minimum height or weight requirement for all prospective employees, will amount to disparate treatment if it was adopted by an employer with the purpose of placing female employees at a disadvantage.⁵² In *Price Waterhouse v Hopkins*⁵³ the court found that sexual

48 Cox 6-6 illustrates the point by means of the following example: "An employer who adopts a high school diploma requirement as a prerequisite for employment may recognise that the requirement will exclude more minority applicants from employment than white applicants.... The employer may therefore be said to have intended to exclude minorities from employment in the sense that the foreseeable or inevitable consequence of adopting the requirement was exclusion of minorities. The employer was not, however, motivated by a desire to exclude minorities unless the employer's reason for the diploma requirement was the exclusion of minorities."

49 Player 225.

50 400 US 542 (1971).

51 Player 325 states that the decision implies that an employer may not have a set of rules relating to marriage, childbirth, living arrangements or morality for one gender which is not applied to the other.

52 *Dothard v Rawlinson* 433 US 321 (1977). In *Kilgo v Bowman Transportation Incorporated* 789 F.2d 859 (11th Cir 1986) the court held that an employer which instituted a prior experience requirement with the intention of eliminating females from its work force, committed an unlawful employment practice, notwithstanding the apparent rationality of the requirement. A neutral rule which places females at a disadvantage will not constitute disparate treatment where an employer does not intend to discriminate. A disparate impact claim may then be

stereotyping could constitute disparate treatment.⁵⁴ The court, however, required sexual stereotyping by the employer's decision makers, as opposed to statements by non-decision makers and stray remarks.

An employee relying on disparate treatment is faced with the task of proving that prima facie the treatment was due to the discriminatory motive of the employer. A causal link must be established between the action of the employer and the proscribed motive. The link may be direct, for example, where a female applicant is rejected for a position or a promotion with the words "the position is not suitable for women".⁵⁵ Where the nexus is not direct, it may be possible to infer. That would be the case, for example, where a position was advertised in a manner which made it apparent that only men were intended to apply, and a female applicant was subsequently rejected. Disparate treatment may relate to an individual or may be systematic. In an individual disparate treatment case the question will be whether a particular employee was intentionally discriminated against on a particular occasion.

brought.

53 109 SC1 1775 (1989).

54 Hopkins was employed as a senior manager in the accounting firm of Price Waterhouse. The partners in her firm refused to propose her for partnership because they viewed her as macho, as attempting to over-compensate for being a woman, and requiring a course at charm school. The partner who explained the partners' decision to Hopkins told her that she could improve her chances of promotion if she walked, talked and dressed more femininely, wore make-up and had her hair styled. This was held by the court to constitute illegal stereotyping. Terrell 298 observes that stereotyped assumptions tend to take on two forms. The first consists of unwarranted assumptions concerning an entire class (such as the assumption that women tend to be more nurturing than men or instill more confidence in those under their care). The second consists of assumptions or conclusions which may be true of the class in general, but do not necessarily apply to all members of that class (such as the ability of women to lift heavy weights).

55 Direct evidence of this nature is referred to as smoking gun evidence. An example of such evidence (in a racial context) is to be found in the case of *Wilson v City of Aliceville* 779 F.2d 631 (11th Cir 1986) at 633 in which the mayor of the city of Aliceville allegedly stated that "he wasn't going to let no Federal Government make him hire no god-dam nigger."

In the case of systematic disparate treatment the issue is whether the particular conduct complained of is the employer's standard operating procedure (and is applied with a discriminatory motive). Typically, a class of employees as opposed to an individual will have been affected, and some aspect of an employer's employment system will be scrutinised.⁵⁶

In *McDonnell Douglas Corporation v Green*⁵⁷ the US Supreme Court developed a four step process by which the establishment of a prima facie case of disparate treatment is to be analysed where there is no direct evidence of an intention to discriminate. The case dealt with the failure to hire a job applicant, but the test has subsequently been modified to a variety of employment situations.⁵⁸ A prima facie case of discrimination against a female employee will be established if the complaining party shows: 1) membership of a protected group, that is, she is a female employee; 2) that she either is qualified for the job sought or is performing the job satisfactorily; 3) despite these qualifications, she suffers an adverse employment action; 4) a similarly situated employee who is not a member of the protected group does not suffer the adverse action.⁵⁹ The existence of the first element is self-evident. The second element does not require proof of a high standard of performance such as perfect or even average performance. All that is required of an employee is proof of performance at a level which has been tolerated by the employer in the past.⁶⁰ A prospective employee is required to show minimal com-

56 *International Brotherhood of Teamsters v United States* 431 US 324 (1977). Cox 6-22 points out that the systematic disparate treatment model will generally be used to establish a long term pattern of discrimination.

57 411 US 792 (1973).

58 *Maikovich and Brown* 35.

59 *Goldman* 117.

60 *Maikovich and Brown* 35 point out that for a current employee all that is required is some showing of satisfactory performance.

petency for the position sought. The third and fourth steps are met by showing that a male employee in a similar situation received better treatment from the employer.

A question which arises with regard to the last two steps relates to the standard of causation required by Title VII. As has been stated, disparate treatment discrimination implies unfavourable treatment of an employee "because of" her sex.⁶¹ In an early disparate treatment case,⁶² the Supreme Court applied the so-called "taint standard" in terms of which unfavourable treatment of an employee was viewed as having been caused by an employer's impermissible motivation if the unfavourable treatment was touched by or tainted by impermissible motivation. The court later held that the proper causation standard was, in fact, more exacting than the liberal taint standard. It adopted a "but for" causation standard, in terms of which an employee was required to show that but for her sex the employer's adverse decision would not have been taken.⁶³ More recently, in a mixed motive case, that is, one in which the employer's decision was motivated by both permissible and non-permissible criteria, the Supreme Court adopted the "substantial factor" test, in terms of which an employee is required to prove that her unfavourable treatment was substantially motivated by an impermissible criterion.⁶⁴ This is clearly a more

61 Section 703(a)(1).

62 *McDonnell Douglas Corporation v Green* 411 US 792 (1973).

63 *McDonald v Santa Fe Trail Transportation Company* 427 US 273 (1976). The "but for" standard was again applied in *Newport News Shipbuilding and Dry Dock Company v EEOC* 462 US 669 (1983) in which the court held that the provision of different insurance coverage to male and female employees constituted a violation of Title VII in that it is a distinction which would not have occurred but for the sex of the employees.

64 *Price Waterhouse v Hopkins* 109 SCt 1775 (1989). The phrase "mixed motive" implies that the employer's decision was based not only on sexual considerations. In this case the decision not to promote the employee was based on sexual stereotyping (she was told to walk, talk and dress more femininely), as well as her inability to interact with subordinates. Rohlik 61 explains that the "finding of sexual stereotyping and of interpersonal problems makes this a "mixed motive case", one of both illegitimate and legitimate motives."

rigorous test for an employee to satisfy than the taint test.

In determining whether an employee has established a prima facie case the courts have not overlooked statistical evidence. The use of statistical evidence has been approved in class actions and in individual discrimination claims where employees have not relied solely on that evidence.⁶⁵ The role of statistical evidence in an individual sex discrimination case was considered in *Davis v Califano*.⁶⁶ There a female chemist alleged unlawful discrimination against her in hiring, promotions and other conditions of employment. She alleged that her rate of promotion was lower than that of male chemists with less time in the particular job grade than she had, and that she had been passed over for promotion on several occasions. The court found that she had established a prima facie case and, holding that statistical evidence could be used to prove a prima facie case in an individual employment discrimination action, stated that statistical data need only include the minimum objective qualifications necessary for the position sought. As there were no minimum objective qualifications for the position, the employee's statistics showing that the upper grade and salary structures at the particular organisation were overwhelmingly made up of male employees was regarded as adequate to establish a prima facie case.⁶⁷

65 In *International Brotherhood of Teamsters v United States* 432 US 324 (1977), the court stated at 339: "Statistics showing racial or ethnic imbalance are probative in a case such as this one only because such imbalance is often a telltale sign of purposeful discrimination; absent explanation, it is ordinarily to be expected that non-discriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition in the community from which the employees are hired." In *Kinsey v First Regional Securities Incorporated* 557 F.2d 830 (DC Cir 1977) the court held that an individual claim, as opposed to a class action, did not alter the probative value of evidence of an employer's practices, policies or patterns relative to a determination of whether discrimination existed in a specific case. It also stated that statistical evidence was valid in upper level job discrimination cases, provided that the relevant labour pool was accurately defined as to those persons possessing the qualifications which the employer sought. See also *Funico Construction Corporation v Waters* 438 US 567 (1978).

66 613 F.2d 957 (DC Cir 1979).

67 In general the proper pool of comparison, that is, the sets of figures to be examined, has been regarded as being the relevant labour market (*Hazelwood School District v United States* 433 US 299 (1977)). In the present case the higher level positions at the organisation were filled

After an employee has made out an initial prima facie case, an employer must formulate a non-discriminatory reason for its action.⁶⁸ This can be done by means of objective evidence, such as attendance or performance records.⁶⁹ Rebuttal of the employee's prima facie case by the employer will differ depending on whether the issue is one of individual disparate treatment or systematic disparate treatment. In an individual discrimination case the employer is required to formulate a legitimate, non-discriminatory reason for its conduct. In the case of systematic disparate treatment the employer's response is similar in form to the employee's statement. It provides figures which account for the disparities which the employee disclosed in its prima facie case. The effect of legitimate factors on the composition of the work force or pool of affected employees is thus examined.⁷⁰

The employer's response returns the burden to the employee, who may attempt to show that the articulated response is a pretext for discrimination, that is, that the rationale is a guise to cover up the employer's discriminatory motive. This can be done by proving that the rationale is unworthy of belief, or by showing that discriminatory factors were an additional motivating cause for the employer's actions. An employee's claim will fail if the employer's actions were taken as a result of good faith business decisions, irrespective of whether such decisions are correct or incorrect - in such a case the employee will have failed to show discriminatory motive. An employee will also fail to show that there is a pretext for discrimination where she simply explains the employer's articulated response, for example, where

from within, and the court regarded the organisation itself as the relevant labour market.

68 *McDonnell Douglas Corporation v Green* 411 US 792 (1973); *Texas Department of Community Affairs v Burdine* 450 US 248 (1981).

69 *Maikovich and Brown* 37.

70 *Cox* 6-25 - 6-26.

she provides an explanation for poor work performance.⁷¹

*McDonnell Douglas Corporation v Green*⁷² is generally regarded as the landmark decision regarding the nature of the burden of proof in disparate treatment cases. The decision sets out the requirements for the establishment of a prima facie case of intentional discrimination by an employee. Thereafter, it is stated, the employer bears the burden of showing that it had a non-discriminatory reason for taking the action complained of. It appears from cases following the decision that the courts had difficulty agreeing on the nature of the employer's burden of proof following the establishment of a prima facie case by the employee.⁷³ The confusion regarding the employer's burden of proof was resolved in *Texas Department of Community Affairs v Burdine*,⁷⁴ where the court ruled that once an employee has established a prima facie case, the burden which shifts to the employer is to rebut the presumption of

71 *Maikovich and Brown* 38-40. Weir 2 sums the position up as follows: "In every Title VII discrimination case, there were three aspects to the burden of proof. The employee had to initially prove a prima facie case.... If this so-called prima facie case were established, it became the burden of the employer to prove that there were some legitimate business reasons why the employment action was taken. Once a legitimate business reason was articulated by the employer, plaintiff had the ultimate burden to show that the discriminatory reason was more likely than not the motivating factor in the decision, or that the employer's proffered business explanation was not believable. The employee could do this in several forms: (a) statistical proof showing a significant adverse impact on members of the protected class; (b) actual admissions of legal intent by authorized agents of the employer; (c) anecdotal testimony, usually statements made by supervisors tending to show legal intent, eg "that all blacks are just lazy", or "the old gal's lost it"; (d) evidence which tends to show that the employer's business reason is untrue, and the only reason to lie is to cover up discrimination; and (e) inconsistent statements by someone who speaks for the employer."

72 411 US 792 (1973).

73 *Cohen* 723. Terrell 290 states: "Unfortunately, the theories behind the concepts of prima facie case and burdens of proof are vague, and have thus generated much confusion and controversy. Evidencing this muddle are at least eight Supreme Court decisions in the last twelve years discussing the burden of proof in employment discrimination cases. The confusion and controversy have centered around the defendant's burden of proof, attempts to distinguish between burdens of persuasion and burdens of production, orders of proof and rebuttal, rebuttals and affirmative defenses, and burdens of proof and presumptions. Attempts to resolve these issues have often fallen short of that goal, frequently shifting the blame rather than clarifying the law."

74 450 US 248 (1981).

discrimination by producing evidence that the employee was rejected or someone else preferred for a legitimate non-discriminatory reason. But the employee retains the burden of persuasion and is granted an opportunity to demonstrate that the reason advanced by the employer was not the true reason for its action. In terms of the decision, the ultimate burden of persuading the court that she has been the victim of intentional discrimination thus remains with the employee.⁷⁵ However, the more recent decision of *Price Waterhouse v Hopkins*,⁷⁶ a mixed motive case, did not apply the same standards of proof as those utilised in the *Burdine* decision. Instead the court required something more of the employer than the mere articulation of a legitimate non-discriminatory reason for its action, namely, that it should prove that it would have made the same decision even if it had not allowed gender to play a role. The employee, however, retains the ultimate burden of proving that gender did play a role in the employment decision.

b Disparate impact

An employer is generally required to apply the same job requirements and conditions to all employees and applicants for employment (provided that it does not do so with the intention of discriminating.) But many common requirements, such as minimum education requirements and testing procedures, may have unequal effects on various groups even though they are imposed on all alike.⁷⁷ As a result of these

75 As Cohen 724 observes, the decision supports the thinking that employers in disparate treatment cases are not required to prove the absence of discrimination, while the employee retains the burden of proving intentional discrimination. Terrell 308 states that the employer is required "to do something more than merely deny discrimination, but to do something less than prove non-discrimination". See also Hawk 436- 437.

76 109 S.Ct 1775 (1989).

77 A variety of employment policies may have an adverse or disparate impact on protected classes of employees. However, a great deal of case law concerns employer policies and criteria for the selection of individuals for employment and for promotion. Title VII does not forbid the use of professionally developed employment tests by employers, "...provided that such test, its administration or action upon the results, is not designed, intended or used to dis-

concerns the US Supreme Court first articulated the concept of disparate impact in *Griggs v Duke Power Company*.⁷⁸ In terms of this concept a facially neutral rule that results in different classes of employees being treated differently is an act of discrimination. Unlike disparate treatment, disparate impact requires no proof of intentional discrimination.⁷⁹ An employment policy which has an adverse impact on female employees will be unlawful unless justified by business necessity. The employee is required to provide prima facie proof of adverse impact. The employer may then attempt to show that the particular policy or requirement is job related, that is, that it is a business necessity. If the employer succeeds, the employee may attempt to show that although the policy is job related, it does not constitute a business necessity because an alternative device exists which has a lesser adverse impact, while still protecting the employer's interests.⁸⁰

Various employer practices and policies may lead to allegations of disparate impact by employees. However, the context in which this has occurred most frequently is that of selection procedures for hiring and promotion. In *Griggs v Duke Power Company*,⁸¹ the court ruled that the educational requirement (a high school diploma)

criminate..." (section 703(h)). For a discussion of employment test practices, see Hancy 1- 86.

78 401 US 424 (1971).

79 The concept may at first glance appear not to differ from the systematic disparate treatment model. The key difference concerns the motive of the employer. The employee is not required to prove any discriminatory motive by the employer in order to establish a prima facie case of disparate impact. Cox 7-1 explains: "In conception, the model renders employer motive immaterial, for a facially ... gender neutral criterion adopted for reasons wholly independent of ... gender may be rendered unlawful under the model if it generates disproportionate ... gender effects. The prohibition, in short, is a prohibition of insufficiently justified disparate consequences."

80 Schlei and Grossman 91- 92. The authors refer to a test having comparable business utility (92).

81 401 US 424 (1971).

and the employment tests utilised by the employer to select individuals for hiring and promotion were unlawful because they had the consequence of disproportionately excluding a protected class, while they bore no relationship to the jobs in question.⁸²

A disparate impact inquiry is limited in the sense that the policy complained of must concern an employer's standard procedure under given circumstances and not random or sporadic acts. The latter must be considered under disparate treatment. The impact of a particular policy is determined by comparing the number of female employees or applicants for employment affected thereby with the total number of affected individuals. A statistical analysis is thus made.⁸³ As identification of each member or potential member of the available work force is impossible, a proxy is utilised as the unit of comparison. The issue is how to choose the appropriate proxy. Should all potential applicants or employees form the unit of comparison, or should only those employees or applicants for employment actually affected be considered? These two units of comparison have been termed "applicant pool" and "applicant flow", respectively.⁸⁴ In *Dothard v Rawlinson*⁸⁵, the applicant pool was considered in order to establish the adverse impact of a state statute imposing minimum height and weight requirements for state prison guards. The court relied on national

82 Jain and Sloane 81. An employer is thus required to show that tests which lead to a disparate impact provide an indication of job performance.

83 *International Brotherhood of Teamsters v United States* 431 US 324 (1977) established that statistical patterns could be used to establish illegal motivation. *Hazelwood School District v United States* 433 US 299 (1977) approved the *Teamsters* model and accepted the standard deviation theory in terms of which statistical disparities of more than three deviations (which equates to a five percent possibility of occurring by chance) would usually be regarded as supporting a disparate impact claim. The theory is a complex one and is explained by Player 343-352.

84 Player 357 - 361. Cox 7-8 distinguishes between the external population and the sub-population actually subjected to the challenged criterion.

85 433 US 321 (1977).

height and weight statistics of men and women, which disclosed that the standards would exclude 41% of females in the US and only 1% of males, to establish the adverse impact of the requirement on women. The unit of measurement was thus the female population as a whole, to the extent that that population was assumed to possess the requisite qualifications other than the challenged height and weight requirements.⁸⁶ The applicant pool must be defined in terms of the geographical area from which the employer is likely to receive applications, and the persons in that area who are qualified to hold the job. In *Griggs v Duke Power Company*⁸⁷ the court also utilised the applicant pool method. The applicant pool was limited geographically to persons residing in the state in which the employer's business was located. As the job required no special skills, the court placed no limit on the persons deemed to be qualified to hold the particular job. The court found that the employer's requirement of (inter alia) a high school diploma had a disparate impact on a protected group residing in the state.

The disproportional impact of an employer policy must be substantial in order for an employee to succeed in establishing a prima facie case.⁸⁸ The courts have referred to a significant difference in selection or disqualification rates for men and women.⁸⁹ Because the court is looking for substantially disparate effects rather than

86 Gold 442 questions the use of the national population as a proxy for the available work force. He points to practical problems in the context of the particular case: "One may harbor serious doubt that the women in the available work force for prison guards had the same height and weight characteristics as the national averages for women. In the first place, women who are willing and able to be prison guards are probably taller and heavier than average. In the second place, such women are probably younger than average, and young women in America are probably taller and heavier than their mothers and grandmothers."

87 401 US 424 (1971).

88 *Maikovich and Brown* 55 explain the requirement as follows: "In layman's terms, statistics must not only raise one's curiosity, they must convince a reasonable person that there is almost no possibility that the results came about by chance."

89 In *Abermale Paper Company v Moody* 422 US 405 (1975) the court accepted the establishment of a prima facie case where tests utilised by an employer selected applicants for promotion or hire in a significantly different (racial) pattern from that of the pool of applicants. The princi-

discriminatory motivation, disparate impact cases rely on statistics to a far greater extent than do disparate treatment cases for the proof needed to establish a prima facie case of discrimination. When considering the weight to be attributed to statistical evidence in establishing a prima facie case of discrimination the courts have considered whether the evidence reveals a substantial disparity between protected groups.⁹⁰ The Supreme Court has gone so far as to hold that where gross statistical disparities can be shown, these alone could constitute prima facie proof of a pattern or practice of discrimination.⁹¹ As a general rule the EEOC has suggested that the existence of adverse impact is to be determined by the so-called four-fifths rule.⁹² In terms of the rule a policy or criterion, such as a test for hiring or promotion, which selects females at four-fifths or less of the rate of selection of males, is open to suspicion. The four-fifths rule implies the use of the applicant flow method of comparison as opposed to the applicant pool method - the percentage of actual applicants of one class (women), which is eligible for employment, is compared to the percentage of actual applicants of another class (men), who qualify.⁹³

ple is applicable to sex discrimination. In *Dothard v Rawlinson* 433 US 321 (1977) the court accepted that prima facie the facially neutral height and weight requirement set by the employer selected female applicants for hire in a significantly different discriminatory pattern to males.

90 *Castaneda v Partida* 430 US 482 (1977). While the case involved discrimination in grand jury selection, its statistical analysis has been reaffirmed in employment discrimination cases under Title VII, for example, *Hazelwood School District v United States* 433 US 299 (1977).

91 *Hazelwood School District v United States* 433 US 299 (1977).

92 Under this eighty percent rule adopted by the EEOC's Uniform Guidelines on Testing and Employee Selection (29 CFR 1607) 1979, a selection criterion is viewed as having a disparate impact on a protected class of employees if the selection rate for that class is lower than eighty percent of the selection rate for majority employees (Player 363). Sobol and Ellard 381 state that the rule, which is essentially a "rule of thumb" rather than a statistical criterion, is used because it is simple to calculate and understand. In certain circumstances, however, it is an unreliable indicator of discrimination. The authors state that it should be used with caution, particularly where population ratios are close to 50% and where sample sizes are very large, in which circumstances it is least reliable (399).

93 The four fifths rule has been accepted in a number of cases, for example, *Williams v Vukovich* 720 F.2d 909 (6th Cir 1983); *Firefighters Institute for Racial Equality v St Louis* 616 F.2d 350 (8th Cir 1980).

An issue which often arises is that one portion of a particular employer policy, such as a test for hiring or promotion, impacts against females, while the test as a whole does not. The question which arises is whether each of the individual components of the selection procedure must be valid. The policy of EEOC is that where there is no adverse impact it will not examine the individual components of a test. This principle is known as the bottom line justification. It is successful where the portion of the test in question does not constitute an absolute barrier to selection. The principle can be demonstrated by reference to the following example. A selection test may require applicants to lift an eighty kilogram weight. It is likely that the test would impact adversely on females. If the strength test is just one portion of a test which measures overall competency for the position, and the test as a whole does not impact on females, the weight-lifting requirement would be permissible. The test as a whole must thus be non-discriminatory and not necessarily each component thereof.⁹⁴ However, a selection process will be regarded as having a disproportionate impact if it consists of vertical stages and disqualifies females disproportionately at a particular stage, thereby preventing them from progressing to the following stage. This is demonstrated by the situation in *Connecticut v Teal*⁹⁵ where the employer hired applicants who passed a series of tests which had been arranged in a vertical manner. An applicant who failed to pass the first stage of the testing process was disqualified from proceeding to the next. A disproportionate number of the protected class failed the first stage, but the bottom line was that the protected class in fact passed the whole battery of tests, and was hired, in a slightly larger proportion than the remaining applicants. The court nonetheless pronounced

94 Jain and Sloane 82; Maikovich and Brown 57.

95 457 US 440 (1982).

the procedure unfair because the protected class was disproportionately eliminated from proceeding at the initial stage of testing.⁹⁶ It found that although the bottom line approach could prevent discrimination in hiring or promotion, it failed to prevent discrimination in job opportunities. This was because it failed to protect individual rights by it condoning discrimination against individual members of a protected group at a given stage in the process, even if the end results of the process were non-discriminatory.⁹⁷ An employer could overcome the effect of the *Connecticut* decision by utilising a horizontal series of tests, none of which need be completed successfully in order to proceed to the next. If one component of such a series of tests has a disproportionate impact on female employees, but the tests as a whole do not, the bottom line justification would apply.

Prima facie proof, by an employee or applicant for employment, of adverse impact of an employer policy does not establish a violation of the Act. An employer is then granted an opportunity to justify the policy by showing that it is a business necessity. This is typically done by showing that a relationship exists between the procedure and job performance. In the case of a selection procedure for hiring or promotion, an employer is required to validate the procedure. A bona fide belief in the validity of the procedure will not justify it. The employer is required to provide statistics which prove the validity thereof.⁹⁸ The defence is a difficult one to establish. The

96 Bennett-Alexander 704- 713 analyses the decision closely. She notes that the effect of the decision was to change the previous position whereby employers concerned with the affect of their hiring and promotion procedures had only to ensure that their overall bottom line figures were in order (709).

97 As Yellen 747 points out, however, Title VII is concerned with both individual and group rights. The bottom line defence may not protect individual rights satisfactorily, because individuals (such as the *Connecticut* employees) are discriminated against, regardless of the number of members of the protected group who are ultimately hired or promoted. But utilisation of the defence is consistent with a group rights approach because it encourages proportional representation in the employees work force.

98 Maikovich and Brown 56.

court has referred to a "business necessity", a "manifest relationship" between a procedure having an adverse impact and a business need, and the "job relatedness" of a procedure or criterion.⁹⁹ The EEOC's employee selection guidelines require strict validation by industrial psychology standards. It has been said that the standard required by the EEOC is virtually impossible to achieve.¹⁰⁰

According to the EEOC guidelines, a selection procedure for hiring or promotion may be either content validated or criterion validated.¹⁰¹ Content validation occurs when the particular policy closely resembles the work which is required to be performed, for example a typing test for a secretary¹⁰² or a welding test for a welder.¹⁰³ The test thus measures particular elements of the job to be performed. A test which has been content validated does not test anything beyond the ability to perform a specific task.¹⁰⁴ Should an employer wish to test for characteristics such as

99 These three phrases were all utilised by the court in *Griggs v Duke Power Company* 401 US 424 (1971), at 431- 432. The language was repeated in *Abernale Paper Company v Moody* 422 US 405 (1975), where the court applied strict requirements set by industrial psychologists as the standard required by the defence. Necessity was again emphasised in *Dothard v Rawlinson* 433 US 321 (1977).

100 Gold 456 states: "In fact, however, the Guidelines hamper more than assist. The General Accounting Office reported in 1982 that the level of reading difficulty of the Guidelines, as measured by the level of education required to understand them, was beyond the doctor of philosophy level. Moreover, according to the Committee on Psychological Tests and Assessment of the American Psychological Association, "the guidelines reflect a reliance on and use of measurement theory that does not represent the current state of research and theory in psychological testing." Cox 7-38 states that there is a tendency to restrict a strict application of the business necessity defence to employment tests, physical requirements and education credential requirements.

101 Section 5. The guidelines also make provision for construct validity (which is seldom applicable) where a test measures a personality trait considered vital to success on a particular job.

102 In *Walls v Mississippi State Department of Public Welfare* 542 F Supp 281 (ND Miss 1982) the court did not regard a test for a typist, comprising grammar, basic maths, reading, spelling and punctuation, as content valid.

103 *Ligon v Bechtel Power Corporation* 625 F.2d 771 (8th Cir 1980). A language comprehension test for a court reporter has been regarded as content valid (*Herd v Allegheny* 463 F Supp 1152 (WD Pa 1979)); and a test of police ability to apply rules to factual situations (*Guardians Association of NY City Police Department Incorporated v Civil Service Commission* 630 F.2d 79 (2d Cir 1980)).

intelligence, initiative, personality or leadership, which are regarded as important for a particular position, the test will have to be criterion validated in order to be acceptable. The test will have to be shown to be predictive of, or significantly correlated to, important elements of the particular job for which candidates are to be considered. That will be the case when the employer shows, by professionally accepted methods, that test scores can be compared favourably to job performance.¹⁰⁵ The test can be studied in one of two ways. One is by means of a predictive study, where all job applicants are given the test and all are then hired. After a period of time has elapsed, their job performance is evaluated and the correlation between job and test scores is established. The other method of validation is by means of concurrent study, where current employees are given the test. Their job performance is then evaluated and the correlation between test scores and performance is established. A precise and detailed evaluation of the job being evaluated for performance is required.¹⁰⁶

The EEOC thus requires any instrument or criterion utilised by an employer to select employees for hiring or promotion to be shown to be predictive of job performance through a rigorous validation procedure. The courts too have tended to adopt a strict approach.¹⁰⁷ However, a more lenient interpretation of the concept

104 *Player 371* refers to a "facial relationship between test and job". The EEOC requires an employer to show that the behaviour demonstrated in the selection procedure is a representative sample of the behaviour of the job in question. As *Player 372* points out, that implies that a test which measures only a small or insignificant aspect of the job is not validated as to employees who must perform the whole job. But a test which measures a necessary aspect of the job will have content validity.

105 *Maikovich and Brown 57*.

106 *Abernale Paper Company v Moody* 422 US 405 (1975) rejected an allegedly concurrently validated test where an employer attempted to use the test to select employees for job "A", while the particular test had been validated only for job "B".

107 As *Portwood and Koziara 356* note, in the post *Griggs* period, the EEOC and the courts regarded a showing of a direct relationship between an act, policy or procedure and job performance as the only acceptable proof of job relatedness.

of job relatedness can be detected in certain decisions of the Supreme Court. In *Washington v Davis*,¹⁰⁸ for example, the employer had validated a selection test for promotion against a measure of performance in a training programme rather than actual job performance. The EEOC had ruled that the test did not meet its standards. The Supreme Court held that a positive relationship between the test and training course was sufficient to validate the former. Validation against actual job performance was thus not required. The decision was seen as lightening the burden on the test user to prove job relatedness.¹⁰⁹ A relaxation of the business necessity requirement was again to be detected in *National Education Association v South Carolina*,¹¹⁰ which allowed the board of education of South Carolina to continue using a test for teacher certification and salary determination, despite the fact that the adverse impact of the test on a protected class of employees was shown. No criterion validation study had been conducted, but the court accepted the test based on a content validation study, which showed that the test included questions relating to subject matter taught in the South Carolina teaching programmes.

The decision of *Wards Cove Packing v Atonio*¹¹¹ addressed the burdens of proof in disparate impact cases. The decision brought forth storm of protest by holding, inter alia, that the burdens of proof in disparate impact cases should conform to the burdens of proof in disparate treatment cases.¹¹² The Supreme Court first

108 426 US 229 (1976).

109 Hancy 23 refers to a "new trend in court decisions", giving employers far greater latitude to deviate from EEOC guidelines.

110 434 US 1026 (1978), in which the Supreme Court affirmed a District Court ruling.

111 109 SCt 2115 (1989). For a discussion of the significant principles which emerged from the decision see Shanor and Marcossou 150- 161.

112 Bryan 233 explains: "Plaintiffs attorneys, civil rights organizations, and commentators have denounced the decision, arguing that it overrules long-established principles and immunizes from attack numerous discriminatory employment practices. Proposals have been advanced in Congress for amending Title VII of the Civil Rights Act of 1964 to nullify the decision."

expanded the reach of the disparate impact theory in a decision handed down shortly before the *Wards Cove Packing* decision. It held that the theory could be used to challenge the possible discriminatory impact of an employer's use of subjective criteria in making employment decisions.¹¹³ In *Wards Cove Packing* (a race case) the court was again confronted with the impact of subjective criteria in an employer's hiring and promotion policy.¹¹⁴ Regarding the establishment of a prima facie case by the employees, the court found that the proper method of comparison was not between the composition of the at issue jobs (in which non-white employees were concentrated) and the remainder of the work force (which consisted largely of white employees) as alleged by the employees, but was between the composition of the at issue jobs and the qualified population in the relevant labour market. In that regard the court broke no new ground. The court then went on to state that an employee could not make out a prima facie case of disparate impact merely by showing that there was an imbalance in the work force as a whole, that is by relying solely on statistical evidence in respect of the work force composition. The employee was required to show that each practice challenged had a disparate impact.¹¹⁵ It has been suggested that the test was actually intended for situations

113 *Watson v Fort Worth Bank and Trust* 108 SCt 2777 (1988).

114 The employees were seasonal employees at salmon canneries in remote areas of Alaska. The jobs at the canneries fell into two broad categories, namely, those involving unskilled work on the cannery lines, and the so-called non-cannery jobs which involved a variety of job classifications and skill levels. The majority of unskilled cannery jobs were filled by "non-whites". An action was brought on behalf of "non-white" employees, alleging that the company utilised a variety of hiring and promotion policies (including nepotism, a re-hire preference, a lack of objective hiring criteria, separate hiring channels and a policy of not promoting from within) which denied them jobs as non-cannery workers on the basis of their race.

115 Shanor and Marcossou 153 explain the requirement: "*Wards Cove* can be read to hold that each employment practice challenged must be shown to have an independent, statistically significant adverse impact. As Justice White put it, to establish a prima facie case on remand, 'Respondents will... have to demonstrate that the disparity they complain of is the result of one or more of the employment practices that they are attacking here, specifically showing that each challenged practice has a significantly disparate impact on employment opportunities for whites and non-whites'."

where each step taken by an employer, for example in a selection process, constitutes a barrier to further consideration for hiring or promotion. A selection process may, however, consist of several components, none of which need be completed successfully in order to proceed to the next. The decision seems to preclude a reliance on the overall effect of such a process to establish disparate impact.¹¹⁶ The adverse effect of this decision on the role of statistical evidence appears to have been reduced by the Civil Rights Act 1991. In terms of that Act an employment practice is deemed to be unlawful if there is a statistical showing of disparate impact. The implication appears to be that the practice as a whole must be shown to have a disparate impact and not every element of that process.¹¹⁷

The court in *Wards Cove Packing* also redefined the nature of the burden placed on the employer in order to rebut the employee's prima facie case. It held that the burden which shifts to the employer once the employee has established a prima facie case, is a burden of production of evidence that the employee was rejected or some one else preferred for a legitimate reason. It also rejected the requirement that the practice be shown to be essential or indispensable to the employer's case, but stopped short of actually defining what would constitute an adequate business justification.¹¹⁸

116 Bryan 244. The author also points out that the components of a selection process may be identifiable, but that the impact of any one component taken in isolation may be small enough not to establish any disparate impact. The question which arises is whether the courts will allow reliance on the overall selection process in such cases. Shanor and Marcossou 155 suggest that they will: "It is far from clear that a court would reach a similar decision when the employer used an interdependent set of selection procedures. In such circumstances a cumulative disparate impact arising from multiple factors should suffice."

117 Weir 5. The author explains that the statute: "It was initially passed in a different form by congress in 1990, vetoed by President Bush as a "quota bill", and submitted to congress again in the 1991 session. After much negotiation, a compromise was achieved and the bill was signed... on November 21, 1991 (3- 4).

118 The court referred to a "reasoned view of the employer's justification" and said that the practice challenged was not required to be essential or indispensable (at 2126).

Despite the criticisms leveled at the decision, it has been noted that the application of the disparate impact theory to subjective or discretionary employment practices made the redefinition of the burden of proof -- in the sense of the degree of proof required -- inevitable.¹¹⁹ The chief distinction between the disparate treatment and disparate impact theories concerns the issue of the employer's motivation, which is irrelevant in a disparate impact case but decisive in a disparate treatment case. The distinction begins to fade when the disparate impact theory is applied to subjective criteria which, by necessity, involve a consideration of intent. Even in the absence of conscious discrimination, decisions may be affected by unconscious bias, such as sexual stereotypes.¹²⁰ The Civil Rights Act 1991 requires an employer to show that the practice challenged is job related for the position in question and consistent with business necessity.¹²¹

Once an employer has shown that its policy is job related, the employee is granted an opportunity of showing that an alternative test is available which protects the employer's interests to the same extent, but which has a lesser impact on female employees. The 1991 Civil Rights Act permits an employee to show that she proposed an alternative practice which would have had a lesser disparate impact. An employer which failed to accept the alternative is required to show that it was not viable because of business necessity.¹²²

119 Bryan 245.

120 Bryan 246 explains that deliberate or unconscious sexual prejudice will affect the decision-making process. This is virtually impossible to distinguish from intent in a disparate treatment case. Thus subjective criteria cases will inevitably involve issues of intent and bias, irrespective of whether they are analysed under a disparate impact or disparate treatment theory.

121 Weir 5.

122 Weir 5.

4 Title VII Defences

Two significant defences are contained in the Act. One deals with bona fide occupational qualifications and the other with seniority systems. In terms of the former, employers are allowed to make certain distinctions based on sex if the classification is "a bona fide occupational qualification reasonably necessary to the normal operation of the particular business".¹²³ In terms of the seniority proviso, employers may base distinctions on bona fide systems of seniority.¹²⁴

a Bona Fide Occupational Qualification (BFOQ)

An employer relying on the BFOQ defence admits that it has treated female employees less favourably, but advances some justification for doing so. The BFOQ defence applies only in cases of intentional, or disparate treatment, discrimination. The reason is that the essence of the defence is not that the employer did not discriminate, but that it did discriminate and that such discrimination was permissible.¹²⁵ Title VII does not set out the requirements of the BFOQ defence. However, the courts have set out three elements which the party asserting the defence, that is the employer, must prove. First, it must prove that members of the

123 Section 703(c)(1) provides: "It shall not be an unlawful employment practice for an employer to hire and employ employees... on the basis of... sex... in those certain instances where... sex... is a bona fide occupational qualification reasonably necessary to the normal operation of that particular operation or enterprise".

124 Section 703(h) provides: "Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions or privileges of employment pursuant to a bona fide seniority or merit system... Provided that such differences are not the result of an intention to discriminate because of... sex...."

125 The defence is thus distinguishable from the business necessity concept which is applicable in disparate impact cases.

excluded class, that is, women, cannot safely and effectively perform essential job duties. Inability to perform peripheral job duties does not establish the defence.¹²⁶ Secondly, it must have a factual basis for the belief that all, or substantially all, women cannot perform the essential job duties.¹²⁷ If a significant percentage can do so, the employer must evaluate the ability and capacity of each individual. But if the employment of women presents a clear and substantial risk to the employer or to third parties, and if it is impossible to predict job performance by individual evaluations of fitness, the defence may be relied upon. Thirdly, as the statute itself requires, the qualification be reasonably necessary to the normal operation of the business.¹²⁸

In terms of the Act it is not an unlawful employment practice for an employer to "hire and employ"¹²⁹ employees on the basis of their sex where the BFOQ defence applies. Despite this apparent limitation of the employer action covered by the defence, it has been invoked in situations such as job assignments, promotions and discharges.¹³⁰ But it is improbable that the defence could be relied on to justify compensation discrepancies between two employees of the opposite sex.¹³¹

126 *Diaz v Pan American World Airlines Incorporated* 422 F.2d 385 (5th Cir 1971); *Dothard v Rawlinson* 433 US 321 (1977).

127 *Weeks v Southern Bell Telephone and Telegraph Company* 408 F.2d 228 (5th Cir 1969); *Dothard v Rawlinson* 433 US 321 (1977).

128 Section 703(c)(1). According to *Player* 282, the defence will only be established if there is no reasonable and less discriminatory alternative which would serve the employer's business needs equally well.

129 Section 703(c)(1).

130 *Player* 284.

131 Differences in compensation may be justified in terms of section 703(h) which allows salary distinctions based on seniority, merit, quantity or quality of work, or location. Similar defences are incorporated into the Equal Pay Act of 1963 by the Bennett Amendment of section 703(h). The defences may only be invoked, however, if the factors used to justify the pay distinctions are gender neutral.

Distinctions based on the sex of the affected employee are those most commonly sought to be justified by the BFOQ defence. The courts have held that the defence will not be established where the employer seeks to rely on notions of so-called romantic paternalism in order to do so. That means that the subjugation of women to men, supposedly for their own benefit and protection, will not be allowed.¹³² Women may not be denied work which the employer feels might subject them to embarrassment or harassment, as personal risks not affecting the business of the employer are to be left to the persons who might be the targets thereof to decide upon. Even health risks to the employee will not entitle the employer to rely on the BFOQ defence with success.¹³³ However, where the threat to the employee is so acute that she cannot safely and efficiently perform the essential elements of the job, the defence will succeed.¹³⁴

Customer preference may constitute a BFOQ where such preference prohibits

132 Wagner 317. The author states that women are now being confronted by an emerging "pragmatic paternalism", by which they are subjugated to men, supposedly for the benefit of employers and clients.

133 This was the view of the court in *Burwell v Eastern Air Lines Incorporated* 633 F.2d 361 (4th Cir 1980), where the employer sought to disqualify pregnant flight attendants from flight duty.

134 In *Dothard v Rawlinson* 433 US 321 (1977), the court was of the opinion that the defence could not be invoked to exclude females from jobs deemed to be dangerous or undesirable by notions of romantic paternalism, as the particular female should be allowed to make that decision herself. But in the particular case the court decided that there was more at risk than the usual risk of harm to women. The job was that of a security guard at a maximum security prison, and was one which the court believed would subject women to attack simply because they were women, resulting in a breakdown in prison security with the accompanying threat to the safety of other guards and of inmates. Women as a class could thus not safely and effectively perform the job of security guard at the all-male maximum security prison. For that reason the defence was allowed. More recently, in the case of *Torres v Wisconsin Department of Health and Social Services* 859 F.2d 1523 (7th Cir 1988), the court accepted the employer's argument that its interest in the rehabilitation of sexually abused female inmates justified the maintenance of an all-female staff of guards in the residential areas of a women's prison as a BFOQ. Thus, the court in the *Torres* decision recognised the inmates' actual victimisation as a justification for measures designed to protect them from the continuing effects of that victimisation, while in the *Dothard* decision the potential victimisation of the female guards justified their exclusion.

effective performance. The precise point at which that occurs may be difficult to determine. It has been decided, for example, that the preference of predominantly male passengers for female flight attendants does not justify the exclusion of males from that position.¹³⁵ But where the preference of customers becomes so strong that women are prevented from performing their duties effectively, the defence may be established.¹³⁶ In *Diaz v Pan American World Airlines Incorporated*¹³⁷ the employer had hired only females to serve as flight cabin attendants, because it was of the view that females had a soothing psychological effect on passengers (that is, the airline's customers) which males could not provide. The court found that that assertion was inadequate to establish the BFOQ defence, even if one were to assume the accuracy thereof. The reason was that it was not reasonably necessary to the normal operation of the airline's business, the essence of which was to transport passengers safely. The test which was applied was thus not a business convenience test, but a business necessity test.¹³⁸

The defence has been categorised as an extremely narrow one which cannot be based upon stereotyped assumptions.¹³⁹ As stated above, an employer seeking to

135 *Diaz v Pan American World Airlines Incorporated* 422 F.2d 385 (5th Cir 1971). The court in *Ward v Westland Plastics Incorporated* 651 F.2d 1266 (9th Cir 1980) found that an employer who did substantial business with Latin and Arabic businessmen, whose religious or cultural backgrounds made them reluctant to transact serious business with women, could not rely on customer preference to establish a BFOQ.

136 *Dothard v Rawlinson* 433 US 321 (1977).

137 442 F.2d 385 (5th Cir 1971).

138 The question which arises is whether the focus is on the essence of the employers total business or whether the test should apply only to the essence of the employment position in question. The emphasis in *Diaz v Pan American World Airlines Incorporated* 422 F.2d 385 (5th Cir 1971) was on the essence of the total business operation. Sirota 1045 suggests that a test which focuses on the essence of the specific employment position rather than the essence of the total business operation of the employer may be a more reasonable one. The employer would then not be required to justify its refusal to hire a woman by showing that such a decision would undermine its entire business operation. Commenting on the decision, Terrell 315 observes the court not only sought a business reason impelling the employer to treat employees less favourably because of their sex, but also required that reason to be legitimate.

139 *Dothard v Rawlinson* 433 US 321 (1977). The Court also sanctioned the approach of the EEOC, which states in its Sex Discrimination Guidelines (29 CFR 1604) 1976 that:

invoke the defence must prove that all or substantially all females would be unable to perform essential job duties safely and efficiently. An employer may not rely on statistical studies which show that females perform less effectively than men, such as a statistical study which indicates that women employees as a class have a higher absenteeism rate than men do. Such a study would not establish the male sex as a BFOQ because it does not show that all or substantially all females have an unacceptably high rate of absenteeism. Sexual characteristics, and not merely attributes that are culturally or socially attributed to one sex, thus constitute the basis of the qualification. Each individual must be given the opportunity to demonstrate her capacity for the job.¹⁴⁰

It has been recognised that sex can be a BFOQ where necessary for the sake of authenticity.¹⁴¹ Thus, a theatre casting agent, seeking someone to play the role of a male character, would not need to consider females for the part. This situation differs from one where an employer seeks to promote its business by relying on the

"(2)(a) The Commission believes that the bona fide occupational qualification exception as to sex should be interpreted narrowly. Labels- "Men's jobs" and "Women's jobs"- tend to deny employment opportunities unnecessarily to one sex or the other.

(1) The Commission will find that the following situations do not warrant the application of the bona fide occupational qualification exception:

(i) The refusal to hire a woman because of her sex based on assumptions of the comparative employment characteristics of women in general. For example, the assumption that the turnover rate among women is higher than among men.

(ii) The refusal to hire an individual based on stereotyped characterisations of the sexes. Such stereotypes include, for example, that men are less capable of assembling intricate equipment; that women are less capable of aggressive salesmanship. The principle of non-discrimination requires that individuals be considered on the basis of individual capacities and not on the basis of any characteristics generally attributed to the group.

(iii) The refusal to hire an individual because of the preferences of co-workers, the employer, clients or customers except as covered specifically in paragraph (a)(2) of this section.

(2) Where it is necessary for the purpose of authenticity or genuineness, the commission will consider sex to be a bona fide occupational qualification, e.g., an actor or actress."

140 *Rosenfeld v Southern Pacific Company* 444 F.2d 1219 (9th Cir 1971). See also Neuberger 427-428.

141 That is acknowledged in the EEOC's Sex Discrimination Guidelines. See also Player 289.

image of its female employees (such as female flight attendants). Discrimination based on customer privacy would be recognised as a BFOQ where an employer restricts jobs to members of one sex because of community standards of morality or propriety, for example, in the case of a cloakroom attendant.¹⁴²

The exclusion of female employees by the employer must also be reasonably necessary to the normal operation of the business. Where a reasonable alternative to the exclusion of female employees exists, the exclusion would not be necessary and would not constitute a BFOQ. The obligation to adopt a less discriminatory alternative would include making reasonable alterations to job assignments. On the one hand, a complete restructuring of jobs by the employer is not required, while on the other, the exclusion of females will not be deemed necessary where minor adjustments would accommodate them.¹⁴³

b Seniority

In terms of the Act, an employer may, pursuant to a bona fide seniority system, apply different standards of compensation, and may differentiate as to terms, conditions and privileges of employment, provided that there is no intention to discriminate on the ground of sex.¹⁴⁴ But a seniority system may perpetuate the effects of past discrimination. The question is whether such a system will be lawful

142 As Sirota 1065 observes, the privacy justification should not be allowed to subvert the general prohibition against sex discrimination. Allowing cautious employers to invoke the privacy claim on behalf of their customers could result in the freezing of traditional employment roles, while Title VII was intended to alter both employment patterns and social mores. According to the author, privacy should thus qualify as a BFOQ only when the employer has received so many privacy complaints that the ability of its business to perform its primary function is endangered.

143 Player 295.

144 Section 703(h).

or whether the existence of such a system will be regarded as unlawful employment discrimination. A seniority system which perpetuates the effects of either legal (pre- Title VII) or illegal (post- Title VII) discrimination will be protected if it is bona fide.¹⁴⁵ The seniority system will be protected, irrespective of whether it was introduced before or after the enactment of Title VII.¹⁴⁶

It appears from a reading of the Act that the defence consists of two elements. The first is the existence of a *system* of seniority. It has been suggested that that implies the existence of a practice which is established and sufficiently definite to meet the requirement of being a system, irrespective of whether it has been negotiated collectively or imposed unilaterally by the employer.¹⁴⁷ The second is the existence of good faith, or the absence of an intention to discriminate on the ground of an employee's sex. Only systems adopted and applied in good faith are protected by the act. The existence of good faith is a factual issue.¹⁴⁸

145 An example of the former can be found in the decision of *International Brotherhood of Teamsters v United States* 431 US 324 (1977). The company had two categories into which its truck drivers fell, each with its own seniority unit. Generally, minority workers had been assigned to the less desirable category of drivers. In terms of a collective agreement, seniority earned in each category would determine eligibility for promotion within the category, and an employee could not carry over seniority earned in one category if he transferred to another. The court found the seniority system to be bona fide, despite the fact that it perpetuated the effects of pre- Title VII discrimination. In *United Airlines Incorporated v Evans* 431 US 553 (1977), the court did not distinguish between legal pre- Title VII and illegal post- Title VII discrimination, and found a seniority system which perpetuated the latter to be bona fide.

146 *American Tobacco Company v Patterson* 456 US 63 (1982). See also Player 300.

147 Player 303. The Supreme Court in *California Brewers Association v Bryant* 444 US 598 (1980) found that a seniority system would exist where the rule or practice in issue embodied the principle that length of employment would be rewarded, or was an ancillary rule serving a necessary function within a seniority system.

148 In *Quarles v Philip Morris Incorporated* 279 F Supp 505 (ED Va 1968), for example, the employer had, prior to the passing of Title VII, employed blacks only in the least desirable departments of its business. After passage of the Act the employer ceased this practice, but barred transfers between departments, or required employees transferring between departments to forfeit seniority. This practice locked blacks (the protected class) into the department in which they had originally been placed. The court found the restrictive transfer and seniority policy to be an unlawful employment practice in which the employer had intentionally engaged in order to discriminate on the ground of race. Section 703(h) was not regarded as capable of preserving the use of the unit seniority system, which was not bona fide. See also

5 Special Problems Associated with Sex Discrimination: Sex Plus Discrimination

The fundamental disparate treatment and disparate impact theories of discrimination apply to sex discrimination, and the development of general sex discrimination principles have come about within that framework. But certain distinctions, such as those between pregnant and non-pregnant persons, or between women with and without children, have been more problematic. The question which arises is whether they are they intentional sex-based distinctions or unintentional distinctions which may at most have a disparate impact on either sex? It may even be asked whether they amount to sex discrimination at all. Distinctions such as these, which are unique to one sex, have been classified as sex plus distinctions.

The sex plus label implies different treatment on the basis of sex together with some other factor. A variety of problems, confronted in the context of sex discrimination, have been labeled as sex plus problems. The facts of *Phillips v Martin Marietta Corporation*¹⁴⁹ provide an example. In that case the employer refused to hire women with pre-school age children, but did not otherwise discriminate with regard to the sex of prospective employees. The combination of gender plus another factor formed the basis of the employer's discriminatory action. There was thus a sub-class of persons within the general class against whom the employer discriminated. The question was whether discrimination against the sub-class was unlawful sex discrimination. As a general rule, courts regard distinctions of that nature as unlawful. An employer who discriminates against a sub-class has usually been compelled to take the sex of the employees into account. An employer who refuses to hire

International Brotherhood of Teamsters v United States 431 US 324 (1977).

149 400 US 542 (1971).

women with pre- school age children is obliged to take the sex of applicants with pre- school age children into account. Gender is thus a condition for employment, and the employer's action is unlawful. On the other hand, dress and grooming requirements for male and female employees have been regarded as lawful because they do not constitute immutable characteristics, that is, they are easily satisfied.¹⁵⁰ They do not entail impermissible sexual stereotypes and do not threaten any fundamental right. But an employer may not impose such requirements on only one of the two gender classes.¹⁵¹

Two sex plus issues have had an impact on the vast majority of female employees at some stage in their working lives. These are pregnancy and sexual harassment.

a Pregnancy

Courts initially adopted the view that pregnancy distinctions could not be considered to constitute sex discrimination. The principle is illustrated by the (Fourteenth Amendment) case of *Geduldig v Aiello*,¹⁵² where the Supreme Court found that a state disability benefits programme which excluded normal pregnancy did not dis-

150 The most commonly litigated difference is a requirement that men may not wear their hair beyond a certain length, while no such restriction applies to female employees. Since hair length can be changed easily, it does not involve an immutable characteristic associated with a particular sex, and is generally not regarded as offensive. In *Willingham v Macon Telegraph Publishing Company* 507 F.2d 1084 (5th Cir 1985) the hair length requirement imposed on male employees was not regarded as unfair. But in *Carroll v Talman Federal Savings and Loan Association of Chicago* 604 F.2d 1028 (7th Cir 1979), the employer's practice of imposing a uniform requirement only on female employees was held to be unlawful. Oldham 544 observes that employer policies placing cosmetic limitations on females but not on males perpetuates irrational impediments to employment for females at a time when such impediments ought not to be countenanced.

151 *Carroll v Talman Federal Savings and Loan Association of Chicago* 604 F.2d 1028 (7th Cir 1979). See also Cox 15-15.

152 417 US 484 (1974)

criminate on the ground of sex, as a pregnancy distinction was not a sex classification, but was an objectively identifiable physical condition.¹⁵³

In *General Electric Company v Gilbert*,¹⁵⁴ the court found that the exclusion of pregnancy from an employer's disability program providing sickness and accident benefits did not have a disparate impact on women, despite the fact that the excluded group consisted entirely of women. The reason for the decision was that the employee had failed to prove that women as a group received lesser actuarial return from the programme than men received. The pregnancy exclusion classification was found not to be gender based because the disability benefits plan divided persons into classes of pregnant and non-pregnant persons, both male and female. The finding was based on the fiction that pregnancy was not synonymous with gender.¹⁵⁵

This decision can be contrasted with the decision in *Nashville Gas Company v Satty*,¹⁵⁶ which also involved a pregnancy issue. An employer policy permitted employees to retain accumulated seniority and to accrue seniority while on leave of absence for any disability other than pregnancy. Employees who took a leave of absence for any reason other than a disability, including employees who took leave for pregnancy, lost all accumulated seniority. The court ruled that this policy, although facially neutral, had a disparate impact on female employees and violated Title VII. It contrasted the case with the *Gilbert* decision referred to above, where male and female employees were provided with equal benefits. The court distin-

153 The decision has been referred to as one embodying an "Alice-in-Wonderland view of pregnancy as a sex-neutral phenomenon" (Wagner 343).

154 429 US 125 (1976).

155 As Cox 7-26 observes, "it is obvious that disqualification of a sub-population composed of 'pregnant persons' from an employment benefit is equivalent to exclusion of women, as such, from that benefit."

156 434 US 136 (1977).

guished the case, stating that the employer had not merely refused women a benefit which men could not and did not receive, as had been the case in the *Gilbert* case, but had imposed on women a burden which men were not required to suffer. The view of the court was that while an employer was not required to provide greater benefits to one sex or the other due to differences in their roles in life, an employer could not burden female employees because of their different role.

As a consequence of the *Gilbert* decision, Title VII was amended by the Pregnancy Disability Amendment Act of 1978.¹⁵⁷ The amendment redefines the phrases "because of sex" and "on the basis of sex" to include pregnancy and childbirth.¹⁵⁸ Pregnancy discrimination is equated with sex discrimination. An employer may not refuse to hire a woman, or transfer or discharge her because she is pregnant or has delivered a child. But where a pregnant woman's ability to perform in a particular instance is taken into account by an employer, that consideration will not constitute sex discrimination.¹⁵⁹ While an employer is not prevented from taking pregnancy-related disabilities into account, it is prevented from treating pregnancy-related disabilities differently from other disabilities.

157 Johnson 354 observes that members of congress amended Title VII because of the adverse effect which they feared the *Gilbert* decision would have on working women. See also Kohn 384.

158 The amendment, section 701(k), provides: "The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth or related medical conditions; and women affected by pregnancy, childbirth or related medical conditions shall be treated the same for all employment-related purposes, including the receipt of benefits under fringe benefit programmes, as other persons not so affected but similar in their ability or inability to work, and nothing in section 703(h) of this title shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical conditions have arisen from an abortion: Provided that nothing herein shall preclude an employer from providing abortion benefits or otherwise effect bargaining agreements in regard to abortion."

159 Shulman and Abernathy 5-51 distinguish this situation from the one where an employer creates a general rule affecting pregnant employees. In this situation an employer accused of direct discrimination may justify it in terms of the BFOQ defence.

A closely related issue concerns the ability of an employer to require a pregnant employee to take involuntary maternity leave either upon discovery of her pregnancy or at some later stage. In such a case the BFOQ defence will succeed where the employer can show that the mandatory leave requirement is imposed in the interest of the safety of its customers, and is imposed on all temporarily disabled persons.¹⁶⁰ It is unlikely that mandatory maternity leaves imposed at the beginning of pregnancy will be found to be lawful. Employers may also seek to require that pregnant employees remain out of work for a given period following childbirth. In terms of the Act's specific pregnancy discrimination provision,¹⁶¹ an employer who draws a distinction between persons returning to work after pregnancy and those returning after any other temporary disability, is per se guilty of sex discrimination. A BFOQ defence may succeed where the employer can show actual medical differences related to pregnancy. Each case would have to be considered on its merits.¹⁶²

An employer is required to treat a woman affected by pregnancy, childbirth or a related medical condition in the same manner that it treats other persons who are similar in their ability or inability to work. The employer's duty includes equal provision of benefits under health care programmes. This does not mean that an employer is obliged to provide pregnancy benefits, but if it has a health or disability benefit programme, pregnancy and childbirth must be treated in the same manner

160 Shulman and Abernathy 5-46. The authors observe that these factors seldom favour the employer outside of the narrow area of airline operations.

161 Section 701(k).

162 In *Cleveland Board of Education v La Fleur* 414 US 632 (1974), the Supreme Court found the flat three month waiting period imposed by the employer to be unlawful, where such a rule did not accurately reflect medical disabilities and where individualised determinations were possible.

as other conditions covered by the plan which similarly affect the ability of employees to work.¹⁶³ However, it has been suggested that facially neutral but inadequate sick leave policies may have a disparate impact on female employees¹⁶⁴, although they do not constitute disparate treatment.¹⁶⁵ The court in *Abraham v Graphic Arts International Union*¹⁶⁶ found that an employer's maximum ten day sick leave policy would accommodate a wide range of temporary disabilities, but fell considerably short of the respite generally needed to bear a child.

State laws which require employers to give pregnant employees a period of maternity leave, and to reinstate those employees in the same or similar jobs upon their return to work, appear to give pregnant employees preferred treatment as compared to other temporarily disabled employees. Those laws have been found to be consistent with the purposes of Title VII.¹⁶⁷ Preferential treatment is possible where its goal is to remove burdens which inhibit the full participation of pregnant women in the workplace.

An employer which provides health care benefits to dependents of employees may not treat the pregnant dependents of employees differently from other dependents.

163 Player 243 states that an employer is not entitled to distinguish between the pregnancies of married and unmarried employees; a pregnant employee who is temporarily unable to perform her normal job duties must be treated in the same manner as other employees who suffer a temporary disability; if the employer's policy is to permit either paid or unpaid leave for illnesses, it may not compel an employee to utilise paid vacation leave to deliver her child; and a request for additional maternity leave must be considered in the same light as other requests for non-work related issues.

164 In terms of the general discrimination clause contained in section 703(a).

165 In terms of section 701(k).

166 660 F.2d 811 (DC Cir 1981).

167 *Shulman and Abernathy* 5:55 - 5:56. The protection contained in section 701(k) is seen as the legal minimum, not the maximum.

This is demonstrated by the decision of the Supreme Court in *Newport News Shipbuilding and Dry Dock Company v EEOC*.¹⁶⁸ There the employer complied with the literal provisions of the Act¹⁶⁹ by treating pregnancy no differently from other medical conditions in its employee benefit package. But the health care benefits provided to dependents of employees placed a limit on hospital coverage for pregnancy that did not apply to other types of dependent hospitalisation coverage. Pregnancy protection for dependents thus differed from other medical protection for dependents, and from medical protection for employees. The court found the different treatment of pregnant dependents (typically the spouses of male employees) to be discrimination against the male employees. The employer was not, however, obliged to provide the same benefits for dependents of employees as those provided for employees themselves.¹⁷⁰

The effect of the specific pregnancy provision contained in the Act¹⁷¹ is to make intentional discrimination due to pregnancy, that is, disparate treatment, unlawful discrimination. But certain neutral employer policies may have a disparate impact on pregnant employees. Although the policy may not be capable of being challenged under the specific pregnancy provision, it could still fall foul of the general provision.¹⁷² This was demonstrated by the decision in *Nashville Gas Company v Satty*,¹⁷³ where the court found that apparently equal treatment of pregnancy could constitute unlawful sex discrimination if the treatment had the effect of burdening

168 462 US 669 (1983).

169 Section 701(k).

170 For a discussion of the significance of this decision, see Kohn 383- 432; Johnson 355- 359.

171 Section 701(k).

172 Section 703(a)(2).

173 434 US 136 (1977).

women as a class.¹⁷⁴ The application of a neutral rule which adversely affects women as a class will be regarded as sex discrimination unless justified by business necessity.

An issue closely related to that of pregnancy discrimination is that of the protection of women against fetal hazards in the workplace. While all state protective legislation has been abolished since the Civil Rights Act took effect in 1964, a new protective structure has developed in its place to protect women against reproductive hazards in the work place. Various industrial chemicals have been identified as hazards which may present a greater risk to the developing fetus than to the sperm or egg.¹⁷⁵ Many employers responded to this risk by excluding fertile women from the work place through the implementation of fetal protection policies. Unlike the traditional protective legislation which tended, for example, to restrict hours of work, night work or overtime, on the ground that women were physically inferior to men, or on the ground that their place was in the home, or that it was immoral for them to work, fetal protection policies restrict women's employment on the ground that they may be pregnant and the fetus they carry may be damaged by exposure to hazardous substances in the workplace.¹⁷⁶ The question which arises is whether these fetal protection policies can be said to constitute unlawful sex discrimination in terms of Title VII.

The courts initially stated that scientifically justified fetal protection policies did not

174 See also *Abraham v Graphic Arts International Union* 600 F.2d 811 (DC Cir 1981).

175 Examples include lead, mercury, benzene, vinyl chloride and carbon monoxide.

176 As Kenney 396 observes, although those advocating protective legislation in the past often did so on the grounds of women's role within the family and as the reproducer of the race, the focus was on women as women - they were the ones to be protected, and their health and wellbeing were the issues. The new protective policies, on the other hand, focus on women as the vehicles who transport fetuses into a dangerous work environment. The aim of the policies is thus the protection of the fetuses and not the women.

fall foul of Title VII.¹⁷⁷ In doing so they applied the disparate impact analysis, as opposed to the disparate treatment analysis. An employer was allowed to justify the exclusion of women from the workplace by showing that it was a business necessity. The business necessity concept was adapted to include fetal protection by equating the fetus to a visitor to the business, and courts held that an employer could not be deprived of the right to protect all legitimate visitors to the business, especially those related to employees.¹⁷⁸ An employee could rebut the business necessity claim by showing that the employer could have achieved the same result in a less discriminatory manner.¹⁷⁹

That approach appeared contrary to the express provision of the Act, which provides that sex discrimination includes discrimination on the grounds of pregnancy, childbirth or related medical conditions.¹⁸⁰ By virtue of this provision a policy which expressly excludes child bearers from the work place should be regarded as discriminatory per se. It should therefore be analysed in terms of the disparate treatment theory, which allows only the BFOQ defence. Under that defence, an employer is required to show that female employees are incapable of performing their jobs effectively in order to exclude them from the work place.

The trend was reversed and the latter line of reasoning adopted by the Supreme

177 *Wright v Olin Corporation* 697 F.2d 1172 (4th Cir 1982); *Hayes v Shelby Memorial Hospital* 726 F.2d 1543 (11th Cir 1984). In both cases the courts in fact found that the employers' policies violated Title VII.

178 *Wright v Olin Corporation* 697 F.2d 1172 (4th Cir 1982). In *Hayes v Shelby Memorial Hospital* 726 F.2d 1543 (11th Cir 1984) the employer's claim that a desire to avoid possible tort liability constituted a valid business necessity was rejected.

179 But as Buss 589 notes, a court limited by its own expertise, and by its concerns for feasibility, effectiveness and industrial autonomy, is unlikely to identify less discriminatory alternatives which it feels comfortable imposing on an industry.

180 Section 701(k).

Court in *International Union, UAW v Johnson Controls Incorporated*.¹⁸¹ In that case the employer had excluded all women of child bearing capacity from its battery division, where employees were exposed to lead. The court found that fetal protection policies constituted overt sex discrimination, and that the BFOQ defence could not justify policies which protected only female employees. An employer could not discriminate in that manner unless the reproductive potential of female employees prevented them from performing their duties. The court concluded that:

"Decisions about the welfare of future children must be left to the parents who conceive, bear, support and raise them, rather than to the employers who hire those parents. Congress has mandated this choice through Title VII, as amended by the Pregnancy Discrimination Act."¹⁸²

Ideally the employment environment should be one in which it is safe for all employees to work. If employers who are refused the option of excluding women from the workplace, will be obliged to improve working conditions of all employees in order to avoid potential civil liability and to ensure the health and safety of their employees' offspring.¹⁸³

b Sexual Harassment

181 111 SC11196 (1991).

182 At 1207. Commenting on the decision and the provisions of the Pregnancy Discrimination Act, Kelly states: "Congress... gave women the ability to choose between the economics of a job and all the related hazards and the responsibility of raising a family if they so desired. In other words, Congress had given to women what men had been free to do since day one. Equality, choice and freedom to choose are the essence of Title VII."

183 But discrimination law alone cannot solve the problem of fetal hazards. It has been suggested that Title VII should be read together with the Toxic Substances Control Act, which requires that the protection from toxic substances be adequate to protect both employees and their offspring from unreasonable risks. Read together the two statutes would protect employees by limiting the use of fetal toxins in the workplace.

Sexual harassment has been recognised as a form of sex discrimination in employment in terms of Title VII, both where a refusal to submit to sexual demands leads to a deprivation of a tangible job benefit, and where harassment creates a hostile and discriminatory work environment even though there has been no loss of a tangible job benefit. The former type of harassment is commonly referred to as *quid pro quo* harassment, while the latter is termed hostile or offensive work environment harassment. Initially, the view was adopted by the lower courts that sexual harassment in the employment context could not constitute sex discrimination in terms of the Act. The reason was that use of the word "sex" in the Act was interpreted as covering gender, and not sexual activity. There was also a fear of widespread litigation.¹⁸⁴ The distinction between sexual advances and gender was rejected subsequently and it was accepted that demands for sexual favours constituted terms of employment for women which differed from those of men, and which were discriminatory by nature.¹⁸⁵

Sexual harassment cases are generally considered within the disparate treatment framework and require proof of intent.¹⁸⁶ An employee must prove five elements in

184 *Shulman and Abernathy* 5-86; *Cohen and Vincelette* 302. In *Come v Bausch & Lomb Incorporated* 390 F Supp 161 (D Ariz 1975) two female employees alleged that they had had to resign their jobs to avoid their supervisor's verbal and physical advances. The court found no contravention of Title VII because no employer policy was served by the supervisor's conduct, and the advances were beyond the scope of the supervisor's representation of the employer. The court also feared the potential of a lawsuit every time any employee made sexually oriented advances to any other employee. See also *Garber v Saxon Business Products Incorporated* 552 F.2d 1032 (4th Cir 1977).

185 The first case in which a federal judge held that sexual advances connected with retaliation for their refusal constituted actionable sex discrimination was *Williams v Saxbe* 413 F Supp 654 (D DC 1976). The Supreme Court confirmed this view in *Meritor Savings Bank FSB v Vinson* 477 US 57 (1986). The court also confirmed that it was appropriate to resort to the EEOC guidelines for guidance. Regarding conduct which would constitute sexual harassment, the Guidelines on Sexual Harassment (29 CFR 1604) include unwelcome sexual advances, requests for sexual favours and other verbal or physical conduct of a sexual nature. The conduct need not be linked to the grant or denial of an economic *quid pro quo* where the conduct has the purpose or effect of unreasonably interfering with employee's work performance, or creating an intimidating, offensive or hostile work environment (section 11(a)).

186 See, for example, *Henson v City of Dundee* 682 F.2d 897 (11th Cir 1982), which relied on

order to establish a prima facie case of sexual harassment.¹⁸⁷ First, she must belong to a protected class. This merely requires the employee to stipulate that she is a woman. Secondly she must have been subjected to unwelcome sexual harassment.¹⁸⁸ Thirdly the harassment must have been based on sex.¹⁸⁹ Fourthly the harassment must have affected a term, condition or privilege of employment.¹⁹⁰ Finally the employee must show that her employer is liable.

When adverse action, such as the denial of a benefit, is taken against an employee who has refused sexual advances, the treatment is regarded as harassing and discriminatory per se. This was first recognised by the Court of Appeals in *Barnes v Costle*.¹⁹¹ The employee was made redundant because she refused to engage in a sexual relationship with her supervisor. The court found that she had been harassed because she was a woman. Since a male employee would not have been harassed in that manner, discrimination on the ground of sex had occurred.¹⁹² Where no

McDonnell Douglas Corporation v Green 411 US 792 (1973) and *Texas Department of Community Affairs v Burdine* 450 US 248 (1981). The traditional disparate treatment model was modified in *Bundy v Jackson* 641 F.2d 934 (DC Cir 1981) to accommodate sexual harassment claims.

187 *Vinciguerra* 1721- 1722. See also *Attanasio* 20- 24.

188 That means that the employee did not solicit or incite the unwelcome behaviour. In *Meritor Savings Bank FSB v Vinson* 477 US 57 (1986) the Supreme Court held that sex related conduct in which the employee's participation was voluntary, could still be unwelcome.

189 This element was initially difficult to prove due to the distinction which the courts drew between sex as gender and sex as sexual activity.

190 As will be explained below, the courts require either the loss of a tangible benefit, or the creation of a hostile work environment which affects the employee's psychological well-being.

191 561 F.2d 983 (DC Cir 1977).

192 In *King v Palmer* 778 F.2d 878 (DC Cir 1986), for example, the court found that discrimination had occurred where a female employee, a nurse, was denied a promotion because it was given instead to another female employee who had had an intimate relationship with the male "supervisor", the chief medical officer. In *Horn v Duke Motor Homes* 755 F.2d 599 (7th Cir 1985) the employee's supervisor remarked on her sexual needs after her husband left her and promised that it would be to her advantage if she went out with him. Shortly after her final rejection of his advances, she was reprimanded for the standard of her work, transferred, and dismissed one week later. The court found that *quid pro quo* harassment had occurred as the

specific sanction is imposed on employees, an employer may be held liable for an environment in which employees are harassed. In the case of *Bundy v Jackson*¹⁹³ the court found that the creation or condonation of a hostile work environment constituted sexual harassment which amounted to sex discrimination in respect of "terms, conditions, or privileges of employment".¹⁹⁴ Conditions of employment were found to include the psychological and emotional work environment.

The first case in which the Supreme Court ruled on sexual harassment was the case of *Meritor Savings Bank FSB v Vinson*.¹⁹⁵ There the Supreme Court confirmed that a hostile work environment, without the infliction of a tangible economic loss, could constitute a violation of Title VII. It rejected the employer's contention that voluntary submission by an employee was a defense. The crux of the matter as far as the court was concerned was that the advances were unwelcome. Voluntary submission was not regarded as indicative of the fact that the advances were not unwelcome.¹⁹⁶

The EEOC guidelines take a broad view of the conduct which constitutes sexual harassment. In terms of the guidelines:

employee's dismissal had resulted directly from her rejection of the supervisor's advances.

- 193 641 F.2d 934 (DC Cir 1981). The employee in this case had received numerous propositions from co-employees and supervisors in the department in which she worked. When she complained to another supervisor, he replied that any man in his right mind would want to rape her. The court found that the employee had been sexually harassed, even though she had received several promotions during the years of harassment.
- 194 Section 703(a).
- 195 477 US 57 (1986). See also Jones, Murphy and Belton 315- 328; Player 252- 255.
- 196 For a synopsis of the court's findings, see Sullivan and Nowlin 624.

"Unwelcome sexual advances, requests for sexual favours, and other verbal or physical conduct constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive work environment."¹⁹⁷

An issue facing the courts concerns the point at which sexual interaction at the workplace should be classified as sexual harassment, that is, when is harassment pervasive enough to constitute a violation of Title VII? Unlike *quid pro quo* sexual harassment, which may involve only a single incident, courts have tended to characterise hostile environments by multiple incidents of offensive conduct.¹⁹⁸ Closely related to the above issue, is the question of the viewpoint from which the determination should be made. Should it be considered from the objective viewpoint of the reasonable employer, or that of the reasonable employee, or should it be considered from the subjective viewpoint of the particular employer or employee? No clear policy can be identified as the courts have tended to adopt an *ad hoc* approach.¹⁹⁹

A further issue to be considered concerns the liability of an employer for acts of its

197 Section 11(f) of the guidelines.

198 In *Jones v Flagship International* 793 F.2d 714 (5th Cir 1986), the court regarded two requests for sexual contact plus one incident involving bare-breasted mermaids as a table centre piece for an office party as insufficient to establish a hostile environment. In *Highlander v KFC National Management Company* 805 F.2d 644 (6th Cir 1986) the court found one incident of fondling and one sexual proposition to be insufficient to establish sexual harassment. See, also *Henson v City of Dundee* 682 F.2d 897 (11th Cir 1982), and *Bundy v Jackson* 641 F.2d 934 (DC Cir 1981).

199 Abrams 1202 sums the situation up: "More often, courts strive for a more "objective" viewpoint by subordinating the "subjective" view of the plaintiff to some other standard. Some courts compare the reaction of the plaintiff with the perspective of the "hypothetical reasonable person". Other courts replace the "reasonable person" with the "reasonable woman", yet fail to denunciate the difference between the two. Still others consult the perspective of the reasonable woman as well as the actual intention of the employer. Each of these approaches illustrates the difficulties courts have had in understanding how sexual harassment affects working women."

managerial and supervisory employees. A distinction has been drawn between the *quid pro quo* and the hostile work environment situations. The tendency has been to adopt a strict liability approach to *quid pro quo* violations.²⁰⁰ The reason is that the employer has granted the manager or supervisor the power which makes the demanded trade-off possible. The employer is therefore held liable for the abuse of that power, irrespective of whether it had a policy against discrimination, and irrespective of whether or not it was actually aware of the abuse.²⁰¹ On the other hand, opinion is divided as to the scope of employer liability in the hostile environment situation. The EEOC Guidelines on Sexual Harassment treat responsibility for supervisory sexual harassment in the hostile environment situation in the same manner as in the *quid pro quo* situation, that is, the employer is viewed a strictly liable.²⁰² But employees in hostile environment suits have on occasion been

200 The doctrine which is applied is that of *respondeat superior*, that is, let the principle (here, the employer) be held responsible (see Ledgerwood and Johnson-Dietz 743; Warren 607). The doctrine was applied in *Miller v Bank of America* 600 F.2d 211 (9th Cir 1979), where the court found the employer to be liable for the actions of the supervisor under the doctrine, even though the bank had a policy against harassment, and in spite of the fact that the complainant had failed to exhaust internal company grievance procedures.

201 In the case of *Horn v Duke Motor Homes* 755 F.2d 599 (7th Cir 1985), the court found, in a *quid pro quo* situation, that an employer should be held liable for the acts of its supervisory employees with respect to sexual harassment, irrespective of whether the employer knew or should have known of the acts complained of, and regardless of whether the employer had authorized or even forbidden the acts. Cox 15-13 states that an employer is liable for the conduct of superiors with the authority to control terms, conditions and privileges of employment, at least where the harassment occurs within the context of a matter over which the superior has been delegated authority. The employer remains liable even where it lacks knowledge of the harassment, or has taken steps to prevent the harassment by the superior. Attanasio 32 explains the approach as follows: "No reasonable person would contend that a supervisor could fire an employee because that employee is black. Nor can an employer escape liability for the supervisor's actions merely because it had a policy against discrimination. Such a loophole would allow circumvention of Title VII, or for that matter, of any employer obligation... Only if the employer strips the supervisor of the authority to fire should such a result ensue. Employer liability, then, according to the principles of agency, is based on the authority given an agent regardless of how the employer tells the agent to use the authority."

202 The EEOC Guidelines on Sexual Harassment (29 CFR 1604) state: "Applying general Title VII principles, an employer... is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence. The Commission will examine the circumstances of the particular employment relationship and the job functions performed by the individual in determining whether an individual acts in either a supervisory or agency capa-

required to prove that higher management knew or should have known of the sexual harassment before the employer will be held liable for its supervisor's actions.²⁰³ The reason is that the employer has not delegated some power or authority to the supervisor, such as the ability to promote, hire or fire, which makes the harassing conduct possible. It has been observed that this line of reasoning ignores the fact that supervisors do not only distribute employment benefits, but also structure the work environment. Both *quid pro quo* and hostile environment harassment involve abuse of a relationship of power, and should be treated similarly.²⁰⁴

In *Meritor Savings Bank FSB v Vinson*²⁰⁵ the Supreme Court addressed the liability of the employer for the hostile work environment created by supervisory employees, but failed to formulate any guidelines. The district court had held that the employer could not be held liable for the acts of the supervisor because it had no actual knowledge of the supervisor's conduct. The court of appeals took the opposite view, finding that the employer should be held liable for all acts of the supervisor by virtue of the latter's authority to hire, fire and promote employees. On appeal it was

city' (paragraph 11(c). See also *Ledgerwood and Johnson-Dietz* 743; *Frost* 20.

203 See, for example, *Henson v City of Dundee* 682 F.2d 897 (11th Cir 1982).

204 Cohen *Legal Dilemmas* 687 explains that employees may be fearful reporting harassment due to concerns of being stigmatised as trouble makers; they may also fear retaliation or fear that they will not be believed because the person who has harassed them is an executive of the company. As Attanasio 30 explains: "Should courts continue to refuse to impute to unknowing employers the sexual discrimination of their supervisors, the policy against sexual discrimination could become *see no evil, hear no evil*. Two of the leading decisions demanding such knowledge, *Munford v James T Barnes & Co* and *Heclan v Johns-Manville Corp* implicitly recognised this problem by obligating the employer to investigate all complaints of sexual discrimination. A duty to investigate complaints does not solve the problem because it in no way insures that complaints will be made. The employer has little incentive to encourage them because the fact remains that lack of knowledge remains lack of liability. From the victim's perspective, complaining about one's supervisor is a frightening prospect, with possible results hinging on delicate credibility questions." This view is reiterated by Cohen and Vineclette 305. See also Schupp, Windham and Draughn 245- 247.

205 477 US 57 (1986).

submitted by the employer that it could not be held liable in the particular instance because it was unaware of the supervisor's conduct. It had an express policy against harassment and an established grievance procedure which the employee had made no effort to utilise. The Supreme Court rejected the approaches adopted by both lower courts, as well as the argument advanced by the employer, but did not articulate any positive standard for judging employer liability.²⁰⁶

Where an employee complains of harassment by co-employees which has led to a hostile or abusive working environment, the court will consider whether the employer was aware, or should have been aware, of the harassment and whether it took steps to correct the situation.²⁰⁷ An employer with no knowledge of the employee's conduct, and who could not reasonably have foreseen such conduct, will not be held liable.²⁰⁸

6 Remedies

Regarding the power to remedy violations of Title VII, the Act provides:

"If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and may order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay... or any

²⁰⁶ *Monat and Gomez* 713 suggest that the thrust of the court's decision is that harassment by a supervisor will only render an employer liable where it had actual knowledge or where the harassment was so pervasive and so long continuing that the employer must have become aware of it.

²⁰⁷ See, for example, *Swanick v US Air Incorporated* 830 F.2d 552 (4th Cir 1987). *Shulman and Abernathy* 5-98 point out that there have been few cases involving co-workers.

²⁰⁸ The EEOC Guidelines on Sexual Harassment (29 CFR 1604) provide: "With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action" (paragraph 11(d)).

other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to a filing of a charge with the commission. Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable....²⁰⁹

The term "intentional" has not been construed to mean that the employer should have acted with the intention of contravening the Act, but to mean that the discriminatory act complained of should have been volitional as opposed to accidental.²¹⁰

The relief ordered by the court will depend on the nature of the unlawful conduct. An employer may be ordered to refrain from the discriminatory conduct. The court may order hiring of a person who was illegally denied a position, or reinstatement of an employee who was illegally dismissed, or any other relief which it deems equitable. Remedies granted to employees who have been successful in sexual harassment cases include reinstatement, promotion, and orders forbidding harassing practices or mandating the establishment of grievance procedures.²¹¹ Generally, a successful employee will also be entitled to an order for back pay, that is, lost wages and benefits that would have been earned had it not been for the illegal discrimination. Calculation of the amount of back pay is based on a reconstruction of the employee's hypothetical work history. The Supreme Court has held that back pay should be awarded routinely in Title VII cases.²¹² The purpose of the monetary back pay award is twofold. The first is to compensate victims of discrimination for losses suffered. The second is to attempt to eradicate discrimination by employers,

209 Section 706(g).

210 *Abemdale Paper Company v Moody* 422 US 405 (1975).

211 *Cohen Legal Dilemmas* 684.

212 *Abemdale Paper Company v Moody* 422 US 405 (1975). Victims of sexual harassment who succeed only on a hostile environment claim, and not on a *quid pro quo* claim, cannot receive back pay (*Vinciguerra* 1733).

by imposing on them something more than an order to refrain from discriminatory conduct.²¹³ The amount which the employee would have received had she not been discriminated against is calculated,²¹⁴ less the amounts actually earned elsewhere, or amounts which could have been earned with reasonable diligence. The employee thus has a duty to mitigate her losses. The employer may be ordered to pay interest on lost wages, as it has had the benefit of services while applying illegally discriminatory practices.²¹⁵ Where seniority has been denied illegally, the court may order remedial seniority, including benefit seniority, that is, seniority which influences terms and conditions of employment without regard to the relative length of service of other employees. An order of this nature, in effect, differs little from a back pay award.²¹⁶ The Civil Rights Act 1991 has increased the potential for higher monetary awards.²¹⁷ It provides for recovery of future pecuniary losses, damages for emotional pain, suffering, inconvenience, mental anguish and loss of enjoyment of life, as well as punitive damages, reinstatement, back pay and attorney's fees.²¹⁸

A court may also impose affirmative action as a remedy.²¹⁹ The purpose of affirm-

213 For a discussion of the structuring of back pay awards, see Parker 171- 219.

214 *Player 442* refers to the "lodestar" amount of wages and benefits which the plaintiff would have received had it not been for the illegal discrimination.

215 See, for example, *Hodgson v Wheaton Glass Company* 446 F.2d 527 (3d Cir 1971).

216 *Franks v Bowman Transportation Company* 424 US 747 (1976).

217 *Weir 4*. The author explains that this is a "matter of special concern to all employees covered by its provisions."

218 *Weir 4*. The limit on the amount of damages for which an employer can be liable depends on the size of the undertaking. The limit is \$50 000 for companies with 50- 100 employees; \$100 000 in respect of 101- 200 employees; and \$300 000 in respect of more than 500 employees.

219 In terms of section 706(g): "If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to reinstatement or hiring of employees, with or without back pay... or any other equitable relief as the court deems appropriate..." In *Local 93, International Association of Firefighters v City of Cleveland* 478 US 501 (1986), the court held that section 707(g) did not preclude the conclu-

ative action is not merely to provide a remedy to identified victims of discrimination. Its purpose is to dismantle prior patterns of discrimination and to prevent such discrimination in the future. Relief may be provided to the affected class of employees as a whole, rather than to individual employees. Beneficiaries may include employees who were not victims of discrimination.²²⁰

C Equal Pay: The Equal Pay Act 1963 and Title VII of the Civil Rights Act 1964

Allegations of sex discrimination regarding salary may give rise to claims under the Equal Pay Act (the EPA) and Title VII of the Civil Rights Act. While a violation of the EPA is also a violation of Title VII, the converse is not necessarily true. Title VII prohibits discrimination in employment on the basis of sex with respect to employment decisions such as hiring, promotion, job assignments and discipline, as well as compensation.²²¹ The Equal Pay Act is an amendment to the Fair Labor Standards Act 1938. Its scope of application is far narrower than Title VII as it covers only pay discrimination between men and women. It does not prohibit discrimination on the basis of sex in hiring, promotion, job assignment or discipline.

The EPA does not limit the substantive scope of Title VII. Thus compensation discrimination which does not fall within the provisions of the EPA may nonetheless violate the broader provisions of Title VII. That would be the case where the alleged compensation discrimination occurs with respect to jobs which are not

sion of a settlement agreement which provided relief that could benefit individuals who were not the actual victims of the employer's discriminatory practices. In terms of section 703(j), an employer is not *required* to grant preferential treatment to any individual because of a gender based imbalance in the work force. This provision has been interpreted as *permitting* such treatment (*Local 28, Sheet Metal Workers International Association v EEOC* 478 US 421 (1986); *United Steelworkers of America v Weber* 443 US 193 (1979)).

220 *Johnson Affirmative Action* 580. Voluntary affirmative action, adopted by employers without statutory or judicial coercion, is discussed below.

221 Section 703(a).

equal, or are performed in different establishments, and therefore do not fall within the scope of the EPA.²²² For that reason the issue of comparable worth, that is, unequal pay for dissimilar but comparably valuable work, which is not actionable under the EPA, may be challenged under Title VII. But the four exceptions specifically provided for in the EPA may not be challenged in terms of Title VII.²²³

1 The Equal Pay Act 1963 (EPA)

a Coverage and Scope

Employers and employees covered by the EPA are the same as those covered by the Fair Labor Standards Act (FLSA), of which the EPA is a part. The term "employee" is not defined, but it is interpreted liberally to include any person who is in the economic position of an employee.²²⁴ "Employer" includes any person acting directly or indirectly in the interest of any employer in relation to any employee, but does not include labour unions except where the union itself is acting as an employer.²²⁵ State and local governments are also regarded as employees.²²⁶

222 Section 206(d)(1) of the EPA refers to "equal work" which is performed "within any establishment". The Supreme Court rejected the contention that a wage claim which was not cognisable under the EPA could, for that reason, also not fall within the ambit of Title VII in *County of Washington v Gunther* 452 US 161 (1981).

223 This is by virtue of the so-called Bennett Amendment which was incorporated into section 703(h) of Title VII, and which provides: "It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorised by the provisions of section 6(d) of the Fair Labour Standards Act as amended (Equal Pay Act)."

224 Common law principles are taken into account; substance prevails over titles; and independent contractors are excluded (Player 127). The primary factors taken into account in determining whether or not a person is an employee include contractual designation, degree of control, degree of dependency on the employer's business for a livelihood; whether the person invests in the business and shares in the profit or loss, and the permanency of the relationship (Cox 2-4).

225 Section 203(d). Unions may not cause employers to discriminate in violation of the Act (section 206(d)(2)).

226 The extension of the provisions of the FLSA to state and local governments, originally

An employee is covered by the EPA if she²²⁷ is engaged in commerce or the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, or within any establishment qualifying as such an enterprise.²²⁸ An enterprise is engaged in commerce if it is involved in cleaning or repairing clothing, construction, or if it is a school or public agency. If the enterprise does not fall within one of the special classes, it will be covered if it has a minimum annual volume of sales made or business done and has two or more employees who engage in commerce, engage in the production of goods for commerce, or handle goods which have been moved in commerce.²²⁹ As the approach of the EPA is entirely different to that of Title VII, it is possible that employers who employ fewer than fifteen employees, and are thus not covered by Title VII, will be covered by the EPA. The converse is also true, as an employer may employ fifteen employees, while having insufficient dollar volume of sales to qualify for EPA coverage.

The wage comparison is between employees employed in the same establishment. Although most comparisons will be between male and female employees employed at the same time, the Act is viewed as applying to jobs held in immediate succession as well as simultaneously.²³⁰

regarded as unconstitutional, was upheld by the Supreme Court in *Garcia v San Antonio Metropolitan Transit Authority* 469 US 528 (1985).

227 The EPA protects both male and female employees. This study focuses on the female perspective because female employees are typically those against whom pay discrimination occurs.

228 Section 200(a) and (d).

229 Section 203(s). If an employer satisfies this alternative test, all of the employees in the enterprise are protected, whether or not they are engaged in commerce or the production of goods for commerce. For a discussion of the legislative principles, see *Player* 129-138.

230 *Player* 164.

b Enforcement Procedures and Remedies

There are no procedural requisites, such as the filing of complaints with state or federal enforcement agencies or mandatory conciliation efforts, for the filing and processing of EPA complaints.²³¹ An individual may bring a private action²³² to recover unpaid wages and liquidated damages on behalf of herself and similarly situated employees.

The Act is administered by the EEOC. An individual employee may institute a claim without first processing the charge through the EEOC. But once a charge has been filed with the EEOC, the agency has the option of instituting a claim, which, if exercised, terminates the employee's private right to sue.²³³

As stated, an aggrieved employee may recover back pay and liquidated damages. Back pay is the difference between what the affected employee was actually paid over the particular period, and that which she should have been paid. The employer's obligation is to pay male and female employees the identical rate for work which is equal. All remuneration for employment is taken into account, including overtime rates, holiday pay, bonuses, payment into insurance funds and deferred compensation plans, and payments in kind, for example clothing, food and lodging.²³⁴ An employee may also recover liquidated damages in an amount equal

231 Lehr 257.

232 Section 216(b).

233 Lehr 258; Cox 2-2. The Fair Labour Standards Act, of which the EPA is a part, is administered by the Secretary of Labour. In 1978, administration of the EPA was transferred from the Secretary to the EEOC.

234 Player 185.

to that of the back pay liability. The effect is to double the back pay which an employee may recover. Liquidated damages may be reduced by the court where the employer acted in good faith and with reasonable grounds for believing that its actions were legal.²³⁵ Private individuals cannot secure a court order compelling an employer to desist from a discriminatory practice, but a claim of that nature may be brought by the EEOC in conjunction with a claim for back pay and liquidated damages.²³⁶

c Substantive Provisions of the Equal Pay Act

The EPA provides, in pertinent part:

"No employer having employees subject to any provisions of this section shall discriminate... between employees on the basis of sex by paying wages to employees... at a rate less than the rate at which he pays wages to employees of the opposite sex... for equal work the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any factor other than sex: Provided, that an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with provisions of this subsection, reduce the wage rate of any employee."²³⁷

In order to establish a prima facie case under the EPA, an employee must prove that she was performing work that was equal to that of a person of the opposite sex in the same establishment. In terms of the Act, equal work is work which requires equal skill, effort and responsibility and which is performed under working conditions which are similar. Once the employee has established the payment of unequal

235 Liquidated damages have been construed as a substitute for compensatory damages for pain, suffering, humiliation and loss of credit (Shulman and Abernathy 13-23; Player 187- 189).

236 An injunction is generally granted in relation to specific contraventions and employees and not generally for all prospective contraventions (Player 192).

237 Section 206(d)(1).

wages for equal work, the employer is granted the opportunity of showing that the differential was due to one of the four statutory defences, that is, seniority, merit, quantity or quality measuring system, or any factor other than sex.

The equal work requirement supposes something less than identical work, but more than comparability. Substantial equality is required. That was established in *Schultz v Wheaton Glass Company*,²³⁸ in which the court found that while comparable work differed from equal work, male and female jobs should not be regarded as unequal merely because they were not identical. The court's decision was that jobs should be only substantially equal.²³⁹ Jobs are evaluated as to actual content and not by the description or title which the employer has assigned to the particular job.²⁴⁰

The Act applies only to jobs requiring equal skill, effort and responsibility.²⁴¹ Skill is assessed objectively, with regard to the ability required to perform a particular job. The efficiency of a particular employee is not considered, nor is the frequency of actual utilisation of a necessary skill. Effort concerns the mental or physical exertion required to perform a particular job. As is the case with skill, effort is related to job requirements and not to the effort which a particular employee puts into the job. Responsibility concerns the degree of accountability, and may consist of supervisory responsibility, decision-making authority, or accountability for the success or

238 421 F.2d 259 (3d Cir 1970).

239 In the particular case, the employer paid female packers 10% less than male packers. The main duty of all packers was to inspect and pack bottles as they emerged from the oven. Male packers were occasionally required to perform additional tasks which involved heavy labour. The court found the jobs to be substantially equal. See also *Jennings and Willits* 417.

240 *Schultz v Wheaton Glass Company* 421 F.2d 259 (3d Cir 1970). *Modjeska* 363 explains that jobs are evaluated by the actual duties that employees are called upon to perform, because job descriptions prepared by the employer may or may not fairly describe job content.

241 For a discussion of these concepts, see *Player* 146- 149; *Shulman and Abernathy* 13-9 - 13-12; *Modjeska* 365- 370.

failure of the operation.²⁴² Two jobs may have equal core duties, but secondary duties which differ. A higher rate of pay for the secondary duties is justifiable, provided that it is related to the performance of those duties.²⁴³

While the Act requires equal skill, effort and responsibility, it requires only similar working conditions. In *Corning Glass Works v Brennan*,²⁴⁴ the first case to be decided by the Supreme Court under the EPA, the court considered working conditions in the context of identical work performed at different periods. In the particular case night shift employees, who were predominantly male, were paid more than predominantly female employees performing identical work on the day shift. The court limited the meaning of working conditions to two sub-factors, namely, surroundings and physical hazards, and found that the time of day worked was not a relevant criterion in determining working conditions.²⁴⁵ By virtue of this decision, the place of performance would be relevant if it involved exposure to dissimilar haz-

242 In *Hodgson v Miller Brewing Company* 457 F.2d 221 (7th Cir 1972), the jobs of laboratory technicians who worked in different laboratories was held to be equal. Although they performed different tests, which had different purposes, they involved a similar process, which required the same objective level of skill, effort and responsibility. On the other hand, the court in *Spalding v University of Washington* 740 F.2d 686 (9th Cir 1984) found that the jobs of female members of the university's nursing school differed from those of male faculty members teaching in other disciplines. Although the jobs involved the same duties, namely teaching and research, and required the same general levels of effort, skill and responsibility, the court found that the subjective difference in the nature of the jobs warranted a finding of inequality. But in *Brock v Georgia Southwestern College* 765 F.2d 1026 (11th Cir 1985) the court found that a teacher and a school administrator performed equal work for the purposes of the Act.

243 *Brennan v Prince William Hospital Corporation* 503 F.2d 282 (4th Cir 1974). That means that the duties must exist; they must actually be performed; they must be of more than minimal scope and importance; employees who do not receive the higher pay must not perform equivalent duties; and qualified employees of the opposite sex must not be denied the opportunity to perform the extra work. In *Schultz v Wheaton Glass Company* 421 F.2d 259 (3d Cir 1970) the court found that denying one gender the opportunity to perform the extra duties, rendered the higher wage gender related and not work related.

244 417 US 188 (1974).

245 The court found that the time of day worked did not influence the similar working condition requirement, but could none the less be raised by an employer under the "factor other than sex" defence. In the particular case, the employer could not rely on the defence because sex was a factor which had been taken into account, as females had initially been denied access to the night shift.

ards or surroundings. If work is performed at different establishments the issue of equal pay would not be capable of being analysed in terms of the Act.

The EPA contains three specific exceptions. They are seniority, merit, and a system which measures quantity or quality of production. It also contains a general catch-all defence, namely, a wage differential based on any factor other than sex.²⁴⁶ Employers relying on the general defence must prove that the wage differential is based on a non-sex-related factor. The defence may succeed where permanent employees are paid a higher wage than temporary employees, and where full time employees are paid more than part time employees, provided that the difference can be justified on factors other than sex.²⁴⁷ Education and experience can also be factors other than sex, provided that they are significant and are relevant to the job requirements.²⁴⁸ Night shift wage differentials may be justified where they are based on factors other than sex.²⁴⁹ The real or perceived cost of employing one gender cannot be used as a reason for paying a different wage rate.²⁵⁰ One sex may not be paid less merely because members of that sex are willing to work for a lesser rate, or because members of the opposite sex can command a greater market value.²⁵¹

246 Section 206. See *Player* 167- 170; *Shulman and Abernathy* 13-14 - 13-15; *Modjeska* 371- 372.

247 Katz 221 observes that time related factors, such as shift differentials, differences in the number of hours worked per week, and whether the work is temporary or part-time, may affect the worth of employees and provide a legitimate basis for compensating those employees.

248 *Strecker v Grand Forks County Social Services Board* 640 F.2d 96 (8th Cir 1980). See also Katz 223- 224.

249 *Coming Glass Works v Brennan*. 417 US 188 (1974).

250 In *Los Angeles Department of Water and Power v Manhart* 435 US 702 (1978), the employer's pension plan required a larger deduction from the salary of female employees. The contribution differential was based on the fact that women live longer than men and therefore draw pension for a longer period. The employer submitted that longevity was a factor other than sex. The court found that the distinction was based on sex as was the pay differential.

251 *Coming Glass Works v Brennan* 417 US 188 (1974); *Brock v Georgia Southwestern College* 765 F.2d 1026 (11th Cir 1985).

2 *Title VII of the Civil Rights Act 1964*

Title VII forbids sex discrimination, inter alia, regarding compensation, terms, conditions and privileges of employment. This provision has been used to challenge distinctions between male and female employees in respect of pension fund contributions and benefits. Because women on average live longer than men do, and therefore tend to receive a pension for a longer period, many employers required female employees to make larger monthly pension fund contributions than male employees. In *Los Angeles Department of Water and Power v Manhart*²⁵² the Supreme Court held that Title VII prohibited that sort of sex based distinction in the assessment of pension contributions. Employers also tended to equalise the pension differential based on the longevity of women as a group by providing smaller monthly benefits for women after retirement. That practice was challenged in *Arizona Governing Committee v Norris*.²⁵³ The Supreme Court rejected any distinction in the benefits received by women which were based on actuarial calculations of life expectancy of the sex as a whole. It stated that Title VII required employers to treat their employees as individuals, and not as components of a sexual class. The court reiterated the reasoning adopted in the *Manhart* decision, namely, that an individual's life expectancy was based on a number of factors, of which sex was only one. One could not say that an actuarial distinction based entirely on sex constituted an exception to the equal remuneration requirement.

As explained above, the EPA addresses pay discrimination in respect of equal work,

252 435 US 702 (1978).

253 463 US 1073 (1983).

that is, the performance of work which is substantially equal. A critical question regarding wage discrimination suits brought under Title VII is whether the concept of comparable worth may be relied on. Under the comparable worth theory employees are entitled to equal pay for jobs that are not substantially equal, but are comparable in their value to the employer. An employer engages in sex-based wage discrimination if it pays employees in traditionally female jobs lower wages than employees in male dominated jobs of comparable value. Proponents of the theory contend that it addresses the general undervaluation of jobs traditionally dominated by women, which remains unremedied by the EPA because of the absence of male workers in those positions.²⁵⁴ Courts, however, have been reluctant to accept the theory largely because of qualms about the practical difficulties and risks which the claim might entail.²⁵⁵ They have also accepted reliance by employers on market wages for female jobs which are below those of traditionally male jobs.²⁵⁶ substantially equal ü » work, merely because females are prepared to work for less (ü »*Corning Glass Works v Brennan* ü » 417 US 188 (1974)).»

In terms of the Bennett Amendment to Title VII, a wage differential which is authorised by the EPA is not unlawful in terms of Title VII.²⁵⁷ Employers argued

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- 254 *Modjeska* 162; *Thomas Pay Equity* 3; *Sorensen* 470. The doctrine thus permits comparison of jobs which do not fall within the ambit of the EPA requirement of equal pay for jobs which are substantially equal.
- 255 *Horrigan and Harriman* 704 give the following general reasons for the courts' refusal - the sparse legislative history about congressional intent; early confusion over the meaning of the Bennett Amendment to Title VII; a reluctance on the part of judges to interfere with the traditional market setting of wages; and a concern that there might be some merit in the predictions by opponents of comparable worth that its widespread implementation would result in economic collapse.
- 256 This situation is distinguishable from the position under the EPA. Under the EPA, an employer may not pay a female employee less than a male for ü
- 257 Section 703(b) of Title VII, commonly referred to as the Bennett Amendment, provides: "It shall not be an unlawful employment practice under this sub-chapter for any employer to differentiate on the basis of sex in determining the amount of wages or compensation paid or to be paid to employees of such employer if such differentiation is authorised by the provisions of Section 206(d) of Title 29 (the Equal Pay Act)."

that the effect of the amendment was to limit wage discrimination claims under Title VII to those which could be brought under the EPA, that is, claims not arising from equal work were excluded. Employees, on the other hand, argued that the effect of the amendment was merely to incorporate the four affirmative defences contained in the EPA into Title VII. The matter was addressed by the Supreme Court in *County of Washington v Gunther*.²⁵⁸ In that case the jobs of male and female prison security guards were found to be not substantially equal, and a claim under the EPA was excluded. Relying on Title VII, the female employees sought to prove intentional discrimination with direct evidence that the employer set the wage scale for female guards, but not for male guards. The question before the court was whether the claim was excluded from Title VII by the Bennett Amendment. The court found that the claim fell within the ambit of Title VII, as only the four affirmative defences were covered by the amendment. The court emphasised that the claim before it was not based on comparable worth but on intentional sex discrimination.²⁵⁹ The case thus permitted intentional sex-based wage discrimination claims under Title VII, but did not resolve the Title VII viability of comparable worth.

But courts both before and after *Gunther* have uniformly rejected Title VII claims based on comparable worth. In *American Federation of State, County and Municipal Employees v State of Washington*,²⁶⁰ which was decided shortly after *Gunther*, the

258 425 US 161 (1981).

259 For a discussion of the controversy surrounding the Bennett Amendment prior to *County of Washington v Gunther* 452 US 161 (1981), as well as a discussion of that decision, see Worman 161- 178; Hogler 737- 744.

260 770 F.2d 1401 (9th Cir 1985).

court of appeals expressly rejected the notion that Title VII authorizes comparable worth claims. Employees had filed a class action suit alleging that the employer's compensation scheme violated Title VII. The district court had found that the employer's requirement that employees' salaries should reflect prevailing market rates discriminated on the basis of sex by compensating employees in predominantly female jobs at lower rates than employees in predominantly male jobs. The court relied on a comparable worth study undertaken by the employer which found a wage disparity of approximately 20% between predominantly male and female jobs of comparable worth. Although aware of the findings, the employer failed to implement a comparable worth scheme and relied on prevailing market rates for the wages actually paid. The court of appeals reversed the district court's finding, holding that reliance on a market system which compensated employees in female dominated jobs at a relatively low rate did not violate Title VII, despite the findings of the comparable worth study undertaken by the employer.²⁶¹ The court also declined to apply a disparate impact analysis²⁶² and, on the facts, refused to find that disparate treatment had occurred, because the requisite discriminatory intent had not been established.

The comparable worth doctrine was again rejected in *American Nurses' Association V Illinois*.²⁶³ The employees alleged the existence of sex-based discrimination in the classification and compensation of employees. They argued that employees in historically female dominated job classifications were paid lower wages than employees

261 The two cases responsible for establishing the acceptability of reliance on the market rate are *Christensen v Iowa* 563 F.2d 353 (8th Cir 1977), and *Lemons v City and County of Denver* 620 F.2d 228 (10th Cir 1980). For a comment on these decisions, see *Thomas Pay Equity* 8-9.

262 The disparate impact analysis was also rejected in *Christensen v Iowa* 563 F.2d 353 (8th Cir 1977). Brown, Baumann and McNick 145 note that the rejection of the disparate impact model for wage claims which cannot meet the substantial equality requirement, significantly increases the employee's burden of proof.

263 783 F.2d 716 (7th Cir 1986).

in historically male dominated job classifications for work requiring comparable skill, effort and responsibility. The court dismissed the claim holding that the employees had failed to establish a cause of action under Title VII. The comparable worth theory was expressly rejected as the court was regarded as ill-equipped to undertake the economic analyses necessary to establish a comparable worth claim.²⁶⁴

It is apparent that the federal courts have not accepted the comparable worth doctrine. They do not wish to become involved in a determination of the value of an employee to the company.²⁶⁵ They have also shown a reluctance to require wage scales which do not reflect market forces, and employers have not been compelled to implement equal pay based on their own evaluations where existing wages reflect prevailing market rates. Given the rejection of the disparate impact doctrine and the comparable worth analysis, an employee instituting an equal pay claim under Title VII is obliged to rely on the disparate treatment doctrine which requires proof of intention to discriminate by an employer.²⁶⁶

D Affirmative Action

264 As Berger 438 notes, the above decisions continue to reflect a general reluctance by the courts to depart from market-based wage systems. See also Fogel 296.

265 In *County of Washington v Gunther* 452 US 161 (1981), for example, the Supreme Court endorsed the validity of the employer's job evaluation as it did not require the court to make its own assessment of the value of male and female employees. In *Power v Barry County* 539 F Supp 721 (WD Mich 1982) the court refused to evaluate the worth of different jobs.

266 In *County of Washington v Gunther* 452 US 161 (1981) the employer's failure to comply with its own wage survey served as evidence of intentional discrimination. In *Lanegan-Grimm v Library Association of Portland* 560 F Supp 486 (D Or 1983) a female library employee who drove a book mobile was paid less than a library truck driver. She had been paid less throughout her employment. Historically the two jobs were paid differently, and one had always been a male job and the other female. The court found that although no job evaluation was available the jobs were sufficiently similar to give rise to an inference of intentional discrimination in their disparate compensation.

Affirmative action as a court ordered remedy under Title VII was discussed above in the context of Title VII relief. This discussion focuses on affirmative action programmes which are adopted voluntarily by employers in order to correct gender imbalances in the work force. Affirmative action programmes often refer to goals and timetables. A goal is a target percentage of the work force to be constituted by women, while a timetable refers to the period within which the goal should be reached. Goals are distinguished from quotas on the basis that quotas are rigid requirements, while goals and timetables require only a good faith effort to meet a stated goal within an allotted time frame.²⁶⁷

Affirmative action entails favouring a defined group of employees, by referring only to their group status, that is, female employees. The action is taken solely on the basis of this status, and not on the basis of some identifiable act of harm which has befallen the affected persons, as is the case where an employer is ordered to hire, promote or compensate a specific group of female employees which has been harmed by an unlawful act. Affirmative action may be imposed by a court as a remedy.²⁶⁸ It may be imposed by government on its own employment practices or on private employers. An example is to be found in Federal Executive Order 11246, which imposes affirmative action obligations designed to achieve, inter alia, gender balance in the work forces of federal contractors.²⁶⁹ A gender preference

267 Cox 8-12; Brooks *Affirmative Action* 618.

268 Section 706(g).

269 The order provides, in pertinent part, that: "The contractor will not discriminate against any employee or applicant for employment because of... sex.... The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their... sex.... Such action shall include, but shall not be limited to the following: Employment, promotion, upgrading, demotion, or transfer, recruitment, or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of this non-discrimination clause." Shulman and Abernathy 10-5 explain the effect of the clause as follows: "Affirmative action" is the key term in the clause. It gives rise to a succession of obligations on the contractor, which range from

programme may be adopted privately. An employer may adopt a programme because it fears that a failure to do so may result in liability under Title VII (as an imbalance in an employer's work force may be used as evidence of discrimination). Gender preference may also be adopted in a settlement agreement or consent decree.

Privately adopted affirmative action programmes, adopted by private and government employers without statutory or judicial coercion, are generally referred to as voluntary affirmative action programmes, and have been the subject of much litigation.²⁷⁰ They can be challenged on either constitutional or statutory grounds. In the statutory context, the programmes are generally challenged on the ground that they require disparate treatment because of race or gender, while Title VII prohibits employment discrimination "because of" race or gender.²⁷¹ The Act also contains a specific provision stating that it does not "require" preferential treatment because of an imbalance in the work force.²⁷² Constitutionally, the equal protection

Abernathy 10-5 explain the effect of the clause as follows: "Affirmative action" is the key term in the clause. It gives rise to a succession of obligations on the contractor, which range from the promulgation of a policy of equal employment opportunity to the commitment to pursue specific numerical goals for the hiring of protected persons within a specified time frame, usually a year. These 'goals and timetables' are by far the most controversial aspect of the required affirmative action. They are geared to the identification of shortfalls between the employment of such persons and their availability to the employer, a concept labelled 'underutilization'. Apart from this, the required affirmative action raises little or no legal (or political) problems, and is set forth in a document the employer must adopt, which is called an "affirmative action compliance programme".

270 *Brooks Affirmative Action* 618 explains the distinction between voluntary and involuntary affirmative action plans as follows: "The former are affirmative action programmes not imposed on an employer by the Executive Order or by a court as a remedy for a proven violation of constitutional or statutory law. Voluntary affirmative action programmes may, however, arise in anticipation of a threat of future litigation. Like the Supreme Court, I would include consent decrees in the category of voluntary affirmative action." See also *Johnson Voluntary Affirmative Action* 611.

271 Section 703(a).

272 Section 703(j).

clause of the Fourteenth Amendment of the Constitution and the equal protection component of the Fifth Amendment due process provision prohibit state, local and federal governments from discrimination motivated by gender, unless the discrimination serves important government objectives and is substantially related to the achievement of those objectives.²⁷³ Because public employers are subject to both constitutional (equal protection) and statutory (Title VII) law, constitutional and statutory challenges may be joined against a single affirmative action programme adopted by those employers.

One of the earliest decisions on affirmative action was handed down by the Supreme Court in *Regents of the University of California v Bakke*.²⁷⁴ The case originated as a charge that the reservation of sixteen places in a state medical school exclusively for minorities constituted a violation of the Fourteenth Amendment, which states that the law must give equal protection to all individuals. The court found the admission programme to be unlawful, but indicated that state educational institutions could take membership of a protected group into account in properly devised admissions programmes. The significance of the decision is that it did not regard properly devised affirmative action programmes as *per se* violations of the Fourteenth Amendment.

The central issue before the Supreme Court in *United Steelworkers of America v Weber*²⁷⁵ was whether or not a programme voluntarily adopted in order to correct past discrimination against a protected group of employees had an adverse impact on members of the unprotected majority. The case involved an allegation that a

273 *Craig v Boren* 429 US 190 (1976).

274 438 US 265 (1978).

275 443 US 193 (1979).

craft training programme administered jointly by the employer and a trade union, which reserved one half of all available opening for blacks, violated Title VII.²⁷⁶ The question considered by the court was whether Title VII forbids private employers and unions from voluntarily agreeing on bona fide affirmative action plans which provide (racial) preference in the manner described. The court found that the plan in question did not violate the specific anti-discrimination provisions of the Act.²⁷⁷ It then went on to consider the implication of the fact that the Act does not "require" an employer to grant preferential treatment in order to correct an imbalance in its work force.²⁷⁸ It found that as the statute said that preferential treatment of minorities was not required, it was in fact permitted. If the intention had been to prohibit preferential treatment, the statute would have stated that such treatment was neither required or permitted. In the present case the purpose of the programme adopted by the employer mirrored the purpose of the Act, in that both were designed to break down old patterns of segregation and hierarchy. Voluntary affirmative action was thus permissible, provided that it met certain requirements. First, it should be a temporary measure designed to achieve rather than to maintain a balanced work force. Secondly, it should not constitute an absolute bar to the employment of persons not covered by the action. Finally, it should not require the discharge of persons not covered.²⁷⁹

The significance of the *Weber* decision lies in the finding that voluntary affirmative action programmes do not necessarily contravene the provisions of Title VII.

276 Section 703(a) and (d).

277 Section 703(a) and (d).

278 Section 703(j).

279 As Cox 8-17 explains, the rationale is one of remedy, that is, the action remedies the effects of past discrimination. But, the affected persons need not have been the actual victims of discrimination, nor is it necessary that the employer remedy only the effects of its own conduct. For a discussion of the *Weber* guidelines, see also Robertson and Johnson 696.

However, the remedial purpose of a programme should mirror the purpose of the Act, and the means employed by the programme to accomplish that purpose should not show unnecessary disregard for the interests of unprotected employees. The court also laid down certain guidelines for assessing the legality of such programmes. But it did not clarify the meaning of a balanced work force, that is, with whom the employer's work force should be compared in order to determine whether or not protected groups are under-represented? The tendency since *Weber* has been to compare the employer's work force with the local labour market or population in the case of unskilled positions, and with those in the labour force who possess the relevant qualifications in the case of highly skilled positions.²⁸⁰ The extent of the imbalance in the employer's work force need not be such that it would support a prima facie case against the employer, but the affirmative action programme would have a greater chance of surviving judicial scrutiny if significant under-representation could be found.²⁸¹

*Johnson v Transportation Agency, Santa Clara County*²⁸² was the first Supreme Court decision involving affirmative action in the hiring of females. The question before the court was whether an employer could use a voluntary affirmative action plan which authorised sex to be one factor to be taken into consideration in the hiring process, when hiring in an area in which there was a significant under representation

280 See, for example, *Johnson v Transportation Agency, Santa Clara County* 480 US 616 (1987), which relied on the decisions in *International Brotherhood of Teamsters v United States* 431 US 324 (1977), and *Hazelwood School District v United States* 433 US 299 (1977). See also *Johnson* 615.

281 Simon 139 explains that the courts have not established a specific formula to define the measure of job segregation which would justify voluntary affirmative action. Gross or significant under-representation could be found in both *United Steelworkers of America v Weber* 443 US 193 (1979) and *Johnson v Transportation Agency, Santa Clara County* 480 US 616 (1987).

282 480 US 616 (1987).

by a group afforded protection under Title VII. The employer had adopted the plan in order to address a manifest imbalance in its work force caused by the limited opportunities for women which existed in traditionally male-dominated job categories. The aim of the plan was to achieve a statistically measurable annual improvement in hiring, training and promotion of women in all major job classifications where they were under represented. The long term goal was to attain a work force that reflected women in percentages approximating those of the area labour force. The court found that the programme did not unnecessarily trammel the rights of other employees or create a bar to their advancement because it set aside no positions for women, and expressly stated that the goals established for each division were not to be construed as quotas which had to be met.

In summary, it appears that voluntary affirmative action is permissible not only in respect of hiring decisions, but also in selection for apprenticeship, training and promotion.²⁸³ But an affirmative action programme requiring the loss of jobs protected by a bona fide seniority system will not be allowed. In two cases before the Supreme Court, the layoff provisions of an affirmative action programme resulted in retaining minority workers with less seniority, while laying off non-minority workers with greater seniority.²⁸⁴ In both cases the court refused to permit the displacement

283 In *Brunton v City of Detroit* 704 F.2d 878 (6th Cir 1983), the line of reasoning of employees who were not favoured by the employer's affirmative action programme regarding promotions was that the impact of granting racial preferences at the hiring stage was diffused because no specific minority was selected at the expense of a specific white male applicant. But in the case of promotional selections, an identified white male is passed over and his expectations are thus unreasonably and unlawfully trammelled. The court found that any affirmative action remedy could upset expectations but determined that the need to eradicate past discrimination justified the imposition of preferences. *Liggett* 415 explains that in instances of selection for apprenticeship, training and promotion, the affirmative action is "forward-looking", and does not unnecessarily trammel the interests of employees not favoured by the programme.

284 *Firefighters Local Union Number 1784 v Stotts* 467 US 561 (1984), and *Wygant v Jackson Board of Education* 476 US 267 (1986).

of non-minority workers and upheld the seniority systems.²⁸⁵

285 Johnson *Affirmative Action* 579 observes that the decisions are consistent with the principle that a permissible affirmative action plan is one which does not include the discharge of non-minority employees and their replacement with new minority employees, and does not unnecessarily trammel the interests of non-minority employees (as per *United Steelworkers of America v Weber* 443 US 193 (1979)). See also Liggett 415- 416.

CHAPTER FIVE

THE UNITED KINGDOM

A Introduction

The anti-discrimination legislation of the United Kingdom draws upon American principles, but takes into account differences which exist between the two systems.¹ It also reflects European law principles. The most significant protection against discrimination in respect of female employees stems from four statutes. They are the Sex Discrimination Act 1975 (the SDA), the Equal Pay Act 1970 (the EqPA), Part III of the Employment Protection (Consolidation) Act 1978 (the EPCA), and the Sex Discrimination Act 1986, which amends earlier legislation in the light of developments in European law.²

The SDA protects women against discrimination in employment with regard to matters not covered by the EqPA, and against discrimination in education and in the provision of goods, facilities, services and premises to the public.³ The ambit of the Act thus extends beyond the employment situation. The focus of this study will be on the protection provided in the employment context. A woman who alleges that she has been discriminated against may bring an action before an industrial tribunal, with a right of appeal to the Employment Appeal Tribunal on questions of law⁴

1 Hepple 117; Napier 1494.

2 Racial minorities are protected by the Race Relations Act 1976, which repeals and replaces earlier legislation contained in the Race Relations Acts of 1965 and 1968.

3 By virtue of section 2(1), the protection afforded by the Act applies equally to men. This study, however, focuses on discrimination against female employees.

4 In matters other than employment matters she may bring an action in a county court.

The EqPA complements the SDA and the two statutes may be viewed as one code, the former covering contractual terms of employment, and the latter prohibiting discrimination in respect of non-contractual terms.⁵ The EqPA implies an equality clause into contracts of employment of women engaged in like work, work rated as equivalent, or work of equal value.⁶ A successful comparison with an actual male comparator is required. The SDA, on the other hand, does not require comparison with an actual male comparator, but permits comparison with a hypothetical male. Only the SDA can apply to non-contractual matters, and to discrimination on the ground of marital status. Where discrimination relates to the payment of money or any other contractual term, a woman must proceed under the EqPA.⁷

The Equal Opportunities Commission (EOC) was established in terms of the SDA. The broad functions of the EOC are to work towards the elimination of discrimination, to promote equality of opportunity between men and women, and to monitor the effectiveness of the legislation.⁸ The legislation grants the EOC the power to assist individuals who allege that they have been the victims of discrimination in terms of the SDA or of the EqPA.⁹ The initiative must, however, come from the individual and remedies which can be awarded by industrial tribunals are confined to the case at hand. Despite the essentially collective nature of discrimination, the rules of procedure for the industrial tribunals and the Employment Appeal Tribunal

5 Section 6(6) of the SDA provides that the Act does not apply to benefits, consisting of the payment of money, which are regulated in a woman's contract of employment.

6 By virtue of section 1(2) of the Act the equality clause applies to all contractual terms and conditions of employment, and is not restricted to the payment of money only.

7 In 1988, the EOC, in a document entitled *Legislating for Change*, proposed that the two acts be integrated as one, and that such act incorporate the hypothetical comparison currently contained only in the SDA.

8 Section 53.

9 Section 75.

(EAT) do not provide for class actions or representative actions,¹⁰ where a number of individuals have similar but not identical claims.¹¹ The EOC can also conduct a formal investigation into more widespread issues. The investigation can be of a general nature for a purpose connected with the statutory functions of the commission,¹² or may take place on suspicion of a discriminatory action which has occurred,¹³ and can result in the issue of a non-discrimination notice by the commission. Finally, the commission has an educational role, which has been undertaken by the issuing of a code of practice, by the commissioning of research and the dissemination of information and advice.

The law of the United Kingdom has been affected by law of the European Economic Community (EEC). EEC equal treatment rights are contained in Article 119 of the Treaty of Rome, which is the founding instrument of the EEC, and in various EEC directives. Article 119 provides that "each Member State shall... ensure and... maintain the application of the principle that men and women should receive equal pay for equal work." The Equal Pay Directive 1975¹⁴ expands Article 119 and defines the principle of equal work as the same work, or work to which equal value is attributed.¹⁵ It provides for the elimination of all discrimination on the ground of

10 Except by agreement between the parties, which is unlikely to occur.

11 There is thus no equivalent to the American class action. Bourn and Whitmore 2 observe that the class action has two advantages. First, it reflects the social and collective nature of discrimination. Secondly, it provides a method whereby individual claims, which may be small in themselves, can be combined and consequently can give rise to substantial legal liabilities for an employer. This may act as an incentive toward the adoption of meaningful equal opportunity policies.

12 Section 53(1).

13 Section 58(3A).

14 Directive 75/117.

15 Article 1.

sex with regard to all aspects and conditions of remuneration.¹⁶ The Equal Treatment Directive 1976¹⁷ provides for equal treatment in access to employment, promotion, vocational training and working conditions.¹⁸ It prohibits discrimination based on sex or marital status.¹⁹

The extent to which Article 119 and the EEC directives create rights which can be enforced in national courts in the United Kingdom must be ascertained. Article 119 creates individual rights which can be enforced directly by an aggrieved party against EEC member states and against private parties. The provisions of the Article can thus be invoked against both public and private sector employers in national courts.²⁰ The provisions of directives can be relied upon directly by public sector employees in national courts. Private sector employees cannot rely on directives in that manner.²¹ But directives do have an indirect effect on both public and private employers as national courts are required to apply national law consistently with the provisions of the directives. Where the terms of a directive cannot be satisfied in that manner, the direct effect becomes relevant.²² The European Commission is

16 Article 1.

17 Directive 76/207.

18 Article 1(1).

19 Article 2(1).

20 This was held to be the case in the decision of the European Court of Justice in *Defrenne v Sabena* (No 2) Case 43/74 (1976) ECR 455 (European Ct). Fitzpatrick 935 explains: "...the Treaty article created not only rights which could be enforced against the Member States (described as "vertical direct effects"), but also rights which could be enforced against private parties ("horizontal direct effects")."

21 For example, the employee in *Marshall v Southampton and South-West Hampshire Area Health Authority* Case 152/84 (1986) ECR 723/ (1986) IRL R 140 (European Ct) could rely directly on the provisions of the Equal Treatment Directive 1976 because she was employed by an area health authority which was viewed as an emanation of the state.

22 Fitzpatrick 936 explains that the question of the direct effect of a directive is the second stage of a national court's consideration of the implication of a directive on national law. The first stage is to attempt to interpret national law consistently with the directive. The effect of community law in the United Kingdom has also been defined by a special Act of Parliament. Sec-

empowered, in terms of the Treaty of Rome, to take infringement proceedings against a member state before the European Court of Justice (ECJ) where a state has failed to amend domestic law in accordance with the provisions of a directive.²³ The ECJ is also required to interpret community law for the benefit of national courts. This procedure stems from the obligation of the highest national court of a member state to refer cases to the ECJ for authoritative interpretation.²⁴

B The Sex Discrimination Act 1975 (SDA)

The discussion below focuses on the Sex Discrimination Act. The expansion of employees' rights by virtue of European principles is described at the appropriate points. British statutes, other than the SDA, which affect employment issues (particularly in the area of pregnancy) are referred to where necessary.

tion 2(1) of the European Communities Act 1972 provides: "All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties (including the Treaty of Rome) and all such remedies and procedures from time to time provided for, by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom, shall be recognised and available in law, and shall be enforced, allowed and followed accordingly". Section 2(4) stipulates that any Act of Parliament is to be interpreted and have effect subject to the principle laid down in section 2(1). Section 2(2) authorises the government, by order, and any designated minister or department, by regulation, to make provision:

- (i) to put into effect those Treaty and other obligations which are not directly applicable or effective by virtue of section 2(1); and
- (ii) to fill out and to make specific provision within the context and limits of United Kingdom law for those Treaty and other Community obligations which are directly applicable or effective".

For a discussion of the provisions of the European Communities Act and its effect on the scope of European law in the United Kingdom, see Hepple *The Law of the European Communities* 1199-1213.

23 Article 169 of the Treaty of Rome.

24 Article 177 of the Treaty of Rome. Docksey 258 likens EEC equality law to a "constitutional code" and states that from a British perspective "it raises the challenging constitutional concept of a unique entrenched right, against which even statute cannot stand" (258).

1 Coverage and scope

The SDA protects employees and applicants for employment from discrimination on the basis of sex²⁵ and of marital status.²⁶ In the case of discrimination on the ground of marital status, a comparison is made between persons of the same sex. A married woman would thus have to compare herself with an unmarried woman and not with an unmarried man.²⁷

The Act describes the circumstances under which discrimination is prohibited. Each stage of employment is covered, from the arrangements made for hiring employees through to dismissal. The section also includes a general catch-all provision.²⁸ Employment is broadly defined and includes a woman working under a contract of service, a contract of apprenticeship, or a contract personally to execute any work or labour.²⁹ A contract to execute work or labour covers independent contractors and

25 Section 1.

26 Section 3. In terms of section 2 the Act protects both men and women from discrimination. As has been the case throughout this study, the person discriminated against on the ground of sex is assumed to be a woman.

27 Palmer and Poulton 5. As the authors observe, less favourable treatment of a married women in relation to an unmarried man could constitute either direct or indirect discrimination on the basis of sex, as opposed to marital status.

28 Discrimination is prohibited with regard to:

- (a) the arrangements made by an employer for determining who should be offered employment (including advertising and selection procedures);
- (b) the terms and conditions on which a person is offered a job (Once a person has been employed the SDA applies to non-contractual conditions while the EqPA applies to contractual conditions.);
- (c) the refusal or deliberate omission to offer a woman a job;
- (d) the refusal or omission to give a woman the same training, transfer and promotion opportunities;
- (e) giving women access to fewer or less favourable benefits, facilities or services;
- (f) dismissing a woman;
- (g) subjecting a woman to any other detriment (section 6(1) and (2)).

29 Section 82(1).

self-employed persons.³⁰

Most government employees are protected by the Act, except for those to whom special provisions apply, for example, the police,³¹ prison officers,³² and the armed forces.³³ The Act prohibits discrimination by employers,³⁴ partners,³⁵ trade unions and employers' organisations (regarding admission of members to the organisation or the provision of benefits to members),³⁶ qualifying bodies,³⁷ vocational training bodies,³⁸ and employment agencies.³⁹

Employment for the purposes of an organised religion is excluded where employ-

- 30 In *Quinnen v Hovells* (1984) IRLR 227 EAT, the EAT held that a contract personally to execute work or labour was a wide and flexible concept and was intended to enlarge upon the ordinary connotation of employment so as to include persons outside of the master-servant relationship. At 229, it stated that persons "who engage, even cursorily, the talents, skill or labour of the self-employed are wise to ensure that the terms are equal as between men and women."
- 31 Sections 85(3) and 17. The Act applies to the police. However, in terms of section 17, regulations under the Police Act 1964 may treat men and women differently in respect of requirements relating to height, uniform or equipment; special treatment afforded to women in connection with pregnancy or childbirth; and pensions for special constables or police cadets.
- 32 Section 18. The Act applies to prison officers, except that discrimination in respect of height is permissible.
- 33 Section 85(4) and (5). The army, navy and air force are excluded from the Act.
- 34 Section 6.
- 35 Section 11.
- 36 Section 12.
- 37 Section 13. Qualifying bodies are bodies which can confer authorisation or a qualification which is needed for, or which facilitates, participation in a particular occupation or trade. Qualifying bodies include, for example, the Law Society and the British Medical Association.
- 38 Section 14. Vocational training bodies may not discriminate with regard to access to training, training facilities or the termination of training.
- 39 Section 15. Employment agencies may not discriminate in the terms on which services are offered, the manner in which services are provided or by refusing to offer services. Services include guidance on careers and other services related to employment.

ment is limited to one sex only so as to comply with the doctrines of the religion.⁴⁰ In the case of mineworkers, women may not be employed if their duties involve spending a significant proportion of their time below ground.⁴¹ Acts done under statutory authority and acts safeguarding national security are excluded from the SDA.⁴² The Act does not apply to women working at an establishment abroad,⁴³ nor to women participating in competitive sport where the physical strength, stamina or physique of the average woman places her at a disadvantage to the average man.⁴⁴ The Act does not apply where sex is a genuine occupational qualification.⁴⁵ The Act permits an employer to provide special treatment for women relating to pregnancy, childbirth and maternity leave,⁴⁶ and permits positive training for women aimed at providing opportunities which have been denied in the past.⁴⁷

Prior to 1986, employment for the purposes of a private household was excluded from the Act, as was employment where there were fewer than six employees employed by the same employer or associated employers. The situation was amended by the SDA 1986 which abolished the exclusions.⁴⁸ The 1986 Act also amended the position regarding the exclusion of provisions in relation to death or

40 Section 19.

41 Section 21.

42 Sections 51 and 52.

43 Sections 6 and 10.

44 Section 44.

45 Section 7. This defence is discussed below.

46 Section 2(2).

47 Sections 47, 48 and 49.

48 Section 1(1) of the SDA 1986.

retirement.⁴⁹

An employer is liable for discrimination carried out by an employee in the course of his or her employment, whether or not it was done with the employer's knowledge or approval, unless the employer can prove that it took such steps as were reasonably practicable to prevent it.⁵⁰

2 Enforcement Procedures

Enforcement of the SDA takes place through industrial tribunals,⁵¹ and lies largely in the hands of individual complainants.⁵² The tribunal process is designed to decide whether there has been a breach of the anti-discrimination legislation by an employer and to provide a remedy for an offended individual. An individual who is of the opinion that she has been discriminated against by her employer may initiate a case with an industrial tribunal by completing the prescribed form. The time limit within which a complaint must be brought is three months from the date of the act complained of.⁵³ A potential applicant is granted an opportunity to question her employer on the reasons for its actions or on any relevant matter by means of a reply form which may be sent to the employer prior to initiating proceedings or thereafter.⁵⁴ This procedure enables a complainant to decide whether to initiate proceedings and, if she does so, to formulate and present her case effectively. The

49 Section 2 of the SDA 1986.

50 Section 41.

51 Industrial tribunals deal with employment matters, while county courts deal with other matters provided for in the Act, for example, education.

52 Section 63(1).

53 Section 76(1).

54 Section 74.

employer is not compelled to complete the form, but a tribunal may draw a negative inference from a failure to reply, as well as from a reply considered to be evasive.⁵⁵

An applicant and a respondent at a tribunal hearing may be accompanied by a representative. The representative need not be legally qualified.⁵⁶ Where cases are legally complex or raise important issues of principle the EOC is authorised to assist applicants by offering advice, attempting settlement or arranging and paying for legal representation.⁵⁷ Once a claim of sex discrimination has been filed with an industrial tribunal, a copy thereof is sent to the Advisory, Conciliation and Arbitration Service (ACAS) in an attempt to promote a settlement of the complaint. A settlement will be attempted if requested by both the applicant and the respondent, or if ACAS itself is of the opinion that there is a reasonable prospect of reaching such settlement.⁵⁸ Where a complaint is not settled it proceeds before a tribunal.⁵⁹ There is a right of appeal on a question of law from an industrial tribunal to the

55 Section 74(2)(b).

56 In addition to legally trained persons, parties may use representatives such as union officials and shop stewards. Townshend-Smith 199 explains that the degree and effectiveness of union support varies. A small percentage of applicants have union representation. Applicants are not always satisfied with the quality of service received from their union, as the law may be too specialist for non-lawyers to give adequate advice, particularly in instances of indirect discrimination. On occasion unions have been perceived as actually siding with employers.

57 Section 75. Leonard 10-11 points out that the commission grants such assistance to only half of those persons who request it in each year. Many applicants are represented by their trade unions, while a few are represented by persons from citizen advice bureaux or by friends. More than half of applicants who attend tribunal hearings do so without any form of representation.

58 Section 64.

59 Parties present their evidence and the tribunal reaches a decision on the facts, subject to the applicable legislation. The tribunal may make a declaratory order declaring the rights of complainant and the respondent. It may award compensation and may recommend that the employer take action which the tribunal deems practicable to obviate the adverse effect of the discrimination (section 65 (1)). Costs are seldom awarded. A tribunal has the power to award costs if proceedings were brought or conducted frivolously, vexatiously or otherwise unreasonably (regulation 11 of the Industrial Tribunal (Rules of Procedure) Regulations 1985).

Employment Appeal Tribunal.⁶⁰

The duties of the EOC entail monitoring the legislation, proposing reform and, to a limited extent, litigation. The EOC may institute proceedings against an employer in certain defined instances. It may do so where an employer has placed a discriminatory advertisement.⁶¹ It is unlawful to publish an advertisement which indicates an intention to discriminate. The use of a job description with a sexual connotation (such as "waiter" or "salesgirl") is deemed to be indicative of an intention to discriminate. In such instances only the commission can bring a legal action. The commission may also institute proceedings with regard to indirectly discriminatory practices, for example, where the nature of the practice has prevented women generally from seeking a benefit.⁶² Under those circumstances there is generally no offended individual who will institute proceedings before an industrial tribunal.⁶³

Enforcement of the anti-discrimination legislation by the EOC was intended to occur primarily through its power to conduct formal investigations and to issue non-discrimination notices.⁶⁴ If a formal investigation discloses unlawful discrimination

60 Appeals are governed by the normal Employment Appeals Tribunal Rules 1980.

61 Section 38.

62 Section 37. The commission must have conducted a formal investigation into the practice and issued a non-discrimination notice (that is, a notice to cease discrimination) prior to instituting proceedings. The commission also has the power to apply to a county court for an injunction where an employer against whom a non-discrimination notice has been issued persists in the discrimination which is the subject of the notice (sections 71 and 72).

63 The same is true where there have been instructions by a person with authority to another to discriminate (section 39), or where a person has brought pressure to bear on another to discriminate (section 40).

64 The EOC can conduct two types of investigation. The first is exploratory, where the commission looks at a general area of activity, such as the legal profession, without naming a respondent (section 53(1)). The second, a named person investigation, is of an accusatory nature and looks at specific conduct by a named employer (section 58(3A)). The latter type of investigation cannot take place unless the commission has reason to believe that the employer has committed an unlawful act. In *Re Prestige Group plc* (1984) *IRLR* 166 (HL) it was held that the Commission for Racial Equality (which has similar powers to the EOC) could not conduct a

the EOC has the power to issue a non-discrimination notice in respect of the employer concerned, requiring it not to commit the acts specified.⁶⁵ The commission monitors the situation and can require that it be provided with information for up to five years to enable it to check that the notice has been complied with. There is no automatic sanction for failure to comply with a notice. The commission may institute a second formal investigation to determine whether the terms of the notice have been complied with, or it may institute a claim for persistent discrimination.⁶⁶

The EOC has issued a Code of Practice.⁶⁷ The code does not have the force of law but may be relied on in tribunal hearings.⁶⁸ Its provisions are of persuasive value and are admissible in evidence before an industrial tribunal, which may take into account any provision of a code which appears relevant. The code is set out in two main sections. The first states what the law requires and gives the commission's recommendations for compliance. The second part gives guidance on the promotion of equal opportunities to give effect to the spirit of the law.

formal investigation into the activities of a named person unless it had formed a suspicion that the person named may have committed some unlawful act of discrimination and had some grounds for that suspicion. The grounds on which the suspicion was based could be tenuous because they had not yet been tested.

65 Section 67.

66 Section 71. For a discussion of the procedural problems associated with the conducting of formal investigations see Newell 508.

67 The power to do so stems from section 56A.

68 In terms of section 56A(10) the code is "admissible in evidence, and if any provision of such a code appears to the tribunal to be relevant to any question arising in the proceedings it shall be taken into account in determining that question."

3 What is Discrimination?

The SDA prohibits two types of discrimination, commonly referred to as direct and indirect discrimination, although not so termed in the Act. It covers discrimination at every stage in the employment process, from the moment at which candidates are sought for a post to the termination of employment. In terms of the Act it is unlawful for an employer to discriminate against a woman in the arrangements made for determining who should be offered employment, in the terms on which employment is offered, or by refusing or omitting to offer her employment.⁶⁹ It is also unlawful to discriminate against a woman regarding access to opportunities for promotion, transfer, training, or any other benefits, facilities or services. Finally, it is unlawful to discriminate by dismissing a woman or by subjecting her to any other detriment.⁷⁰

a Direct Discrimination

This type of discrimination is prohibited in the following terms:

"A person discriminates against a woman in any circumstances relevant to the purposes of any provision of this Act if,

- (a) on the ground of her sex he treats her less favourably than he treats or would treat a man."⁷¹

⁶⁹ Section 6(1).

⁷⁰ Section 6(2).

⁷¹ Section 1(1)(a). The SDA prohibits discrimination in employment, education and the provision of goods, facilities, services and premises to the public. Although the focus of this study is on discrimination in employment, decisions pertaining to discrimination in other areas are referred to where necessary in order to clarify a provision of the Act. The Race Relations Act 1976 contains a virtually identical provision to that contained in the SDA. In terms section 1(1)(a) of that Act, direct discrimination occurs where "on racial grounds he treats that person less favourably than he treats or would treat other persons." Because the prohibitions in the two statutes are couched in virtually identical terms, this study will, where necessary, contain references to decisions pertaining to the Race Relations Act.

Direct discrimination against married persons is prohibited in similar terms, where:

"on the ground of his or her marital status he treats that person less favourably than he treats or would treat an unmarried person of the same sex."⁷²

Direct discrimination occurs where a person is treated less favourably because of her sex. Comparison with an actual or a hypothetical man is permitted. It is not necessary to show that there was an intention to discriminate if the effect of a particular act is to treat a woman less favourably because of her sex. This was established by the Court of Appeal in *R v Birmingham City Council ex parte Equal Opportunities Commission*.⁷³ In that case Birmingham City Council had inherited a situation where more grammar school positions were provided for boys than girls. It was held that all that was required to establish direct discrimination was that girls had been placed at a disadvantage, rather than that the council had intended to place girls at a disadvantage.⁷⁴ Direct discrimination is thus established where it is shown that less favourable treatment has occurred, and that the reason for the treatment was the gender of the affected person.⁷⁵ Less favourable treatment may have more than

72 Section 3(1)(a).

73 (1988) IRLR 430 (CA).

74 In *James v Eastleigh Borough Council* (1989) IRLR 318 (CA) the court again distinguished the reason for the distinction from the motive. It emphasised that the sex of the complainant should be the reason for the discriminatory action. The point is also illustrated by *R v Council for Racial Equality ex parte Westminster City Council* (1985) IRLR 426 (CA), which dealt with parallel provisions in the Race Relations Act 1976. The council had withdrawn the appointment of a black dustman. The reason for the withdrawal was the fear of industrial action by white dustmen. It was undisputed that the council itself was not motivated by racial prejudice. The court found that there could be discrimination on racial grounds without there being an intention to discriminate. Because the action of the discriminator (the council) was based on racial grounds, its motive was irrelevant. Similarly, in *Grieg v Community Industry* (1979) IRLR 158 (EAT) a trainee was not allowed to start her course because, following the withdrawal of another woman, she would have been the only female member of a group which was to be engaged on various building tasks. The employer felt that she might be the subject of unwelcome attention from male course members. The conduct of the employer was held to constitute unlawful discrimination.

75 The position may be contrasted with the American one, where it must be shown that the employer had a discriminatory motive, that is, that it intended to bring about the dis-

one cause. An employer may treat a woman less favourably by virtue of her sex and for other reasons. The sex of the employee must be a significant or substantial factor leading to the unfavourable treatment in order to render it unlawful.⁷⁶

A question which arises is whether an employer which claims to act out of concern for the welfare of one sex, for example by giving special consideration to the needs of women, discriminates unlawfully. In *Automotive Products Ltd v Peake*⁷⁷ the employer had approximately 3500 men and 400 women in its employ. It allowed the women to leave work five minutes earlier than the men in order to avoid being jostled in the general rush at the end of the day. A male employee alleged that the practice constituted unlawful sex discrimination (against male employees). The court held that it did not. One reason for its finding was that the SDA did not obliterate the differences between men and women, nor do away with chivalry and courtesy. The court was of the view that the natural differences between men and women should not be disregarded when interpreting the Act. It has been stated that that line of argument could "drive a horse and coaches through the Sex Discrimination Act, since all kinds of disadvantage might be excused on the basis of consideration for the weaker sex."⁷⁸ The judgment was later disapproved in *Ministry of Defence v Jeremiah*.⁷⁹ There male, but not female, employees who volunteered for

criminary consequences of its actions, or that those consequences were reasonably foreseeable.

76 In *Seide v Gillette Industries* (1980) IRLR 427 (EAT), a case brought under the Race Relations Act, an employee was transferred for racial reasons as well as to preserve good working relationships. The fact that race was a factor leading to the less favourable treatment was held to be insufficient. It had to be the main cause thereof. In *Owen and Briggs v James* (1982) IRLR 502 (CA) it was held that race need not be the only reason for an employer's decision. The fact that it was a significant or substantial factor was sufficient to found a case of discrimination.

77 (1977) IRLR 365 (CA).

78 Ellis 77. The author also points out that the reasoning illustrates the point that men's and women's perceptions of disadvantage are liable to vary radically.

79 (1979) IRLR 436 (CA).

overtime were required periodically to work in a dirty area known as the colour bursting shell shop. A male employee complained that the requirement constituted unlawful discrimination against him. The court held that it did, despite the fact that male employees were paid an extra sum of money for the unpleasant work, as the employer could not buy the right to discriminate. The court expressly rejected the above line of reasoning in the *Peake* decision, holding that chivalry should no longer be relied on as an acceptable ground for discrimination.

Employers may attempt to rationalise discrimination against women in terms of assumptions about characteristics of women in general, that is, stereotyped assumptions. These may include assumptions that women do not have the stamina which men do, or that married women are not prepared to be mobile in their jobs or to work unsocial hours. Such assumptions, which are unrelated to the circumstances and qualities of the individual in question, constitute unlawful discrimination. In *Horsey v Dyfed County Council*⁸⁰ the employer rejected a woman's request for secondment in order to study toward a professional qualification. Secondment was possible only where an employee undertook to return to employment after completing the course. Her request was refused as her husband worked elsewhere (near to where her studies would be undertaken). The employer assumed that she would follow her husband to his place of employment after completing her studies. The assumption was based on the stereotype that wives follow their husbands to their places of employment. Had a man applied for the secondment, his wife's career prospects would not have been considered. A man in the same situation would thus have been treated differently, and direct discrimination by the employer was established. Similarly, assumptions that women with small children make unreliable

80 (1982) IRLR 395 (EAT).

employees,⁸¹ and that the husband is always the breadwinner in a marriage⁸² have been rejected. In all these cases, unfavourable treatment was based on generalised assumptions about the characteristics of women. The true position of the extent to which the individual in question possessed that characteristic was not investigated by the employer.

While the SDA applies to discrimination at every stage in the employment process, the commonest complaints tend to involve an employer's failure to hire a woman, that is, the arrangements which an employer makes for determining who should be offered employment, and the failure to offer employment.⁸³ Public and internal advertisements for a post are included in the arrangements made for determining who should be offered employment.⁸⁴ Selection procedures are also included. Questions asked of job applicants at an interview have been construed as arrangements made by an employer. The asking of gender related questions will not be regarded as discriminatory per se, but will be a matter of fact for decision by a tribunal.⁸⁵ All that is required to establish a breach of the Act is that the arrangements made by an employer operate so as to discriminate against women. It is not

81 *Hurley v Mustoe* (1981) IRLR 208 (EAT).

82 *Coleman v Skyrail Oceanic Ltd* (1981) IRLR 398 (CA).

83 Townshend-Smith 56. Ellis 95 states that complaints tend to involve a failure to hire as well as dismissal, and notes that this is not surprising since a woman who is already employed may be concerned about prejudicing future promotion prospects.

84 The Act also contains a specific head of liability in respect of discriminatory advertisements (section 38). Only the EOC is entitled to initiate proceedings for a breach of section 38. "Advertisement" is broadly defined in the Act and Ellis 95 states that the relationship between section 6(1)(a) and section 38 is therefore unclear.

85 *Saunders v Richmond-Upon-Thames Borough Council* (1977) IRLR 362 (EAT). Here a lady golf professional who was applying for a position was asked whether she thought that men would respond as well to a woman golf professional as to a man. She alleged that the question was discriminatory as it was one which would not have been asked of a man. The EAT found that the asking of gender related questions was not discriminatory per se and could be appropriate where the questions were related to capacity to perform the job in question.

necessary to show a discriminatory motive.⁸⁶

In terms of the Act an employer may not refuse or omit to offer employment on the ground of sex.⁸⁷ The sex of the applicant need not be the only reason for refusing to offer employment in order to render the employer's action unlawful. It must, however, be a significant factor.⁸⁸ An employer may not offer employment on discriminatory terms.⁸⁹ If a woman accepts an offer which is discriminatory, the terms of the resulting contract may be challenged under the Equal Pay Act.

An employer may not discriminate in the way in which it affords access to opportunities for promotion, transfer or training.⁹⁰ Direct discrimination may occur, for example, in the allocation of opportunities for training or promotion. But more often than not the matter will give rise to an allegation of indirect discrimination, where an employer imposes a requirement or condition which has an adverse effect

86 *Brennan v JJ Dewhurst Ltd* (1983) IRLR 357 (EAT). In this case applicants for employment were referred to the shop manager as a first step in the selection process, although final appointments would be made by the district manager. As a result of the shop manager's intention not to employ women, no women passed the first interview. The shop manager's discriminatory manner of conducting the interview was held to be unlawful under section 6(1)(a). The EAT held that the submission on behalf of the employer, that the discrimination had to be found in the making of the arrangements rather than in the operation of the arrangements, would leave a gap in the policy of the Act.

87 Section 6(1)(c).

88 In *Owen and Briggs v Jones* (1982) IRLR 502 (CA) the terms "significant" and "substantial" were used. The employer refused to appoint the applicant because she had been unemployed for three years and had not disclosed the fact that she had been interviewed for the position before. A white woman with inferior qualifications was subsequently appointed. The employer was found to have contravened section 4(1)(c) of the Race Relations Act, which contains a similar provision to section 6(1)(c) of the SDA, because the race of the applicant was a significant factor in the employer's decision. A more stringent test had been applied previously -- in *Seide v Gillette Industries* (1980) IRLR 427 (EAT), the race of the applicant was required to be the "activating cause" of the unfavourable treatment.

89 Section 6(1)(b).

90 Section 6(2)(a). The Act does, however, provide for single sex training and encouragement for employment where the statutorily defined imbalances exist (sections 47 and 48).

on women. Discriminatory dismissals are also unlawful.⁹¹

The concept of "any other detriment" which is used in the Act⁹² provides a residual category of unlawful discrimination directed at existing employees. An area in which the concept is of significance is redundancy. Employers may encounter social pressure to terminate the services of female employees as opposed to stereotyped "male breadwinners". Conduct of that nature may fall within the residual category of unlawful discrimination. A second area in which the concept may be relevant is sexual harassment, where the work environment is made unpleasant for the victim although no tangible benefit is lost.⁹³

English law has not adopted the formal approach to proving discrimination which American law has adopted.⁹⁴ Discrimination cases are civil cases, and the standard of proof which is required is proof on a balance of probabilities.⁹⁵ As the SDA does not state who bears the burden of proof, the normal rule applies, namely, that the person alleging the unlawful conduct bears the burden.⁹⁶ The burden of proof does not shift, but where the facts presented by the applicant indicate that discrimination has occurred the employer is required to provide an explanation for its conduct.⁹⁷ If

91 Section 6(2)(b). The provisions overlap with those of the Employment Protection (Consolidation) Act 1978. Due to differences in qualifying service and in levels of compensation, it is usually advisable to apply under both statutes. The level of compensation for unfair dismissal in terms of the latter Act includes a basic award for length of service, but does not provide for any award for injury to feelings.

92 Section 6(2).

93 This aspect is discussed below in the context of sexual harassment.

94 The process was first set out by the US Supreme Court in *McDonnell Douglas Corporation v Green* 411 US 792 (1973).

95 *Bourne and Whitmore* 57.

96 *Townshend-Smith* 56- 57; *Bourne and Whitmore* 60.

97 *Khanna v Ministry of Defence* (1984) IRLR (EAT).

the explanation by the employer is inadequate or unsatisfactory the inference will be that unlawful discrimination has occurred.⁹⁸ In the case of hiring, for example, the lack of success of the better candidate will be regarded as evidence that discrimination has occurred, and an employer will be required to provide an explanation. A failure to do so could result in a finding of unlawful discrimination.⁹⁹ Discrimination cases thus involve an analysis of all of the evidence before the tribunal or court.¹⁰⁰

Despite the fact that the applicant bears the burden of proving that unlawful discrimination has occurred, the employer generally has the information which the applicant requires at its disposal. For example, where discrimination in hiring is alleged this would include the information which the applicant needs in order to compare herself with the successful candidate, such as gender, age, qualification and experience. An applicant may question an employer on the reasons for its actions or any other matter, by means of a reply form which the employer is required to complete.¹⁰¹ An industrial tribunal may also order discovery of the relevant information after proceedings have commenced in order to dispose of the proceedings fairly. Confidentiality of the material is not a reason for refusing discovery. But the applicant is required to show the relevance of the information sought.¹⁰²

98 *Chattopadhyay v Headmaster of Holloway School* (1981) IRLR 487 (EAT).

99 *Noone v North-West Thames Regional Health Authority* (1987) IRLR 357 (CA); *Wallace v South-Eastern Education and Library Board* (1980) IRLR 193 (NICA); *Dorman v Belfast City Council* (1990) IRLR 179 (NICA).

100 As Bourne and Whitmore 62 note: "...what the cases amount to is not the definition of a turning point but a way of analysing the whole of the evidence received in the case. Do the circumstances call for an explanation? Did we get an explanation? Are we satisfied with it? What is the inference to be drawn from that?"

101 Section 74.

102 The discovery principles were set out by the House of Lords in two cases which reached them at the same time, one under the Sex Discrimination Act and the other under the Race Relations Act - *Nasse v Science Research Council*; *Vyas v Leyland Cars Ltd* (1979) IRLR 465 (HL). The principles apply to direct as well as indirect discrimination. Regarding discovery by an

A question which arises is whether the fact that there are no or few women in a job category is relevant to a claim by a disappointed applicant. The issue here is the weight to be attributed to statistics. Statistics can be obtained by discovery and are relevant but not conclusive evidence. Statistical evidence may establish a discernible pattern in the treatment of a particular group. If the pattern demonstrates a regular failure of members of the group to obtain particular jobs and of under-representation in those jobs, it may give rise to an inference of discrimination against the group. But statistics cannot provide conclusive evidence of discrimination.¹⁰³ The reason is that discrimination must have been directed at a particular individual and there must be evidence that she was treated less favourably. The composition of the work force cannot conclusively prove an employer's reason for acting in a particular case.¹⁰⁴

The assumption underlying the use of statistics is that the work force should reflect the proportion of women in the community. That supposes that men and women have identical qualifications. The employer may show that the absence of women in the work force is due to the fact that relatively few women possess the required qualification. It is therefore probable that statistical evidence will be more significant in the case of unskilled or semi-skilled jobs.¹⁰⁵

industrial tribunal, see *British Library v Palyza* (1984) *IRLR* 306 (EAT).

103 *West Midlands Passenger Transport Executive v Singh* (1988) *IRLR* 186 (CA).

104 *Townshend Smith GO*. But the author notes that common sense suggests that discriminatory behaviour is likely to recur.

105 Statistical evidence has to date not played the prominent role in English law which it has in American law. This is probably due, in part at least, to the fact that American law permits proof of a pattern and practice of discrimination by statistical evidence, without the need to show that a particular individual suffered harm, while that is not possible under English law.

b Indirect Discrimination

The essence of indirect discrimination is that certain criteria exclude women from employment opportunities at a higher rate than men. As with direct discrimination, indirect discrimination can occur at any stage of employment, from recruitment through to dismissal.¹⁰⁶ The SDA provides that a person discriminates against a woman if:

"he applies to her a requirement or condition which he applies or would apply equally to a man but -

- (i) is such that the proportion of women who can comply with it is considerably smaller than the proportion of men who can comply with it, and
- (ii) which he cannot show to be justifiable irrespective of the sex of the person to whom it is applied, and
- (iii) which is to her detriment because she cannot comply with it."¹⁰⁷

The provision contains four elements. Has a requirement or condition been applied equally to both sexes? Is the proportion of women who can comply with it considerably smaller than the proportion of men? Does the requirement operate to the detriment of persons who cannot comply with it? Can the person applying the requirement justify it?

The first element contained in the statutory provision refers to a "requirement" or "condition". The purpose of the legislature in using both words is to extend the ambit of the section to include anything which falls within the ordinary meaning of either word.¹⁰⁸ Practices which have been found to constitute requirements or

106 Section 6(1) and 6(2).

107 Section 1(1)(b).

108 In *Clarke v Eley (IMI) Kynoch Ltd* (1982) IRLR 482 (EAT) it was held that the words should not be construed narrowly or technically, and should not be given separate meanings. In *The Home Office v Holmes* (1984) IRLR 299 (EAT), the EAT stated that the words were plain,

conditions include a redundancy agreement providing that part time employees should be dismissed first;¹⁰⁹ the insistence by an employer that an employee return to work full time rather than part time after the birth of her child;¹¹⁰ and the requirement by an employer that applicants for a position should be between the ages of 17 and 28.¹¹¹ The requirement that employees should not have young children has been held to constitute a condition for the purposes of indirect discrimination on the ground of marital status as married women are more likely to have young children than unmarried women.¹¹²

The Court of Appeal has held that the requirement or condition must act as an absolute bar to employment or continued employment.¹¹³ A factor is not viewed as a condition or requirement unless the employer makes compliance a precondition.¹¹⁴ It has been suggested that the interpretation of the provision is

clear words of wide import fully capable of including any obligation of service. The view of the EAT in *Hampson v Department of Education and Science* (1988) IRLR 87 (EAT), was that there was no valid distinction between a test or yardstick and a requirement or condition.

- 109 In *Clarke v Eley (IMI) Kynoch Ltd* (1982) IRLR 482 (EAT), the tribunal found that the employer's agreement with the trade union that part time workers should be made redundant before full time workers was discriminatory, because the proportion of women who could comply with the requirement (to work full time) was considerably smaller than the proportion of men.
- 110 *The Home Office v Holmes* (1984) IRLR 299 (EAT).
- 111 *Price v Civil Service Commission* (1977) IRLR 291 (EAT).
- 112 *Hurley v Mustoe* (1981) IRLR 208 (EAT).
- 113 In *Perera v Civil Service Commission and Department of Customs and Excise (No 2)* (1983) IRLR 166 (CA) a race case, the applicant alleged that the employer had taken into account various factors, including experience in the UK, command of the English language and age, all of which were to his disadvantage, and that these factors amounted to conditions or requirements for the purposes of the Act. The court held that they could not be viewed as conditions or requirements because the absence of one quality could be offset by another. None acted as an absolute bar to appointment.
- 114 In *Meer v London Borough of Tower Hamlets* (1988) IRLR 399 (CA), the employer had set twelve requirements for the position of borough solicitor, one of which was experience in the borough itself. This criterion was alleged to be a discriminatory requirement or condition in terms of the Act. The court found that that was not the case because it was considered by the employer together with all the other criteria which had been set for appointment to the post,

unnecessarily restrictive, as relatively few hiring procedures operate as absolute bars.¹¹⁵ Employers tend to stipulate a set of interrelated requirements which must be satisfied in order to qualify for employment. Candidates can compensate for poor performance in one by excelling in another. In effect higher standards are imposed on women who are required to excel in certain respects where, by virtue of their sex, they cannot comply with all of the requirements laid down by an employer. A new definition of indirect discrimination has been proposed in terms of which any policy, practice or situation which has a significant adverse impact on women and which cannot be shown to be necessary, is unlawful.¹¹⁶

The second element of the statutory provision is that the proportion of women who can comply with the condition or requirement should be considerably smaller than the proportion of men. The test is one of proportion not of absolute numbers, and can be illustrated by the following example. An employer may employ 50 male and 50 female employees in part time positions. Its entire work force may consist of 100 female and 500 male employees. A decision to retrench all part time employees would affect a greater proportion of females than males, although the actual num-

and was not itself an absolute requirement. Non-compliance was not a bar to employment.

115 Bourn and Whitmore 36.

116 Ellis 82. In the United States, following the decision of the Supreme Court in *Wards Cove Packing v Atonio* 109 SCt 2115 (1989), there was a measure of uncertainty as to whether the overall disparate impact of a selection process could be challenged where no component taken in isolation established disparate impact (Bryan 244). Shanor and Marcossou 155 expressed the opinion that "a cumulative disparate impact arising from multiple factors should suffice" to establish the disparate impact of a selection procedure where those factors were interdependent and none barred progress to the next step in the process. The 1991 Civil Rights Act appears to support their view. In the United Kingdom, a woman who feels that she has been placed at a disadvantage by an employer's criteria for appointment to a position may also complain of unequal treatment in terms of the Equal Treatment Directive, which prohibits discrimination on the ground of sex in the conditions, including selection criteria, for appointment.

bers affected would be the same.

Statistical evidence is admissible to establish, *prima facie*, that women are proportionately more disadvantaged than men.¹¹⁷ It has been held that while statistics are permissible, they are not essential if it is possible to prove a case of indirect discrimination without their use.¹¹⁸ An employer may challenge an applicant's case by introducing rebutting statistics. Having accepted the admissibility of statistical evidence, it is necessary to establish the correct basis of comparison. It can be assumed that men and women are generally evenly represented throughout the community. The comparison should be with persons who possess the necessary qualifications to hold the job, other than the qualifications which are alleged to be discriminatory.¹¹⁹ The comparison is restricted to employees of a particular employer where the challenged condition concerns only the existing work force, for example on issues relating to promotion or termination of employment. The question is whether the condition imposed by a particular employer adversely affects

117 *Townshend-Smith 73*. The author notes that the role of statistics in indirect discrimination cases differs from direct discrimination cases, where their role is to provide an inference of less favourable treatment of a particular woman than of a comparable man.

118 *Perera v Civil Service Commission and Department of Customs and Excise (No 2) (1983) IRLR 166 (CA)*. In *Briggs v North Eastern Education and Library Board (1990) IRLR 181 (NICA)*, the employee, a school teacher, was demoted following her adoption of a baby, because she no longer wished to continue working regularly after school hours. The court found that a considerably smaller proportion of women than men could comply with that requirement. It stated that tribunals were not debarred from taking account of their own knowledge and experience in determining whether a requirement or condition had a disparate impact on female employees, and that it would be undesirable to require elaborate statistical evidence. This seems to imply that tribunals should take judicial notice of patterns of social behaviour. *Townshend-Smith 74* explains that such patterns are demonstrable, for example, by reference to national statistics.

119 In *Price v Civil Service Commission (1977) IRLR 291 (EAT)*, it was alleged that the requirement that applicants for a post should be between the ages of 18 and 28 was indirectly discriminatory as many women of that age took time off of employment due to child care responsibilities. An additional unchallenged requirement was a certain minimum qualification. The EAT held that the appropriate comparison was between men and women who possessed the necessary qualification, as only they could be affected adversely by the age requirement.

female employees in its work force.

The evidence must reveal that considerably fewer women than men can comply with the condition or requirement. The meaning of a "considerably smaller" number has not received much judicial consideration and is not elucidated by the legislation itself. In *Kidd v DRG (UK) Ltd*,¹²⁰ the EAT held that the question of how large a proportion should be before it could be called considerable was a matter of personal opinion on which views were likely to vary over a wide field. A difference of twenty percent has been held to be a considerably smaller proportion, while a difference of ten percent has been held not to be considerably smaller.¹²¹

In terms of the third element of the statutory definition, the condition must be to the detriment of women who cannot comply with it.¹²² That means that the victim(s) of discrimination must be identifiable.¹²³ Detriment implies that the treatment should not merely be different, but should be less favourable. A woman who cannot comply with a condition or requirement is treated less favourably. The question of whether a requirement is to an employee's detriment because she cannot comply with it depends on whether she can comply with the requirement in practice, rather than merely in theory.¹²⁴

120 (1985) *IRLR* 190 (EAT).

121 Those were the findings in *Moyes v Borders Regional Council* (1984) S/1066/83 and *Fulton v Strathclyde Regional Council* (1985) EAT 949/83, respectively, two unreported decisions cited by Palmer and Poulton 61. The position thus differs from the American one, where the courts tend to rely on the eighty percent rule of thumb proposed by the EEOC. In terms of the rule discrimination is established where the success rate for women is less than four fifths of that for men.

122 Section 1(1)(b)(iii).

123 *Bourn and Whitmore* 39 explain that the subsection establishes the applicant's locus standi, that is, that she is the victim of the alleged discrimination.

124 *Briggs v North Eastern Education and Library Board* (1990) *IRLR* 181 (NICA), for example, found that in fact considerably fewer female than male teachers could comply with a requirement to work after school hours on a regular basis, although theoretically all teachers could do

Finally, an employer may argue that an otherwise discriminatory practice is justifiable irrespective of the sex of the person to whom it is applied.¹²⁵ The meaning attributed to "justifiable" is significant, because an employer is provided with a complete defence where an otherwise discriminatory practice is shown to be justifiable. In *Steel v The Post Office*¹²⁶ the EAT adopted a strict approach. It emphasised that the test to be utilised to establish whether a practice was justifiable was one of necessity not of convenience. Objective justification of the condition was required.¹²⁷ The needs of the employer were weighed up against the discriminatory effect of the condition imposed, and the burden on the employer was increased in proportion to the extent of the exclusion of the protected class.¹²⁸ Finally, the tribunal considered whether the employer could find some other non-discriminatory method of achieving its objective. If it could do so, the implication would be that the practice was convenient rather than necessary.

In later decisions the employer's burden was eased. The test was reduced from an objective one of necessity to a more subjective test which took into account the motivation and good faith of the employer.¹²⁹ However, that line of decisions was

50.

125 Section 1(1)(b)(ii).

126 (1977) *IRLR* 288 (EAT). The employer had allocated postal rounds according to the seniority of full time postal employees. But prior to 1976, that is, prior to the pronulgation of the SDA, women had not been eligible to become full-time postal employees, irrespective of their length of service. As a result they lacked the seniority to choose their rounds, which would enable them to select a round which finished near their homes.

127 The EAT referred to the decision of the United States Supreme Court in *Griggs v Duke Power Company* 401 US 424 (1971), where the phrases "business necessity", "manifest relationship" and "job-relatedness" of a practice were utilised (at 431- 432).

128 *Townshend-Smith* 80 explains that this is usually referred to as the principle of proportionality.

129 *Singh v Rowntree Macintosh Ltd* (1979) *IRLR* 199 (EAT); *Panesar v The Nestle Company Ltd* (1980) *IRLR* 60 (EAT); *Ojutiku v Manpower Services Commission* (1981) *IRLR* 156 (EAT).

superseded by *Rainey v Greater Glasgow Health Board*,¹³⁰ in which the House of Lords adopted an objective approach. The court equated the test for justification of indirect discrimination with that of genuine material difference under the Equal Pay Act. In terms of the latter test the policy adopted by an employer must correspond to a real need on the part of the undertaking, must be appropriate with a view to achieving the objectives pursued, and must be necessary to that end.¹³¹

4 Defences and Exceptions

There are four categories of exception to the SDA, namely, acts done under statutory authority, certain special cases such as the police, cases where gender is a genuine occupational qualification, and certain exclusions relating to retirement and pensions.

a Acts Done Under Statutory Authority

Prior to 1989, section 51 of the SDA provided that an act of discrimination was lawful if it was necessary in order to comply with any direct or subordinate legislation passed before the SDA. In 1989 the position was amended to render lawful only those discriminatory actions based on previous enactments where their purpose was to protect women regarding pregnancy, maternity or circumstances giving rise to risks specifically affecting women (such as ionising radiation or working with lead).¹³²

130 (1987) *IRLR* 26 (HL).

131 This test was laid down by the European Court in *Bilka-Kaufhaus GmbH v Weber von Hartz* Case 170/84 (1986) ECR 1607/ (1986) *IRLR* 317 (European Ct). In *Hampson v Department of Education and Science* (1989) *IRLR* 69 (CA), a race case, the Court of Appeal approved the reasoning in *Rainey* and held that an employer should be required to prove that the measure was objectively justified.

132 Section 51 of the SDA as amended by the Employment Act 1989.

The amendment followed the decision of the European Court of Justice in *Johnston v The Chief Constable of the Royal Ulster Constabulary*.¹³³ In that case the applicant's position as a member of the full time reserve force was not renewed because of the chief constable's perception of risks involved in the carrying of firearms by women. The applicant relied on the Equal Treatment Directive which requires equal treatment of men and women, inter alia, regarding access to employment and working conditions.¹³⁴ The employer alleged that its refusal to renew the applicant's position fell within the ambit of the exception contained in the directive, in terms of which an employer may make provision for the protection of female employees.¹³⁵ The European Court interpreted the exception strictly. It found that the risks arising from carrying firearms were not unique or peculiar to women and consequently were not covered by the exception.

Following the *Johnston* decision, exceptions contained in the SDA had to be construed in accordance with the exceptions in the Equal Treatment Directive. The directive permits otherwise discriminatory provisions which protect women, particularly in respect of pregnancy and maternity. It has been said that the exception is intended to protect a woman's biological condition and does not permit stereotypical assumptions about the type of work which is suitable for women.¹³⁶ The subsequent amendment to the SDA was intended to give legislative effect to the derogations from the principle of equal treatment permitted in terms of the direc-

133 Case 222/84 (1986) ECR 1651/ (1986) *IRLR* 263 (European Ct).

134 Article 1(1).

135 Article 2(3) of the directive permits discrimination to protect women, particularly regarding pregnancy and maternity. The applicant could rely on the direct effect of the Directive because she was employed by an emanation of the state.

136 *Townshend-Smith* 129.

tive. In terms of the Act an employer is required to show that the exclusion of women is necessary in order to comply with an existing statutory requirement which protects women from risks specifically affecting them, or regarding pregnancy or maternity.¹³⁷

b Special Cases

The SDA applies to the police, but permits differentiation regarding minimum height requirements, the prescription of different uniforms, equipment, and special treatment for women in connection with pregnancy or childbirth.¹³⁸ It is lawful to discriminate between men and women prison officers as to requirements relating to height,¹³⁹ that is, between the average height required of men and of women. Discrimination regarding employment for the purposes of an organised religion is permitted where employment is limited to one sex in order to comply with the doctrines of the religion and to avoid offending its followers.¹⁴⁰ Initially, discrimination in the employment of men as midwives was permitted. The position was amended in 1983,¹⁴¹ and men may now practice as midwives on the same terms as women, subject to the genuine occupational qualification defence.¹⁴² The armed services

137 Section 51. The principle of equal treatment is also contained in section 1 of the SDA which provides that any statutory provision pre-dating the SDA is of no effect in so far as it imposes a requirement to do an act of sex discrimination. This provision has been referred to as the statutory override provision (Deakin 8). In addition the Secretary of State has the power to repeal, by order, any legislation, passed before the 1989 Act, which he considers a discriminatory act to be committed. Certain legislation is specifically exempted from section 1, namely, legislation aimed at the protection of women during pregnancy, including the bar upon female employees returning to work within four weeks of giving birth (section 5).

138 Section 17.

139 Section 18.

140 Section 19.

141 Section 20 of the SDA was amended with effect from 1 September 1983.

142 The defence is discussed below.

are exempt from the Act,¹⁴³ as are acts done for the purpose of safeguarding national security.¹⁴⁴ Anything done to give effect to the purposes of a charitable instrument is also exempted from the Act.¹⁴⁵

c Genuine Occupational Qualification (GOQ)

In terms of the genuine occupational qualification defence, an otherwise discriminatory act is not unlawful.¹⁴⁶ The SDA defines, by means of an exhaustive list, the circumstances under which biological requirements, or social or cultural values may demand that a job be performed by one sex rather than the other. The GOQ defence is a defence to direct discrimination. In the case of indirect discrimination, the employer must prove that the discriminatory practice is justifiable, irrespective of the sex of the person to whom it is applied. Where the GOQ defence applies it is lawful for an employer to discriminate in the arrangements made for determining who should be offered a job, in failing to offer a job,¹⁴⁷ or in the opportunities for promotion or transfer into a job.¹⁴⁸ An employer may not discriminate with regard to the terms on which employment is offered, dismissal or the imposition of any detriment on the holder of a job.¹⁴⁹ It has been observed that because anti-

143 Section 85(4).

144 Section 52.

145 Section 43.

146 Section 7. In the United States, Title VII of the Civil Rights Act 1964 permits a similar defence where the sex of an employee is a bona fide occupational qualification.

147 Section 7(1)(a).

148 Section 7(1)(b).

149 Townshend-Smith 119 explains that the reason for the distinction is that the defence covers situations where jobs can be restricted to members of one sex or the other. A job which is being performed by both sexes is covered by the normal anti-discrimination principles. The defence would have no logic under those circumstances.

discrimination laws are weakened by exceptions, the GOQ defence should be clearly defined and narrowly interpreted by the tribunals.¹⁵⁰ Being a man is a genuine occupational qualification in nine cases.¹⁵¹

(a) The first is where:

"the essential nature of the job calls for a man for reasons of physiology (excluding physical strength or stamina) or, in dramatic performances or other entertainment, for reasons of authenticity, so that the physical nature of the job would be different if carried out by a woman."¹⁵²

The defence covers cases where biological sex is essential to a job, but not cases where the job can more effectively be performed by a person of a particular sex because of customer reaction. "Entertainment" is not defined. The defence is generally seen as applying to actors and models.¹⁵³

(b) A defence is provided where, a job needs to be held by a man to preserve decency or privacy because:

- (i) it is likely to involve physical contact with men in circumstances where they might reasonably object to its being carried out by a woman, or
- (ii) the holder of a job is likely to do his work in circumstances where men might reasonably object to the presence of a woman because they are in a state of undress or are using sanitary facilities."¹⁵⁴

150 Carty 484.

151 *Fair and Efficient Selection - Guidance on Equal Opportunities Policies in Recruitment and Selection Procedures* 7-10.

152 Section 7(2)(a).

153 Carty 484.

154 Section 7(2)(b).

The defence is one of privacy and decency and includes an objective test of reasonableness. Two situations are envisaged. The first is where the job is likely to involve physical contact and employees of one sex might reasonably object to it being carried out by persons of the opposite sex. The second is where employees may reasonably object because they could be in a state of undress or using sanitary facilities. The defence was considered in *Sisley v Britannia Security Systems Ltd* (which involved an allegation of discrimination against males).¹⁵⁵ The employer acknowledged that it did not employ men, but alleged that being a woman was a GOQ. The reason was that women, who worked twelve hour shifts in a security control centre, spent several hours resting in a state of undress on a bed provided for that purpose by their employer. The EAT interpreted the first limb of the defence, regarding physical contact, as meaning that actual touching was required and that mere physical proximity was insufficient. That was not the case in *Sisley*. The second part of the defence was found to be applicable. The EAT held that the defence was not confined to cases where the job itself required the holder to be in a state of undress while performing her duties. On the facts the EAT found the rest periods to be necessary for effective performance, and sex to be a GOQ.

The defence does not apply to the filling of a vacancy when the employer already has male employees who are capable of carrying out the specified duties, whom it would be reasonable to employ on those duties, and whose numbers are sufficient to meet the employer's requirements. In *Wylie v Dee And Company (Menswear) Ltd*¹⁵⁶ a woman applied for a post as a sales assistant in a men's clothing store. She was rejected because the job involved taking men's inside leg measurements and the employer was of the view that it had to be done by a man in order to preserve

155 (1983) *IRLR* 404 (EAT).

156 (1978) *IRLR* 103 (IT).

privacy and decency. The employer relied on the first limb of the defence, namely, physical contact with men in circumstances where they might reasonably object to it being carried out by a woman. The defence failed because the evidence showed that the taking of inside leg measurements was not often required as most men knew their measurements. The shop also employed seven other assistants, any of whom could take the measurements.¹⁵⁷

(c) A genuine occupational qualification exists where:

"the job is likely to involve the holder of the job doing his work, or living, in a private home, and needs to be held by a man because objection might reasonably be taken to allowing a woman

- (i) the degree of physical or social contact with a person living in the home, or
- (ii) the knowledge of intimate details of the person's life, which is likely, because of the nature or circumstances of the job or of the home, to be allowed to, or available to, the holder of the job."¹⁵⁸

The defence enables persons such as companions, nurses and personal companions to be restricted to the sex of the recipient of the service.

(d) A defence exists where:

"the nature or location of the establishment makes it impracticable for the holder of the job to live elsewhere than in premises provided by the employer, and

- (i) the only such premises which are available for persons holding that kind of job are lived in, or normally lived in, by men and are not equipped with sepa-

157 A man was refused a position as a sales assistant in a dress shop in *Etam plc v Rowan* (1989) IRLR 150 (EAT). The employer defended its refusal on the ground that a sales assistant could be required to work in fitting rooms and to measure women who were uncertain of their size. The defence, based on decency and privacy, failed because it would have been possible to ensure that those aspects of the job were performed by one of the sixteen existing female members of staff.

158 Section 7(2)(ba).

rate sleeping accommodation for women and sanitary facilities which could be used by women in privacy from men, and

- (ii) it is not reasonable to expect the employer either to equip those premises with such accommodation and facilities or to provide other premises for women.¹⁵⁹

The defence is commonly referred to as the "oil rig exception", and applies to live-in jobs on remote work sites.¹⁶⁰ The key issue to be determined is the extent of the expenditure which an employer would have to incur to provide separate facilities which would be viewed as reasonable. The employer's duty to bear a financial burden must be weighed against the employee's right not to be discriminated against.

(e) The SDA provides a defence where:

"the nature of the establishment, or the part of it within which the work is done, requires the job to be held by a man because

- (i) it is, or is part of, a hospital, prison or other establishment for persons requiring special care, supervision or attention, and
- (ii) those persons are all men (disregarding any woman whose presence is exceptional) and
- (iii) it is reasonable, having regard to the essential character of the establishment, that the job should not be held by a woman."¹⁶¹

This defence covers jobs involving close contact with patients or inmates. A question which arises is whether the defence permits the employment of males only in an all male prison due to potential inmate violence toward women. An affirmative answer to this question could reinforce stereotyped assumptions about male and female roles.¹⁶²

159 Section 7(2)(c).

160 Ellis 118. Other examples given by the author are jobs on lighthouses and ships.

161 Section 7(2)(d).

(f) As a rule, customer preference is no defence. Under specified circumstances, the SDA provides what appears to be an exception to this rule, namely, where:

"the holder of the job provides individuals with personal services promoting their welfare or education, or similar personal services, and those services can most effectively be provided by a man."¹⁶³

As stated, customer preference is not regarded as a defence. It may not be argued that customers prefer being served by a male (such as a bank manager), or by a female (such as an airline flight attendant). Acceptance of those arguments would reinforce sexual stereotypes.¹⁶⁴ But the legislature appears to have provided a narrow exception to this general rule. It envisages a situation where the efficacy of welfare services is linked to the sex of the provider, for example persons working in rape crisis centres. The defence in fact relates to effectiveness of the performance of services, rather than mere customer preference.¹⁶⁵

(g) A defence exists where "the job needs to be held by a man because of restrictions imposed by the laws regulating the employment of women."¹⁶⁶ The defence appears to duplicate the exception contained in section 51 in respect of acts done in order to

162 A similar question was answered affirmatively by the United States Supreme Court in *Dothard v Rawlinson* 433 US 321 (1977).

163 Section 7(2)(c).

164 That line of reasoning has been adopted in the United States as well (*Diaz v Pan American World Airlines Incorporated* 422 F.2d 385 (5th Cir 1971)).

165 The defence is illustrated by the decision in *Roadberg v Lothian District Council* (1976) JRLR 283 (IT). The employer wished to employ a man as a social worker in order to maintain a balanced team of men and women. The tribunal refused to accept the existing imbalance between the sexes of workers providing personal services as sufficient to meet the defence. The employer was required to prove that the services could be provided most effectively by a man.

166 Section 7(2)(f).

comply with prior legislation. It has become less significant since the removal of the majority of restrictions on the hours of work of women, including shift work and night work, overtime and maximum hours.¹⁶⁷

(h) A defence also exists where:

"the job needs to be held by a man because it is likely to involve the performance of duties outside the United Kingdom in a country whose laws or customs are such that the duties could not, or could not effectively, be performed by a woman."¹⁶⁸

This recognises that women may be culturally unacceptable in certain countries.¹⁶⁹

It has been noted that the employer's right to maximise business opportunities must be weighed against the employee's right not to be subjected to discrimination.¹⁷⁰

(i) A final GOQ exists where "the job is one of two to be held by a married couple".¹⁷¹ The defence has been criticised because it enables an employer to stipulate that a husband and wife are to perform specific jobs which are based on sex stereotyping, for example that the husband is to perform gardening or maintenance duties, while the wife is to clean and cook. The employment of the two as individuals would not permit such stereotyping.¹⁷²

167 Townshend-Smith 128-129.

168 Section 7(2)(g).

169 The defence applies to the performance of duties outside the UK which are insufficiently extensive to result in a total exclusion from the SDA in terms of section 10, as a result of the work being done wholly or mainly outside the country.

170 Townshend-Smith 127. In the United States, a similar issue arose for decision in *Ward v Westland Plastics Incorporated* 651 F.2d 1266 (9th Cir 1980). The employers bona fide occupational qualification defence was unsuccessful where it sought to exclude women on the basis that it did substantial business with Latin and Arabic businessmen, who were reluctant to enter into business transactions with women.

171 Section 7(2)(h).

172 Ellis 120. The author also notes that the EOC has recommended the repeal of the provision

d Retirement and Pensions

The SDA initially contained a broad exception to discrimination by employers in respect of death and retirement.¹⁷³ The only situation in which this did not apply was regarding access to occupational pension schemes (that is, pension schemes other than state pension schemes). Membership of such schemes was to be open to men and women on equal terms regarding qualifying age and length of service.¹⁷⁴

The broad exemption led to allegations that UK law was contrary to EEC law. The first case in which this allegation was invoked successfully was *Worringham v Lloyds Bank Ltd.*¹⁷⁵ The employer added an additional five percent to the salaries of male employees under the age of twenty-five years as men, but not women, under the age of twenty-five years had to contribute five percent of their salaries to a pension scheme. The men thus received a higher gross pay which led to advantages when applying for mortgages and credit facilities. They also received higher refunds if they left their employment before the age of twenty-five. The ECJ held that the practice contravened Article 119 of the Treaty of Rome, which provides for equal pay for men and women.

In *Garland v British Rail Engineering Ltd.*,¹⁷⁶ a female employee alleged that the practice of extending concessionary travel facilities, which had been enjoyed during

for that reason.

173 Section 6(4).

174 See section 53(2) and section 54(2) of the Social Security Pensions Act 1975.

175 Case 69/80 (1981) ECR 767/ (1981) *IRLR* 178 (European Ct). This was an equal pay case, but is worthy of discussion here because the exemption regarding death and retirement in section 6(1A)(b) of the Equal Pay Act was virtually identical to that contained in the SDA.

176 (1982) *IRLR* 257 (11L).

employment, to the families of retired male employees but not retired female employees was discriminatory. The European Court had ruled that the situation fell within the ambit of Article 119, and the House of Lords was obliged to interpret it accordingly. It therefore held that the retirement exception did not include privileges which had existed during employment and were allowed by the employer to continue after retirement.¹⁷⁷

The EAT, on the other hand, adopted a broad view of the SDA exception in two decisions which came before it at approximately the same time. *Barber v Guardian Royal Exchange Assurance Group* and *Roberts v Tate and Lyle Ltd*¹⁷⁸ both dealt with early retirement schemes. In *Barber* male employees were offered early retirement at fifty-five and females at fifty years of age, which in both cases was ten years before the normal age of retirement. The applicant, a man, was fifty-two years old and claimed that he had been discriminated against because a woman of his age would have been entitled to early retirement. In *Roberts*, on the other hand, early retirement was offered to all employees over the age of fifty-five years. The applicant, a woman, was fifty-three years old, and claimed that she ought to have been offered early retirement because she was within ten years of her normal age of retirement (of sixty years) and that was how a comparable man would have been treated. The EAT held that both situations were excluded from the operation of the SDA. Severance terms were held to form part of the employers' systems of catering for retirement and were therefore included in the ambit of the SDA exception.

The relationship between EEC law and the SDA exception for death and retirement

177 For a brief comment on the decision of the European Court of Justice, see the *Equal Opportunities Commission Seventh Annual Report 4*.

178 (1983) *JRLR* 240 (EAT).

was thus unclear, particularly the extent to which pension provisions were covered by EEC law relating to equal pay.¹⁷⁹ The matter was resolved following the decision in *Marshall v Southampton and South-West Hampshire Area Health Authority*.¹⁸⁰ There the employer's policy was that the retirement age for men and women should correspond with the age at which social security pensions became payable, that is, sixty years for women and sixty-five years for men. The applicant complained that her compulsory retirement at the age of sixty-two was contrary to the Equal Treatment Directive. The European Court of Justice distinguished between retirement and pension ages, and held that a compulsory retirement age fell within the ambit of dismissal under the Equal Treatment Directive,¹⁸¹ even if it was also the moment at which a pension was granted. States were permitted to draw a distinction in pensionable ages for the purposes of granting social security pensions in terms of the Social Security Directive 1979.¹⁸² But that did not permit the imposition of different retirement ages within the confines of a contract of employment. The latter practice was prohibited in terms of the Equal Treatment Directive. The court also distinguished between the ages of access to voluntary redundancy schemes (that is, voluntary early retirement schemes), which could be linked to state pension ages, and the age of compulsory retirement, which could not. As the provisions of the EEC directives are directly effective against organs of the state (which the health

179 The situation was aggravated by the decision in *Burton v British Railways Board* Case 19/81 (1982) ECR 555/ (1982) IRLR 116 (European Ct), which concerned an employer's voluntary redundancy scheme having a minimum age of fifty-five years for women and sixty years for men. For each the age was five years before the retirement age. Discrimination was alleged by the applicant, a fifty-eight year old male who was denied access to the scheme. The European Court held that the claim fell within the ambit of the Equal Treatment Directive, but went on to apply an exception contained in the Social Security Directive. On that basis it concluded that there was no unlawful discrimination because the distinction stemmed from a difference in minimum state pensionable ages which was permissible in terms of the Social Security Directive.

180 Case 152/84 (1986) ECR 723/ (1986) IRLR 140 (European Ct).

181 Article 5(1).

182 Directive 79/7.

authority in *Marshall* was held to be), the protection afforded to private and public sector employees following *Marshall* differed. As a result the exception contained in the SDA was removed.¹⁸³ In the recent judgment of *Barber v Guardian Royal Exchange Assurance Group*¹⁸⁴ the ECJ held that a pension paid under a private occupational scheme constituted remuneration and therefore fell within the ambit of Article 119 of the Treaty of Rome, which required equal pay for equal work.¹⁸⁵

183 Section 6(4) was amended by the Sex Discrimination Act 1986.

184 Case 262/88 (1990) *IRLR* 240 (European Ct).

185 See also *Bilka-Kaufhaus GmbH v Weber von Hartz* Case 170/84 (1986) *ECR* 1607/ (1986) *IRLR* 317 (European Ct) where the ECJ distinguished between an occupational pension scheme, which was covered by the provisions of Article 119, and a social security scheme, which was not.

5 Special Problems Associated with Sex Discrimination: Sex Plus Discrimination

Sex plus discrimination implies different treatment on the basis of the sex of an employee or prospective employee, together with some other factor. A sub-class of women is discriminated against, for example, pregnant women. It would appear that sex-plus discrimination can be regarded as directly discriminatory in terms of the SDA. Direct discrimination is defined as unfavourable treatment on the ground of a woman's sex.¹⁸⁶ That formulation can be applied to cases where the sex of the employee is not the sole reason for the unfavourable treatment, but is taken into account together with some other factor.

Sex plus discrimination generally has been found to be impermissible. The EAT regarded the refusal to hire women with school aged children, on the premise that such women were unreliable employees, as discriminatory.¹⁸⁷ The Court of Appeal held that an employer who dismissed a female employee following her marriage to a competitor's employee, on the assumption that she was not the breadwinner, had discriminated unlawfully.¹⁸⁸ Similarly, the EAT found that an employer's refusal temporarily to transfer a woman to a town where her husband had accepted permanent employment, because it was of the opinion that she would refuse to return to her current position, was sex discrimination based on the assumption that her career would take second place to that of her husband.¹⁸⁹ The EAT also found that an employer who required a single mother to work full time had imposed a

186 Section 1(1)(a).

187 *Hurley v Mustoe* (1981) IRLR 208 (EAT). The applicant in fact had a record of being a reliable employee.

188 *Coleman v Skyrail Oceanic Ltd* (1981) IRLR 398 (CA).

189 *Horsey v Dyfed County Council* (1982) IRLR 395 (EAT).

detrimental requirement which constituted indirect sex discrimination.¹⁹⁰ The tribunal found that the employer had applied a requirement, the requirement of full-time service, with which a considerably smaller proportion of women than men could comply because of their child care responsibilities. The requirement was to the employee's detriment because she could not comply with it, and was not justifiable because the evidence showed that the employer could accommodate part time working.

Sex plus discrimination is based on sexual stereotypes. Assumptions about the characteristics of all women are applied to individual cases. Acceptance of sexual stereotypes is not necessarily considered to be unjust. In the UK, as in the US, certain sexual distinctions are not regarded as unlawful. Sexually segregated toilets are acceptable, as are certain grooming requirements. The EAT did not regard a rule prohibiting women from wearing trousers at work as discriminatory, where the employer treated male and female staff alike in that there were rules governing apparel and appearance which applied to men and women, although the rules in the two cases were not the same.¹⁹¹

Generally, however, it is necessary to guard against the application of sexual stereotypes to individual employees. Two sex plus issues will be considered, namely, pregnancy and sexual harassment.

190 *The Home Office v Hobner* (1984) IRLR 299 (EAT). But the tribunal stated that an employer who imposed that requirement would not necessarily be found to have discriminated.

191 *Schmidt v Austicks Bookshops Ltd* (1977) IRLR 360 (EAT). For a discussion of the imposition of grooming codes and appearance requirements by an employer, see Townshend-Smith 47-50.

a Pregnancy

Despite a general rejection of sex plus discrimination, courts initially viewed less favourable treatment of a woman on the ground of pregnancy as lawful in terms of the SDA, because there was no similarly situated man with whom a comparison could be drawn.¹⁹² In *Turley v Allders Department Stores Ltd*¹⁹³ a woman was dismissed on account of her pregnancy. She was unable to rely on the maternity provisions contained in the Employment Protection (Consolidation) Act 1978 (the EPCA) because she had not been employed for the statutory qualifying period.¹⁹⁴ She alleged that her dismissal constituted unlawful discrimination in terms of the SDA. The majority of the EAT held that it did not. The reason was that the employer was not discriminating against a woman, but against a pregnant woman, for which there was no male equivalent.¹⁹⁵ It stated:

"You look at men and women, and see that they are not treated unequally simply because they are men and women. You have to compare like with like. So, in the case of pregnant women there is an added difficulty.... Suppose that to dismiss her for pregnancy is to dismiss her on the ground of her sex. In order to see if she has been treated less favourably than a man... you must compare like with like, and you cannot. When she is pregnant a woman is no longer just a woman. She is a woman, as the Authorised Version accurately puts it, with child, and there is no masculine equivalent."¹⁹⁶

The dissenting member of the panel, and the only woman, argued that the issue was

192 *Reany v Kanda Jean Products Ltd* (1978) IRLR 427 (IT); *Turley v Allders Department Stores Ltd* (1980) IRLR 4 (EAT).

193 (1980) IRLR 4 (EAT).

194 The provisions of the EPCA are discussed below.

195 The reasoning of the EAT was similar to that initially adopted by the US Supreme Court in *General Electric Company v Gilbert* 429 US 125 (1976), that is, the court distinguished between pregnant and non-pregnant persons.

196 At 5.

whether the employer would have treated a similarly placed man, for example, one with a hernia, differently.

The majority view in *Turley* was rejected by the EAT in *Hayes v Malleable Working Men's Club and Institute*.¹⁹⁷ The tribunal held that the SDA could apply to cases where a woman claimed that she had been the victim of discrimination on grounds associated with her pregnancy. Applying the reasoning of the dissenting member in *Turley*, it held that the proper approach was to ask whether pregnancy was capable of being matched by analogous circumstances, such as illness, applying to a man, and whether a fair comparison could be made between the nature of the treatment accorded to a woman in the one situation and a man in the other. A similar approach was adopted in *Coyne v Exports Credits Guarantee Department*.¹⁹⁸ In terms of their contracts of employment employees were afforded six months' paid sick leave. But pregnant women received only three months. Women claiming additional leave after pregnancy had to prove that the reason was not pregnancy related. The employer argued that the different treatment was due to pregnancy, which was a material factor other than sex. The tribunal disagreed and found that the employer had discriminated unlawfully. There was no comparable provision requiring men to establish that their illness was not connected with a particular circumstance in order to obtain their full six months' sick pay entitlement. The EAT's approach was confirmed in a significant decision of a five member panel. In *Webb v EMO Air Cargo (UK) Ltd*¹⁹⁹ the employer engaged a temporary replacement for an employee who intended taking maternity leave. Several weeks after starting work, the replacement discovered that she was pregnant and informed the employer

197 (1985) *IRLR* 367 (EAT).

198 (1981) *IRLR* 51 (IT). The case was argued in terms of section 1(3) of the Equal Pay Act 1970.

199 (1990) *IRLR* 124 (EAT).

accordingly. She was dismissed and claimed discrimination in terms of the SDA. The EAT held that the question to be considered was whether the woman had been adversely treated because of her sex or because of a neutral factor. To answer that question her treatment had to be compared with the treatment which was or would have been accorded to a comparable man. The tribunal found that there had been no sex discrimination because a man would have been dismissed for a similar inability to carry out the primary task for which he had been recruited.

A pregnancy discrimination claim will thus succeed under the SDA where a comparison can be drawn with a sick man or a man whose disability affects the business in a similar manner, and it can be shown that the pregnant woman has been treated less favourably. Comparison with a hypothetical male is possible.²⁰⁰ Discrimination may also occur in the contractual benefits accruing to an employee who is pregnant or on maternity leave.²⁰¹ Discrimination in respect of contractual benefits, such as the payment of sick pay or entitlement to sick leave, cannot be brought under the SDA, but must be brought in terms of the Equal Pay Act 1970 (EqPA). An appropriate male comparator is required. A comparison must be drawn with a man working in the establishment -- a hypothetical comparison is not possible.²⁰² The

200 The method of comparison is thus the same as that adopted in the United States, where the Pregnancy Amendment Discrimination Act 1978 requires a woman affected by pregnancy, childbirth or related medical conditions to be treated in the same manner as other persons who are similar in their ability or inability to work. That statute also specifically describes discrimination because of pregnancy as sex discrimination. McGinley 418 suggests that pregnancy discrimination also falls directly within the scope of the British SDA, despite the initial reluctance of the courts to recognise it as such. The reason is that in terms of the SDA a man may not claim discrimination when an employer discriminates in favour of a pregnant woman (section 2(2)). If discrimination due to pregnancy were not sex based, the provision would be unnecessary because the employer would be favouring the woman due to her pregnancy and not because of her sex.

201 In *Coyne v Exports Credits Guarantee Department* (1981) *IRLR* 51 (IT), for example, contractual sick leave benefits were challenged.

202 Section 1(2) of the EqPA.

approach to pregnancy discrimination in terms of both the SDA and the EqPA has been criticised as one which places undue reliance on the male norm -- in order to prove discrimination a woman must prove that she was treated less favourably than a man would have been treated. It is said that pregnancy is a genuine difference and should be treated as such.²⁰³

The Employment Protection (Consolidation) Act 1978 (EPCA) provides limited protection for pregnant employees. It protects employees against dismissal on the ground of pregnancy, but does not cover discrimination at other stages of employment, such as appointment or promotion, nor does it cover terms and conditions of employment. Furthermore, an employee is required to satisfy a statutory qualifying

203 Fredman 121. The author's criticism is the following: "The treatment of pregnancy in British law illustrates the absurd results of pure reliance on a male norm. Direct discrimination as defined under the Sex Discrimination Act 1975 (SDA) is explicitly based on a male norm: to prove discrimination a woman must establish that on the ground of her sex, she is treated less favourably than a man would have been treated. What, then, if there is no similarly situated man, as in the case of discrimination against a pregnant woman? In the early case of *Turley v Allclers*, it was held that dismissal of a woman on grounds of her pregnancy did not constitute unlawful discrimination contrary to the SDA, there being no male comparator. Later cases have tried to sidestep this difficulty by comparing the treatment of a pregnant woman with that of an ill man or with a man whose disability had similar effects on the business. However, neither of these comparisons is appropriate; pregnancy, being a genuine difference, should be treated as such without attempting to force conformity with a male norm.... The potential reach of equality based on a male norm varies according to the scope of comparison. The most restrictive formulation is represented by the Equal Pay Act 1970 (EqPA), which specifies that the comparison be drawn between a woman and an actual male employed at the same time at the same or equivalent establishment doing equal work. The limitation to the same establishment renders the law impotent in the face of intransigent job segregation: in predominantly female work-forces, there may simply be no relevant male comparator" (121-123).

period of service.²⁰⁴ In terms of the Act a woman is automatically regarded as unfairly dismissed if the whole or principal reason for her dismissal is her pregnancy, or is any other reason connected with her pregnancy.²⁰⁵ The dismissal of a woman for redundancy because she is pregnant and requires maternity leave, is regarded as dismissal for a reason connected with her pregnancy.²⁰⁶ Reasons connected with a woman's pregnancy have been held to include the development of a medical condition, such as high blood pressure, which makes rest advisable,²⁰⁷ and a miscarriage resulting in temporary absence from work.²⁰⁸

The employer is provided with a defence where the woman is incapable of performing her duties adequately because of her pregnancy,²⁰⁹ and where it would be unlawful for her to continue to work.²¹⁰ But the employer must offer the woman any other comparable and suitable job which is available prior to dismissing her.²¹¹

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- 204 In terms of section 60 she is required to have two years' service if she works for more than sixteen hours a week, and five years' service if she works for eight to sixteen hours a week.
- 205 Section 60.
- 206 *Brown v Stockton-on-Tees Borough Council* (1988) IRLR 263 (HL).
- 207 *Elgebde v The Wellcome Foundation Ltd* (1977) IRLR 383 (IT).
- 208 *George v Beecham Group Ltd* (1977) IRLR 43 (IT).
- 209 Section 60(1)(a). In *Brear v Wright Hudson Ltd* (1977) IRLR 287 (IT), the employee was a shop assistant in a pharmacy. Her duties included unpacking supplies, filling shelves and carrying stock up and down stairs. When her employer discovered that she was pregnant, she was dismissed. Her dismissal was regarded as fair because difficulties related to her pregnancy had resulted in an inability to carry out her lifting duties, which constituted a substantial part of the work which she was employed to do.
- 210 Section 60(1)(b). An example would be where a woman's work involved exposure to ionising radiation in excess of the dose limit for pregnant women prescribed by the Ionising Radiation Regulations 1985. Depending on the circumstances, an employer might also be in breach of the Health and Safety at Work Act 1974, which provides that employers are to ensure, in so far as is reasonably practicable, the health, safety and welfare at work of their employees (section 2(1)).
- 211 Section 60(2) and (3).

A job will be regarded as suitable if it is suitable to an employee's pregnant condition and health, and her particular skill, experience and qualifications. A job is available if it exists, or can be made to exist with a measure of flexibility, within an employer's staffing complement, lay-out and organisation.²¹²

An employee who alleges that she has been dismissed because of her pregnancy or a reason related thereto, and who has worked for her employer for the qualifying period, may rely on the EPCA. If she does not satisfy the service requirements of the EPCA, she must rely on the SDA. Her situation will then be compared to that of a sick or similarly incapacitated man. Discrimination in a form other than dismissal will also have to be considered under the SDA.

In addition to protection against discrimination and dismissal, employees are provided with certain specific statutory rights during pregnancy and around the time of confinement. In terms of the Employment Act 1980 an employee is allowed to take time off during her working hours to keep an ante-natal appointment and is entitled to be paid by her employer for the period of absence at her usual hourly rate.²¹³ The Employment Protection (Consolidation) Act 1978 (EPCA) provides female employees with a limited statutory right to maternity leave, while the Social Security Act provides for maternity pay.

The EPCA does not refer to maternity leave as such, but provides that women who comply with certain service and notice requirements are entitled to return to work within twenty-nine weeks of confinement.²¹⁴ An employee who is entitled to return

212 *Martin v BSC Footwear Supplies Ltd* (1978) IRLR 95 (IT).

213 Section 13 provides that a pregnant employee is entitled not to be refused time off work unreasonably in order to keep an ante-natal appointment. The employer is entitled to demand documentary proof that the employee is pregnant for all appointments except the first (section 13(2)), and that the appointment has been made (section 13(3)).

to work and has given the notice required, but is not permitted to return, is deemed to have been employed until her notified date of return and to have been dismissed on that day.²¹⁵ The fairness or otherwise of her dismissal must then be ascertained. If the reason for refusing the woman permission to return is her pregnancy or any reason connected with her pregnancy, her dismissal is automatically unfair.²¹⁶ The employer must establish that the reason for refusing the woman permission to return related to capability, conduct, redundancy²¹⁷ or statutory restriction, or was for some other substantial reason justifying dismissal.²¹⁸

In order to qualify for the statutory leave of absence, an employee must continue to be employed by her employer until immediately before the beginning of the eleventh week before the expected date of her confinement.²¹⁹ She must also work for at least 16 hours a week and must have been continuously employed by the same employer for two years by the beginning of the eleventh week before her confine-

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- 214 Section 47. Employees are free to return at any time during the twenty-nine week period. The only legal constrictions are contained in the Factory and Workshop Act 1901 (section 61) and the Public Health Act 1936 (section 205). Those statutes make it a criminal offence for the occupier of a factory knowingly to permit a woman to be employed there within four weeks of giving birth.
- 215 In terms of paragraph 6 of Schedule 2 dismissal does not affect an employee's right to return to work where a contract subsists during her absence and her employer dismisses her during that absence. Where dismissal occurs after the employee tries to return to work, she is regarded as having been employed until the day on which she gives notice of her intention to return, and as having been dismissed on that day (section 56).
- 216 Section 60.
- 217 Where a redundancy situation has arisen during the woman's maternity absence, and her employer or successor has a suitable available vacancy, the woman must be offered that alternative employment or her dismissal will be automatically unfair (section 45(3) and paragraph 2(2) of Schedule 2). If alternative employment is not available the woman will be entitled to redundancy payment.
- 218 Section 57(1).
- 219 Section 33(3)(a). She must continue to be employed, irrespective of whether she physically remains at work, and may thus be absent, for example, due to illness or holiday leave.

ment.²²⁰ Alternatively she must work for between eight and sixteen hours a week and must have worked for her current employer for at least five years.²²¹ Women who work for less than eight hours a week have no statutory rights.

A woman is entitled to return to work if she has satisfied the above service requirements. She exercises the right to return by complying with the statutory notice requirements. A woman who wishes to return to work after a statutory leave of absence must inform her employer in writing, at least twenty-one days before her absence begins, or as soon as is reasonably practicable, that she will be away because of pregnancy and that she intends to return to work. She must also inform him of the expected date of her confinement.²²² A second notice period may be initiated by the employer after confinement. The employer may write to the woman, not earlier than seven weeks after the expected date of her confinement, asking for written confirmation that she intends to return to work. She must reply within fourteen days of receiving the request, or as soon as is reasonably practicable.²²³ A third notice must be given to the employer at least twenty-one days before the day on which the woman proposes to return to work.²²⁴ A woman who fails to comply with the notification requirements forfeits her right to return to work, while a woman who complies is under no legal obligation to return.²²⁵

A woman is entitled to return to the job in which she was employed under her

220 Section 33(3)(b) and section 151.

221 Section 151.

222 Section 33(3)(d).

223 Section 33(3A) and (3B).

224 Section 47(1).

225 Ellis 290 explains that as a result of this anomalous aspect of the notice requirements, a woman should always be advised to give the required notice.

original contract of employment, on terms and conditions not less favourable than those which would have been applicable to her had she not been absent.²²⁶ This does not imply that the woman is entitled to have exactly the same job back again. The employer is entitled to undertake a measure of reorganisation during her absence, provided that he acts fairly to her in doing so.²²⁷ The woman's continuity of employment is preserved despite her absence.²²⁸

Small employers, that is employers who employ less than five employees, are exempted from the obligation to reinstate returning employees. But the employer must show that it is not reasonably practicable to permit the woman to return, or to offer her employment in terms of a new contract which is not substantially less favourable than her original contract.²²⁹ A second exclusion applies where it is not practicable, for reasons other than redundancy, to permit the woman to return and she is offered employment on terms which are not substantially less favourable than those contained in her original contract.²³⁰

226 Section 45(1).

227 In *Edgell v Lloyds Register of Shipping* (1977) 463 IRLR (IT), the employee was employed as a bookkeeper with the right to sign cheques up to a specified amount. She reported directly to a manager. During her absence the employer undertook some reorganisation, and on her return she was employed on the same grade, but without the authority to sign cheques. In addition she was to report to a supervisor instead of a manager. The industrial tribunal found that her right to return had not been infringed. Her work and grade had remained unchanged. Changes which had been introduced were not fundamental to her contract of employment. In *McFadden v Greater Glasgow Passenger Transport Executive* (1977) IRLR 327 (IT), on the other hand, the employee's right to return was found to have been infringed, where less favourable conditions were introduced upon her return. The status of her position was altered, which increased the risk of redundancy. She no longer had her own desk, nor was she sure of getting a full day's work.

228 Section 45(2) provides that "as regards seniority, pension rights and other similar rights... the period or periods of employment prior to the employee's absence shall be regarded as continuous with her employment following her absence."

229 Sections 56A(1) and (3).

230 Section 56A(2) and (3).

The right to statutory maternity pay is governed by the Social Security Act 1986. A woman qualifies for payment if she satisfies the statutory service requirements, and notifies her employer of her impending absence from work.²³¹ Liability for payment rests on the employer, who recovers payments by deducting the appropriate amount from its remittance of national insurance contributions and tax to Inland Revenue.²³² An employer may provide more favourable benefits than those defined in the statutory scheme, but may recover only the statutory benefits.

In summary, the law provides a woman with five essential rights around the time of childbirth. First, she is entitled not to be dismissed because she is pregnant, or for any reason associated with her pregnancy.²³³ A second right is the right to take time off work for ante-natal care.²³⁴ Thirdly, a woman may take a maximum of eleven weeks' leave before the birth of her child and twenty-nine weeks leave after her child is born.²³⁵ She is entitled, fourthly, to be reinstated in her original job after her maternity leave is over, on terms and conditions not less favourable than those which would have applied if she had not been absent.²³⁶ Finally, she is entitled to

231 Payment consists of two elements. One is an earnings related payment equivalent to ninety percent of a woman's salary and payable for six weeks. The woman qualifies for payment if she has worked for at least sixteen hours a week for two years by the week preceding the fourteenth week before her expected date of confinement. Alternatively, she must have worked for eight hours a week for a continuous period of five years (section 48). The other element is a flat rate payment, payable at the same rate as statutory sick pay for the whole of the maternity pay period (of eighteen weeks), or for twelve weeks additional to the period (of six weeks) for which the earnings related amount is payable. In order to qualify for the payment the woman must have worked for the same employer for at least six months by the week preceding the fourteenth week before the expected week of her confinement (section 46(2)).

232 Section 46(3).

233 Section 60 of the EPCA.

234 Section 13 of the Employment Act 1980.

235 Sections 33 and 45 of the EPCA.

236 Section 45 of the EPCA.

be paid for a maximum of eighteen weeks. The most that she will receive is ninety percent of her salary for a period of six weeks, plus a flat rate payment for an additional period of twelve weeks. All of these rights are subject to a complicated set of time constraints, resulting in the exclusion of a large number of women, particularly those who work part time.²³⁷ The legislature's requirement that a woman must have demonstrated some commitment to work before acquiring maternity rights has resulted in a statutory scheme which excludes many women.

An employer may grant a woman more favourable rights in terms of her contract of employment than those provided by the statutes. In terms of the Sex Discrimination Act, special treatment afforded to women in connection with pregnancy or childbirth is not unlawful.²³⁸ A similar provision is contained in the Equal Pay Act.²³⁹ These provisions coincide with the exception contained in the Equal Treatment Directive, which permits the protection of women with regard to pregnancy and maternity.²⁴⁰

Once it is known that an employee is pregnant, an employer may need to take

237 The complicated formulation of the statutory maternity provisions was criticised by the EAT in *Lavery v Plessey Telecommunications Ltd* (1982) IRLR 180 (EAT), and in *Secretary of State v Cox* (1984) IRLR 437 (EAT). In *Lavery* the provisions were described as being of "inordinate complexity exceeding the worst excesses of a taxing statute; we find that especially regrettable bearing in mind that they are regulating the everyday rights of ordinary employers and employees" (at 182). In *Cox* the EAT stated that to "speak of formidable confusion is perhaps an understatement. Legislation entitling an employee expecting a baby to periods of payment without work pending or during her confinement might have been expected to aim with especial care at clarity and simplicity of drafting; there are so many people affected by it... who would be unlikely to have, or to be able to afford, specialist knowledge or advice. Such expectation has not, unfortunately, been fulfilled" (at 438).

238 Section 2(2). Thus a man may not claim that he has been discriminated against where the employer affords a woman special treatment.

239 Section 6(1)(a) and (b).

240 Article 2(3).

specific measures to safeguard her health and that of the fetus. Employers are under a common law duty, both in tort and contractually by virtue of a term implied into contracts of employment, to take reasonable care of the health and safety of their employees. In terms of the Health and Safety at Work Act 1974, they are under a statutory duty to ensure, so far as is reasonably practicable, their employees' health, safety and welfare at work.²⁴¹ The measures which an employer is required to take to protect a pregnant employee depend on the circumstances of the case, such as the medical circumstances of the woman and the type of work which she does. Employers also have a statutorily imposed duty in respect of the unborn children of pregnant employees. In terms of the Congenital Disabilities (Civil Liability) Act 1976 an employer which breaches the statutory or common law duty of care toward a pregnant employee, resulting in the birth of a child with disabilities, is liable for damages to that child.²⁴²

The question which arises is whether an employer may exclude all employees of childbearing capacity from the work place because of potentially hazardous conditions there, or whether a practice of that nature would amount to sex discrimination under the SDA. In terms of section 51 of the SDA it is lawful to discriminate against a woman if it is *necessary* to do so in order to comply with an existing statutory provision the purpose of which is to protect women as regards pregnancy or maternity or other circumstances giving rise to risks specifically affecting women. Employment in processes involving the use of lead or ionising radiation is regarded as a risk specifically affecting women. But it has been observed that men may be subject to the same risk as women in that regard, and that both men and women should be protected adequately.²⁴³

241 Section 2(1) of the Health and Safety at Work Act 1974.

242 Section 1 of the Congenital Disabilities (Civil Liability) Act 1976.

243 Deakin 10 states: "The claim that women are especially at risk (to exposure to lead) is weak, in

In *Page v Freightlure (Tank Haulage) Ltd*²⁴⁴ the EAT considered whether it was lawful for an employer to discriminate against a woman in order to comply with the statutory health and safety obligations. A woman truck driver hauling dimethylformamide (DMF) was dismissed from her job, following the client chemical company's advice to the haulage company that women should not transport DMF because of risks related to childbearing. The EAT found that the employer's conduct was covered by the exception contained in section 51 of the SDA -- the woman's dismissal was thus lawful. However, the case was heard before the amendment of section 51 by the Employment Act 1989. Following the amendment, the section is to be interpreted in accordance with the EEC's Equal Treatment Directive 1976. The directive permits a derogation from the principle of equal treatment of men and women where that is done to protect women, particularly with regard to pregnancy and maternity.²⁴⁵ The European Court of Justice has held that this provision does not permit the exclusion of women from a certain type of employment because public opinion demands that women receive greater protection from risks which affect men and woman in the same manner.²⁴⁶ It has been suggested that interpretation of the term "necessary" in section 51, in the context of the directive, will involve a consideration of whether the employer could have achieved the same result by non-discriminatory means.²⁴⁷ In a situation such as that in the *Page*

the light of medical evidence that the reproductive capacity of men is possibly more at risk from this type of exposure. In respect of ionising radiation, the European Commission recommended that so far as possible, provisions relating to the protection of women of reproductive capacity should be extended to men who are able and intending to have children."

244 (1981) *IRLR* 13 (EAT).

245 Article 2(3).

246 *Johnston v The Chief Constable of the Royal Ulster Constabulary* Case 222/84 (1986) *ECR* 1651/ (1986) *IRLR* 263 (European Ct).

247 *Bourne and Whitmore* 54.

case, an employer may be expected to apply precautionary measures strictly instead of excluding women from the work place altogether.²⁴⁸

b Sexual Harassment

There is no statutory definition of sexual harassment. But conduct of that nature is generally regarded as a form of direct discrimination in terms of the SDA. Under the SDA a person discriminates against a woman if, on the ground of her sex, he treats her less favourably than he treats or would treat a man.²⁴⁹ An employer discriminates against a woman if he treats her less favourably by dismissing her or subjecting her to any other detriment.²⁵⁰

Sexual harassment is viewed as a form of detriment, both where specific action is taken or threatened for refusal to comply with a sexual demand (quid pro quo harassment), and where the working environment is made unpleasant as a result of the harassment (hostile or offensive work environment harassment). Detriment means to place under a disadvantage. The nature of the conduct which constitutes a detriment is to be decided in each case and is not a matter of law.²⁵¹ The meaning of detriment as "placing under a disadvantage" was adopted in the context of sexual harassment in the case of *Strathclyde Regional Council v Porcelli*.²⁵² There the

248 In the United States the Supreme Court has stated that fetal protection policies constitute direct sex discrimination, and that a policy protecting only female employees cannot be justified in terms of the bona fide occupational qualification defence (*International Union, UAW v Johnson Controls Incorporated* 111 SC1 1196 (1991)).

249 Section 1(1).

250 Section 6(2)(b).

251 *Ministry of Defence v Jeremiah* (1979) IRLR 436 (CA).

252 (1986) IRLR 134 (SCS).

employee worked as a laboratory technician. From the moment that two male laboratory technicians were employed she was subjected to a campaign of harassment, including sexual harassment, in order to force her to apply for a transfer. The sexual harassment consisted of staring, making suggestive remarks and brushing against her. The conduct had the desired effect as she eventually requested a transfer. The court found that she had been subjected to unlawful discrimination. It held that the very occurrence of sexual harassment constituted a detriment within the meaning of the Act. Harassment was a degrading and unacceptable form of treatment which the legislature had intended to restrain. The fact that not all of the conduct in question had been of a sexual nature did not detract from the fact that sexual harassment had occurred. The fact that a material part of the treatment contained such an element was sufficient.²⁵³ A subjective test is applied in order to ascertain whether sexual harassment, which amounts to a detriment, has occurred. The behaviour is considered from the point of view of the victim rather than the harasser.²⁵⁴ A single act of sexual harassment, provided that it is sufficiently serious, can amount to detriment.²⁵⁵

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- 253 *In De Souza v Automobile Association* (1986) IRLR 103 (CA), a race discrimination case, the Court of Appeal confirmed that harassment which adversely affects an employee's working conditions or environment constitutes a detriment. The offending behaviour need not result in a concrete disadvantage, such as a transfer or dismissal.
- 254 This is evident from the decision in *Wilman v Milinec Engineering Ltd* (1988) IRLR 144 (EAT). A director's secretary complained that she had been a victim of sexual harassment over a period of four and a half years. She endeavoured, inter alia, to introduce evidence of the director's conduct towards other women. The evidence was not admitted because the director's conduct had to be considered in the context of each individual. Conduct which one person regarded as offensive could be inoffensive to another.
- 255 *Bracebridge Engineering Ltd v Darby* (1990) IRLR 3 (EAT). An employee who had been employed for thirteen years was grabbed one afternoon as she was about to finish work and sexually assaulted by her charge hand and works manager. She escaped and complained to the general manager the following morning. The charge hand and works manager denied the incident and no disciplinary measures were taken. One week later the employee resigned due to her treatment and claimed sex discrimination and unfair constructive dismissal. Both complaints were upheld by the EAT.

An employee who has suffered a detriment or has been dismissed has not necessarily been subjected to sex discrimination. She must also have received less favourable treatment than a man has, or would have, received. Where sexual harassment has occurred, the concept of less favourable treatment is generally satisfied by the fact that the employee has been subject to a detriment, namely sexual harassment, on the ground of her sex. The court in *Porcelli* applied a "but for" test. The woman would not have been treated in the manner in which she was treated but for the fact that she was a woman. In that case the court dismissed the employer's submission that a man would have received different, but no less objectionable, treatment. The treatment included a significant sexual element to which a man would not have been vulnerable. The question was not whether the motive was sexual, but whether the means used were.

In terms of the SDA an employer is vicariously liable for acts of discrimination carried out by its employees. Liability arises where an employee acts in the course of his employment.²⁵⁶ An employer may be held liable not only for acts of discrimination by its managers and supervisors, but for the acts of all its employees. An employer is not liable for the discriminatory acts of its employees merely because the employment provides the opportunity for that act.²⁵⁷ To render the

256 In terms of section 41(1), "anything done by a person in the course of his employment shall be treated for the purposes of this Act as done by his employer as well as by him, whether or not it was done with the employer's approval."

257 In *Irving v The Post Office* (1987) IRLR 289 (CA) the Court of Appeal considered whether an employee had acted within the course of his employment for the purpose of section 32(1) of the Race Relations Act. (The provision is identical to that contained in section 41(1) of the SDA.) A letter sorter employed by the post office bore a grudge against his West Indian neighbours. When he came across a Christmas card addressed to the neighbours, he wrote across it "Go back to Jamaica Sambo", and drew a cartoon of a smiling face. The neighbours sought a declaration that the Post Office and its employee had discriminated unlawfully. Their application failed. The Court of Appeal held that the letter sorter's action was not an unlawful way of performing the duties for which he was employed. Although his employment provided the opportunity for his misconduct, the misconduct did not form part of the performance of his duties as a letter sorter, despite the fact that he was authorised to write on envelopes for postal

employer liable, the conduct complained of must be sufficiently closely related to the employment of the person who discriminates as to constitute improper performance of his job.²⁵⁸ The employer need not have any knowledge of the conduct to incur liability. In the context of sexual harassment it has been suggested that an employer would probably be held liable where an employee in a managerial or supervisory position takes advantage of that position to engage in harassment. The abuse of authority would be sufficiently closely linked to the task of supervision to constitute a mode of performing the duties of the particular job.²⁵⁹ An employee who harasses a fellow employee would not necessarily be viewed as acting within the course of his employment.

The SDA provides a defence where an employer can prove that it took steps which were reasonably practicable to prevent the employee, who is alleged to have discriminated, from acting in the manner complained of.²⁶⁰ The defence has been broadly interpreted.²⁶¹ An employer which has promulgated an equal opportunity policy and has brought its provisions to the notice of employees would probably succeed in a defence. It has been suggested that an employer wishing to escape liability should be required to show that it has made sexual harassment an explicit

purposes.

258 In *Bracebridge Engineering Ltd v Darby* (1990) IRLR 3 (EAT) an employee was sexually harassed by her charge hand and works manager. The EAT held that the employer was vicariously liable for the acts of the two men. Both exercised supervisory and disciplinary functions, and were acting within the course of their employment.

259 *Bourn and Whitmore* 46.

260 Section 41(3).

261 In *Balgobin and Francis v London Borough of Tower Hamlets* (1987) IRLR 401 (EAT), the EAT found that the allegations of sexual harassment had not been made known to management, that the employer's equal opportunities policy had been made known to employees and that there was proper and adequate staff supervision. Therefore, the employer had established a defence.

disciplinary offence, and that it has provided a procedure for enforcement.²⁶² An employer should also react promptly to complaints.²⁶³

A woman may also bring an unfair dismissal action in terms of the Employment Protection (Consolidation) Act 1978. She may do so, for example, where she alleges that she has been dismissed for refusing to comply with sexual advances or requests, or where she has been dismissed as a result of her complaints about sexual harassment. The Act also provides for a complaint of unfair constructive dismissal where an employee alleges that she resigned because her working environment was made intolerable.²⁶⁴ A restriction on unfair dismissal actions is the requirement that the employee have at least two years continuous service with her employer before she can bring an action.²⁶⁵ The complaint must also be presented to a tribunal within three months of the date of termination of the contract.²⁶⁶

6 Remedies

An employee or prospective employee who believes that discrimination has occurred may complain to an industrial tribunal, which may grant one or more of three available remedies if it believes that discrimination has occurred, and if it is

262 *Sexual Harassment at Work* 5.

263 The *Balghobin* decision is criticised by Townshend-Smith 54, who calls it naive. Bourn and Whitmore 47 are also critical, and state: "It is in the nature of things that those actions which constitute sexual harassment are likely to be covert and that there may well be other circumstances in which the employer may succeed in the defence that there were no reasonable steps which could have been taken to prevent the conduct complained of from occurring. It is clearly incumbent on the employer to take complaints seriously and act promptly on them. It is also advisable that matters to do with sexual or racial harassment are covered in any disciplinary code which is drawn up by employers and that these sections are drawn to the attention of employees."

264 Section 55 of the EPCA.

265 Section 64 of the EPCA.

266 Section 67 of the EPCA. A similar restriction is contained in section 76 of the SDA.

just and equitable to do so.²⁶⁷ The remedies are, first, a declaration of right,²⁶⁸ secondly, an award of compensation,²⁶⁹ and thirdly, a recommendation for action.²⁷⁰ There is no provision for reinstatement. Costs may be awarded if proceedings were brought or conducted frivolously, vexatiously or otherwise unreasonably.²⁷¹

A declaration states the rights of the employee, and the manner in which the employer has breached the law. It does not compel the employer to take any action. A tribunal usually makes a declaration in conjunction with a further remedy of either compensation or a recommendation.

Compensation may be awarded for future financial loss resulting from failure to appoint or promote, for other financial loss (for example, resulting from dismissal), and for injury to feelings.²⁷² The Act contains a limitation regarding the award of compensation. It provides that in a claim of indirect discrimination, no award of damages may be made if the employer can prove that it did not intend to discriminate.²⁷³ The intention of the employer must be determined subjectively.²⁷⁴

267 Section 65.

268 Section 65(1)(a).

269 Section 65(1)(b).

270 Section 65(1)(c).

271 Regulation II of the Industrial Tribunal (Rules of Procedure) Regulations 1985.

272 Section 66(4).

273 Section 66(3).

274 *Orphanos v Queen Mary College* (1985) *IRLR* 349 (HL.). Section 66(3) is sharply criticised by Townshend-Smith 206. He states: "To say that no damages are payable for indirect discrimination unless the defendant intended to discriminate is odd, because if he intended to discriminate that looks like direct discrimination. But if an employer continues to apply a requirement or condition after it has been declared unlawful, it is not necessarily direct discrimination; there may be no intention to treat any individual less favourably than another; it is the employer's knowledge of the unlawfulness which has changed. The sanction implies that no compensation is payable here either; the contrary argument is that the section contemplates that damages are payable in some cases of indirect discrimination.... The rule contrasts with

Compensation may be awarded where the employer behaves in a high-handed, malicious, insulting or oppressive manner.²⁷⁵ Compensation for injury to feelings is likely to be awarded in cases of sexual harassment. Compensation for sexual harassment relates to the degree of detriment suffered. There is an assessment of the injury to the woman's feelings, which is considered objectively, with reference to the feelings of any reasonable employee, and subjectively, with reference to her as an individual.²⁷⁶ An employer may be held liable for aggravated damages, as an additional element in compensation awarded for injury to feelings, where it behaves in a manner which heightens the sense of injury of the person discriminated against. An award of exemplary damages, in order to punish the employer rather than compensate the employee, may be appropriate to punish the discriminator for anti-social behaviour.²⁷⁷

The final remedy is a recommendation that the employer take action to obviate or reduce the adverse effect of the discrimination complained of, within a specified period. The industrial tribunal's power to make a recommendation does not include

equal pay claims, where up to two years' back-pay may be payable for indirect discrimination" (206-207).

275. *Alexander v The Home Office* (1988) IRLR 190 (CA). In *Noone v North-West Thames Regional Health Authority* (1987) IRLR 357 (CA), a race case, a doctor who had been refused appointment on the basis of race and was found to have been devastated, was awarded three thousand pounds sterling compensation.

276. *Snowball v Gardiner Merchant Ltd* (1987) IRLR 397 (EAT). In *Wilman v Minilec Engineering Ltd* (1988) IRLR 144 (EAT), for example sexual harassment case, the employee was awarded nominal compensation (fifty pounds sterling). The reason was that she had suffered only nominal injury, as she had been irritated but not upset by sexual harassment over a four year period.

277. *Alexander v The Home Office* (1988) IRLR 190 (CA). As a general rule exemplary damages may be awarded in three categories of cases, namely, cases where there has been oppressive, arbitrary or unconstitutional action by government servants; where the defendant's conduct has been calculated to result in personal profit which exceeds any compensation payable to the plaintiff; and cases where such damages are authorised by statute (*Rooks v Bantard* (1964) AC 1129).

the power to award payment of wages which would have been paid in the future if the discrimination had not occurred.²⁷⁸ Loss of remuneration should fall within the ambit of an award for compensation. Two limitations reduce the effectiveness of the remedy. First, the recommendation must relate to a particular complaint. There is no power to make general recommendations.²⁷⁹ Secondly, the recommendation is not an order and cannot be enforced. But a complainant may be awarded additional compensation at the discretion of the tribunal (or may be awarded compensation if none was originally awarded) if an employer refuses to act in accordance with a recommendation without reasonable justification.²⁸⁰

Where discrimination has resulted in dismissal, an employee may bring an unfair dismissal claim in terms of the EPCA, provided that she has at least two years' continuous service with the employer.²⁸¹ The advantage of a claim under the EPCA is that re-employment may be ordered. Compensation may also be awarded. Compensation consists of a basic award, which is based upon the employee's years of service, and an award aimed at compensating for actual financial loss. There is no provision for compensation for injury to feelings.²⁸²

C Equal Pay: The Equal Pay Act 1970 (EqPA)

While the Sex Discrimination Act 1975 covers non-contractual aspects of the

278 *Irvine v Prestcold Ltd* (1981) IRLR 281 (CA).

279 The principle that industrial tribunals have no general power to order an employer to discontinue a discriminatory practice was established in *Ministry of Defence v Jeremiah* (1979) IRLR 436 (CA).

280 Section 65(3).

281 Section 64.

282 See sections 68, 69, 72-76 of the EPCA.

employment relationship, the Equal Pay Act 1970 aims to equalise the contractual terms and conditions of employment of male and female employees. The EqPA implies an equality clause into a woman's contract of employment whenever she is engaged in like work with a man, or in work rated as equivalent, or in work to which equal value is attributed.²⁸³ The EqPA initially failed to provide for equal value claims except where the employer had undertaken a voluntary job evaluation study. As the Act in that form did not reflect the provisions of Article 119 of the Treaty of Rome accurately,²⁸⁴ it was amended in 1972 to incorporate the concept of equal pay for work of equal value.²⁸⁵

Article 119 of the Treaty of Rome provides for equal pay for equal work. The Equal Pay Directive 1975, which restates the principle of equal pay contained in Article 119,²⁸⁶ has an explicit reference to work of equal value.²⁸⁷ Rights flowing from the Treaty of Rome may be enforced before the European Court of Justice, and before the courts of Member States. Article 119 is therefore directly applicable and may be relied on in national courts by private litigants.²⁸⁸ As the Equal Pay Directive does not alter the scope or content of the equal pay principle contained in Article 119, but merely clarifies it,²⁸⁹ it is unlikely that an individual litigant will

283 Section 1.

284 *Commission v The United Kingdom* Case 61/81 (1982) ECR 2601/ (1982) IRLR 333 (European Ct).

285 As a result of the amendment the concept of equal value may form the basis of comparison for an equal pay claim. In this respect British law has developed beyond American law, where courts have not permitted a comparison based on comparable worth under Title VII of the Civil Rights Act 1964. For a discussion of the European and American approaches, see Treu 1-33.

286 *Jenkins v Kingsgate (Clothing Productions) Ltd* Case 96/80 (1981) ECR 911/ (1981) IRLR 228 (European Ct) found that the Directive restated the principle of equal pay contained in Article 119 and did not alter it in any way.

287 Article 1 of the Directive.

288 *Defrenne v Sabena (No 2)* Case 43/74 (1976) ECR 455 (European Ct).

need to rely on the Directive as opposed to the Treaty. Should an individual wish to rely on the Directive, it will be possible in an action against an organ of the state, that is a public sector employer. European Community law (Article 119) and national law (the EqPA) are thus concurrently applicable in national courts.

The Equal Pay Act 1970 is discussed below.²⁹⁰ The expansion of rights conferred by the Act by means of European Community law is described at the appropriate points.

1 Coverage and Scope

The EqPA prohibits discrimination in pay and other contractual terms of employment. It protects persons working under a contract of service, a contract of apprenticeship, or a contract personally to execute any work or labour.²⁹¹ A "contract personally to execute work or labour" has been held to have a wider connotation than "employment", so as to include the self employed.²⁹² But persons working under a contract to supply services other than their own labour are not included.²⁹³ The Act applies irrespective of the length of service of the worker. It covers private employment as well as all public sector employees, with the exception of those

289 *Jenkins v Kingsgate (Clothing Productions) Ltd* Case 96/80 (1981) ECR 911/ (1981) IRLR 228 (European Ct).

290 The Act applies to discrimination against women and men (section 1(13)). But since it is usually women who claim equal pay, it will be assumed in this study that the person claiming equal pay is a woman, and the person with whom she is claiming equal pay (her comparator) is a man.

291 Section 1(6)(a). This is the same as the definition of "employed" under the SDA.

292 *Quinnen v Howell* (1984) IRLR 227 (EAT).

293 In *Mirror Group Newspapers v Gunning* (1986) IRLR 27 (CA) a contract between a company and an independent wholesaler was held to fall outside the ambit of the Act, because the contract did not provide that the work was to be performed by the contractor personally.

employed in the armed forces.²⁹⁴

The Act operates by implying an equality clause²⁹⁵ into the contract under which a woman is employed, whenever she is engaged in like work with a man, work rated as equivalent, or work to which equal value is attributed.²⁹⁶ An equality clause can relate to any term in the contract under which the woman is employed, except for those which are specifically excluded by the Act. Provisions which comply with laws regulating the employment of women are excluded.²⁹⁷ The Act also excludes special treatment of women in connection with pregnancy or childbirth.²⁹⁸ The implication is that men need not be given paternity rights equivalent to maternity rights provided for women.²⁹⁹

A woman may claim equality with a man working in the same employment.³⁰⁰ That means, first, that her comparator must be employed at the same establishment, or employed by the same or an associated employer³⁰¹ at a different establishment if common terms of employment are applied in respect of the two establishments.³⁰²

294 Section 1(9).

295 Section 1(1).

296 Section 1(2). These concepts are discussed below.

297 Section 6(1)(a).

298 Section 6(1)(b).

299 All provisions relating to death and retirement were initially excluded by the Act. But following the decision of the European Court of Justice in *Marshall v Southampton and South-West Hampshire Area Health Authority* Case 152/84 (1986) ECR 723/ (1986) IRLR 140 (European Ct), both the SDA and the EqPA were amended to modify the exclusionary rules relating to death and retirement.

300 Section 1(2).

301 Employers are defined as associated if "one is a company of which the other (directly or indirectly) has control or if both are companies of which a third person (directly or indirectly) has control".

302 Section 1(6).

The geographical scope of the comparison is thus limited to a man in the same employment, irrespective of whether the woman alleges that she is engaged in like work, work rated as equivalent or work of equal value. Secondly, the EqPA does not permit comparison with a hypothetical male. The requirement that the woman should be employed in the same employment as her comparator implies that she should at some point have been in contemporaneous employment with her comparator. But no such limitation is contained in Article 119 of the Treaty of Rome. Therefore the European Court of Justice in *Macarthy's Ltd v Smith*³⁰³ held that a woman could claim equal pay with her predecessor by relying on the European right.

2 Enforcement Procedures and Remedies

Equal pay claims and claims for equal value are enforced through industrial tribunals.³⁰⁴ A woman who claims that she has been discriminated against must choose the employee with whom she wishes to claim equality. She may choose as her comparator any male worker in the same employment whom she believes is performing like work, or whose work has been rated as equivalent under a job evaluation scheme, or whom she contends is performing work of equal value.³⁰⁵ A

303 Case 129/79 (1980) ECR 1275/ (1980) IRLR 209 European Ct.

304 Section 2(1) provides that claims may be presented to an industrial tribunal in respect of the contravention of an equality clause. In terms of section 2(3) a claim pending in any court which could be disposed of more conveniently in an industrial tribunal may be referred to the tribunal. Both equal pay claims and claims for equal value are governed by the Industrial Tribunal (Rules of Procedure) Regulations 1985. The rules of procedure governing claims of like work and work rated as equivalent are the same as for any other tribunal application (Schedule 1). In equal value cases, complex complementary rules of procedure also apply (Schedule 2). The salient points of the rules governing equal value claims are discussed below in the context of the discussion on equal value.

305 *Ainsworth v Glass Tubes Ltd* (1977) IRLR 74 (EAT).

tribunal will not select a suitable or representative comparator.³⁰⁶ Equality is brought about by means of an equality clause which is implied into every contract of employment.³⁰⁷ A successful claim, where the woman is engaged in like work or work rated as equivalent to that of her comparator, results in any term in the woman's contract, which is less favourable than that of her comparator, being raised to the latter's level. Where the woman's contract does not contain a term which is contained in the contract of her comparator, it is deemed to be included in her contract. In the case of a successful equal value claim, the view was initially adopted that a woman's entire remuneration package, should be considered to determine whether it is less favourable than that of her comparator. In *Hayward v Cammell Laird Shipbuilders Ltd*,³⁰⁸ the woman had established that her work was of equal value to that of her comparators. The Court of Appeal held that merely raising her wages to the level of her comparators would not be the correct way of implementing the equality clause. Her entire remuneration package, including sickness benefits, paid meal breaks and holiday entitlement had to be considered to determine whether it was less favourable than that of her comparators. But on appeal to the House of Lords, a different view was taken.³⁰⁹ The Lords accepted that the equality clause implied by the Act modified each and every term in a woman's contract which was less favourable than a corresponding term in her comparator's contract, regardless of whether her contract also contained terms which were more favourable than his. They concluded that the applicant's rate of pay was to be treated as increased to that of her comparators, although certain terms contained in her contract, such as those dealing with sickness and holiday pay, were more

³⁰⁶ *Thomas v National Coal Board* (1987) IRLR 451 (EAT).

³⁰⁷ Section 1(1).

³⁰⁸ (1987) IRLR 186 (CA).

³⁰⁹ *Hayward v Cammell Laird Shipbuilders Ltd* (1988) IRLR 257 (HL).

favourable than theirs.

A tribunal may also order the payment of arrears of remuneration or damages up to a period of two years before the date on which the proceedings were brought or the length of the woman's employment, whichever is shorter.³¹⁰ An order for the payment of damages, as opposed to arrears of remuneration, may be appropriate where a term which is not related to pay has been breached, for example, a term on leave entitlement.

3 Substantive Provisions of the Equal Pay Act

There are three categories of comparator with whom a woman seeking equality in terms and conditions of employment may compare herself. She may compare herself to a man employed on like work, a man employed on work rated as equivalent, or a man employed on work which is of equal value.³¹¹

Like work is work which is the same as, or is broadly similar to, the work of the chosen comparator. Any differences which occur must not be of practical importance in relation to terms and conditions of employment.³¹² Tribunals assess the existence of like work in two stages. The first question is whether the work performed is the same or is of a broadly similar nature. A broad approach is adopted and trivial distinctions are ignored.³¹³ Emphasis is placed on the work actually per-

310 Section 2(5).

311 Section 1(2)(a)-(c).

312 Section 1(4).

313 In *Capper Pass Ltd v Lawton* (1976) IRLR 366 (EAT), the work of female 'cooks' who worked in the kitchen of the director's dining room and the work of male 'assistant chefs' who worked in the kitchen of the factory canteen were found to be broadly similar in nature.

formed, as opposed to job descriptions or titles.³¹⁴ The second question is whether differences exist between the work of the woman and her comparator, and whether such differences are of practical importance in relation to terms and conditions of employment. The frequency with which differences occur and the nature and extent of the differences are considered.³¹⁵ Where a man and a woman perform the same work, the fact that they do so at different times has not been regarded as a difference of practical importance.³¹⁶ On the other hand, the fact that work on a night shift involves more responsibility than a day shift may be a difference of practical importance.³¹⁷ An obligation to supervise or control may also be a difference of practical importance.³¹⁸

A second possible comparator in terms of the EqPA is a man employed on work rated as equivalent to that of the woman.³¹⁹ Work is rated as equivalent if the jobs of the man and the woman have been given the same value under a job evaluation study, or would have been given the same value if the study had not been overtly discriminatory.³²⁰ A job evaluation study is a study undertaken by an employer with a

314 *Electrolux Ltd v Hutchinson* (1976) IRLR 410 (EAT).

315 Section 1(4).

316 *Dugdale v Kraft Foods Ltd* (1976) IRLR 368 (EAT); *National Coal Board v Sherwin* (1978) IRLR 122 (EAT).

317 *Thomas v National Coal Board* (1987) IRLR 451 (EAT).

318 *Waddington v Leicester Council for Voluntary Services* (1977) IRLR 32 (EAT).

319 Section 1(2)(b).

320 Section 1(5) provides that work will be rated as equivalent if the jobs of the applicant and the comparator "have been given an equal value, in terms of demands made on a worker under various headings (for instance effort, skill, decision) on a study undertaken with a view to evaluating in those terms the jobs to be done by all or any of the employees in an undertaking or group of undertakings, or would have been given an equal value but for the evaluation being made on a system setting different values for men and women on the same demand under any heading".

view to evaluating the jobs done by all employees, in terms of the demands made on employees under various headings, such as effort, skill and responsibility.³²¹ The Act thus requires an analysis of job components rather than a comparison of entire jobs.³²² The most obvious shortfall is that an employer is not obliged to undertake such a study. Furthermore, the legislation provides virtually no guidance as to what constitutes a proper job evaluation study. Even where a study is undertaken, it may attach disproportionate weight to traditionally male "skills" such as physical strength. However, where a female employee can show that a job evaluation study is discriminatory, she may institute an equal value claim.³²³ A job evaluation study is binding only if the parties who requested it have accepted its validity.³²⁴ Once they have accepted its validity it is binding even if it has not yet been implemented.³²⁵

321 Section 1(5).

322 The Court of Appeal held in *Bronley v H & J Quick Ltd* (1988) IRLR 249 (CA), that the comparison of whole jobs, an approach which involved greater subjectivity and was more prone to bias than factor analysis, would not satisfy section 1(5). The evaluation of certain benchmark jobs under various factors was found to be insufficient where the complainant's job had not been evaluated in that manner. Four possible job evaluation techniques were set out in *Eton v Nuttall* (1977) IRLR 71 (EAT). The first technique was job ranking, in terms of which each job was considered as a whole and given a ranking in relation to all other jobs. The second was by means of paired comparison. Each job was compared to each other job as a whole and awarded 0, 1 or 2 points, depending on whether it was ranked below, equal to or above the other, respectively. Points were then totalled and a ranking order produced. The third technique was by means of a points assessment. Jobs were broken down into a number of factors, such as skills, responsibility and physical and mental requirements, and points awarded for each factor according to a predetermined scale. Total points determined the job's position in the ranking order. The fourth technique was a factor comparison, which was similar to points assessment, but which used a limited number of factors. A number of key jobs were selected because their wage rates were agreed to be fair. The proportion of the total wage attributed to each factor of the jobs selected was determined. Other jobs were then compared, factor by factor, to determine a rate for each factor of each job. Total pay was determined by adding together the rates attributed to the individual factors. Job evaluation studies based on one of the first two techniques, where entire jobs are compared, do not satisfy the requirements of the Act.

323 Section 2A(2) and (3). If the tribunal is of the opinion that there are reasonable grounds for the claim, it commissions a job evaluation study from an independent expert (section 2A(1)(b)).

324 *Arnold v Beecham Group Ltd* (1982) IRLR 307 (EAT).

325 In *O'Brien v Sim-Chem Ltd* (1980) IRLR 373 (111.), the court held that section 1(5) would apply if a study had not yet been implemented, but evaluations had been completed, enabling a comparison to be made between the jobs in question. On the other hand, *Arnold v Beecham*

The third possible comparator in terms of the Act is a man whose work is of equal value to that of the woman. The Act was amended to include the requirement of equal pay for work of equal value, following the decision of the European Court of Justice in *Commission v United Kingdom*.³²⁶ In that case the court found that the prohibition of pay discrepancies where the work of a woman was the same as that of a man, or had been rated as equivalent in terms of a voluntary job evaluation study undertaken by an employer, did not satisfy the requirements of Article 119 of the Treaty of Rome and the Equal Pay Directive 1975. An equal value claim is possible where a woman's work is neither like work nor work rated as equivalent to that of her male comparator.³²⁷ The presence of a man doing like work does not prevent a woman from claiming equal pay for work of equal value by comparing herself to another man.³²⁸ Thus a group of predominantly female employees performing the same or similar work, whose work is undervalued in comparison with a group of predominantly male employees, may use the Act to challenge that undervaluation, despite the presence of one or more men in the group. A woman may also bring an equal value claim if the job evaluation study undertaken by her employer discriminates on the ground of sex.³²⁹

Group Ltd (1982) IRLR 307 (EAT) held that parties should have accepted the results of a study before it could be viewed as having been completed.

- 326 Case 61/81 (1982) ECR 2601/ (1982) IRLR 333 (European Ct).
- 327 Section 1(2)(c). The scope of the Act is thus broader than that of the American Equal Pay Act 1963 and Title VII of the Civil Rights Act 1964, neither of which permits a claim based on equal value (comparable worth).
- 328 *Pickstone v Freemans plc* (1988) IRLR 357 (HL).
- 329 Section 2A(2)(b). The study is discriminatory if differences in values set by the study on different demands are not justifiable irrespective of the sex of the person on whom the demands are made (section 2A(3)),

The industrial tribunal assesses whether or not the woman's work is of equal value to that of her comparator. First it decides whether there are reasonable grounds for the claim.³³⁰ If it appears to the tribunal that there are no reasonable grounds for determining that the work is of equal value it does not permit the case to proceed. This is a preliminary step, designed to sift out cases which have no chance of success. If there are reasonable grounds for the claim, the tribunal commissions a report from a member of a panel of independent experts.³³¹ The woman is entitled to equal pay if, in the light of this report, the tribunal determines that the value of her work is equal to or greater than that of her comparator.³³² The tribunal must decide whether the woman is employed on work which is of equal value to that of a man employed in the same employment, in terms of the demands made on her under such headings as effort, skill and decision.³³³ Jobs must thus be analysed under a number of headings, as is the case where an employer undertakes a job evaluation study. The comparison of entire jobs is not acceptable.³³⁴

The equality clause does not operate where the employer proves that the variation between the terms of the woman's contract and that of her comparator is genuinely due to a material factor which is not the difference of sex.³³⁵ The employer must establish the defence on a balance of probabilities. The defence is available if the difference in pay has been instituted in pursuit of an objective which corresponds to

330 Section 2A(1)(a).

331 Section 2A(1)(b).

332 In *Murphy v An Bord Telecom Eircann* Case 157/86 (1988) IRLR 267 European Ct, the ECJ held that an employee found to be doing work of a higher value than her comparators should not be frustrated in her attempt to achieve equal pay.

333 Section 1(2)(c).

334 *Bromley v H & J Quick Ltd* (1988) IRLR 249 (CA).

335 Section 1(3).

a real need on the part of the undertaking, is appropriate with a view to achieving that objective, and is necessary to that end.³³⁶ The genuine material factor must be current at the time of the claim.³³⁷

The employer must show that the variation is 'genuinely' for the reason given. The reason may not be a pretext for unlawful discrimination,³³⁸ and may not be one which discriminates directly or indirectly on the ground of sex as defined in section 1 of the SDA. Indirect discrimination may occur, for example, where an employer treats part time employees differently from full time employees, as women tend to be adversely affected thereby. Initially an employer could justify the difference in terms of the genuine material factor defence. But in *Jenkins v Kingsgate (Clothing Productions) Ltd*³³⁹ the ECJ held that a wage differential between part time and full time employees was contrary to Article 119 of the Treaty of Rome, if it was attributable to factors which could not be justified objectively. If it was not possible to explain the difference other than by discrimination based upon sex, having regard to the difficulties in working full time encountered by woman, the inequality would be contrary to Article 119. National courts had to decide whether a difference in pay in fact amounted sex discrimination. The case was remitted to the EAT, which proceeded to consider the position of part time employees in the light of the Euro-

336 *Bilka-Kaufhaus GmbH v Weber von Hartz* Case 170/84 (1986) ECR 1607/ (1986) JRLR 317 (European Ct).

337 The point is illustrated by the decision in *Benveniste v University of Southampton* (1989) JRLR 122 (CA). A female employee was appointed at a time of financial stringency at British universities. For that reason she was appointed at a substantially lower salary scale than the scale at which a person of her age and possessing her qualifications would normally have been appointed. The Court of Appeal held that while a genuine material factor had existed at the time of her appointment, the material difference between her case and that of her comparators was removed when the financial constraints were removed.

338 In *Shieldts v E Coomes Holdings Ltd* (1978) JRLR 263 (CA), the alleged reason for the wage discrepancy was that the male employees had to exercise protective and deterrent functions in the employer's betting shops. As not all the men exercised these functions, but all received higher pay, the reason was regarded as pretextual rather than genuine.

339 Case 96/80 (1981) ECR 911/ (1981) JRLR 228 (European Ct).

pean Court's finding. It held that a differential in pay could not be justified merely by showing that one group of employees worked part time. A differential would be justified where an employer applied it, on objectively justifiable economic grounds, to encourage full time work irrespective of the sex of the employee.³⁴⁰

The term 'material' has been interpreted as meaning significant and relevant. A relevant difference may include skill, qualifications and training.³⁴¹ The fact that a man and a woman perform their work at different times may constitute a material difference. The extent of the pay discrepancy for this reason may, however, be examined in order to ascertain whether it is justified.³⁴² The potential to exercise responsibility could constitute a material difference,³⁴³ as could length of service,³⁴⁴ working conditions,³⁴⁵ and a difference in weekly hours of work between employees whose work is performed at different geographic locations.³⁴⁶ For the defence to succeed, the material factor must justify the whole of the variation, not just part of it. Although the equality clause will operate if the entire variation is not justified, it will do so only to the extent necessary to raise the woman's pay to the level which reflects the justified part of the variation.³⁴⁷

340 *Jenkins v Kingsgate (Clothing Productions) Ltd* (No 2) (1981) IRLR 388 (EAT).

341 *Rainey v Greater Glasgow Health Board* (1987) IRLR 26 (HL).

342 *National Coal Board v Sherwin* (1978) IRLR 122 (EAT).

343 *Edmonds v Computer Services (South-West) Ltd* (1977) IRLR 359 (EAT).

344 *Copper Pass Ltd v Lawton* (1976) IRLR 366 (EAT).

345 In *Davies v McCartneys* (1989) IRLR 439 (EAT), the defence succeeded where the male comparator, a market clerk, worked in the market under unpleasant conditions, while the woman, a secretary, did not. The court also considered the fact that the man bore responsibility for the financial position of the company, that is, he had a greater responsibility.

346 *Navy, Army & Air Force Institutes v Varley* (1976) IRLR 408 (EAT).

347 *National Coal Board v Sherwin* (1978) IRLR 122 (EAT).

A question which arises is whether an employer can justify a pay discrepancy between male and female employees on the basis of existing market forces, such as skill shortages and collective bargaining strengths. Initially, the defence could succeed only where a personal attribute, such as seniority or merit, justified the differential.³⁴⁸ Extrinsic factors, such as skill shortages and other market forces, were excluded. But in *Rainey v Greater Glasgow Health Board*³⁴⁹ the House of Lords allowed a market forces type defence. The employer, the health board, wished to establish a prosthetic service. Until that date all prosthetic work had been carried out by private contractors. In order to attract qualified prosthetists from the private sector, the health board agreed that they could be transferred at their existing rate of pay, which was higher than the board's normal rate. All further employees, both male and female, were taken on at the lower rate. The applicant, a woman who was taken on at the lower rate, claimed equal pay with the (unintentionally) all male employees who transferred from the private sector. The employer argued that the difference in pay was genuinely due to a material factor other than the difference of sex. The House of Lords construed "material" to mean significant and relevant, and found that the employer had shown an objectively justified reason for failing to pay direct entrants similarly to transferees. Weight was attached to the fact that the complainant was not paid less than the norm, but that her comparators were paid more. The court also required a market force consideration to conform to the general guidelines laid down by the ECJ, namely, that it should be in pursuit of an objective which corresponded to a real need on the part of the undertaking, should be appropriate with a view to achieving that objective, and should be necessary.³⁵⁰

348 *Clay Cross (Quarry Services) v Fletcher* (1978) *IRLR* 361 (CA).

349 (1987) *IRLR* 26 (HL).

350 *Bilka-Kaufhaus GmbH v Weber von Hartz* Case 170/84 (1986) ECR 1607/ (1986) *IRLR* 317 (European Ct).

The defence may also succeed where the comparator's pay is red-circled. An employee may be transferred from a higher-paying job to one which pays less, for example, due to illness. If pay is maintained at the higher rate, two employees doing the same job will be remunerated differently. This is referred to as red-circling. The defence will fail where the distinction is based on unlawful discrimination. In *Snoxell v Vauxhaull Motors Ltd*³⁵¹ male employees were red-circled through past membership of a grade which was open only to men. If the female applicants had been permitted entry to the grade, they too would have been red-circled. The material factor defence raised by the employer failed because the difference in pay, preserved by the red circle, had originated in unlawful discrimination.

D Affirmative Action

The Sex Discrimination Act and the Equal Pay Act does not require the promotion of equal opportunities to remedy the effect of past discriminatory practices, that is, affirmative action. Generally, the definition of 'discrimination' in the SDA is such that affirmative action is unlawful. But the Act does permit a measure of affirmative action, by encouraging and enabling women to be candidates for jobs, while allowing an employer freedom as to the person actually selected. That is done by drawing attention to job opportunities and by providing training to enhance the possibility of success of current and prospective employees. In terms of the Act, an employer is permitted to provide single sex training for existing employees, provided that the statutorily defined imbalance in the work force can be established. Training may be provided where there are no women doing the work for which the training is provided, or where the number of women doing the work is "comparatively

351 (1977) *IRLR* 123 (EAT).

small".³⁵² Under these circumstances, an employer is entitled to afford training to women to assist them to perform the specified work, or to encourage women to take advantage of opportunities for doing the specified work. An employer may also provide single sex training for non-employees.³⁵³ The Act thus provides for single sex training for current and prospective employees, and encouragement for prospective employees.³⁵⁴ An employer is not compelled to implement an affirmative action scheme. An employer who wishes to implement such a scheme may consider positive measures such as single-sex training for work which is traditionally the preserve of the opposite sex (for example, manual or technical work), positive encouragement to women to apply for managerial posts, or advertisements which encourage applications from the under represented sex (although selection must be on merit without reference to sex in order not to fall foul of the Act).³⁵⁵ It has also been suggested that employers should increase promotion opportunities for part time employees, develop job sharing schemes, improve maternity and child care facilities, and retain contact with women who cease work for family reasons with the possibility of some credit for time spent out of the work force.³⁵⁶

352 Section 48.

353 Section 47.

354 Bourne and Whitmore 82 refer to a process to "overcome chill and bring about skill."

355 These examples are given by the Equal Opportunities Commission in its *Code of Practice: Equal Opportunity Policies, Procedures and Practices in Employment* (1985). The code, which was issued under section 56A of the SDA, can be cited in unlawful discrimination cases before an industrial tribunal, and if any provision of the code appears relevant to the tribunal, it must be taken into account (section 56(10)).

356 Townshend-Smith 234.

CHAPTER SIX

SOUTH AFRICA

A Introduction

Legislation relating to employment discrimination is sparse in South Africa, and a mere handful of decisions of the Industrial Court have touched on the topic. Initially, provisions which specifically permitted sex-based discrimination in employment could be found in South African labour legislation.¹ In most instances that has been remedied, and the legislation now contains scattered provisions outlawing discrimination in specified instances.² An exception to the tendency to outlaw discrimination is to be found in the case of persons employed in the public service who fall within the ambit of the Public Service Act 111 of 1984. Although discriminatory provisions regarding the compulsory retirement age of male and female employees,³ and regarding the compulsory resignation of female employees upon marriage⁴ have

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- 1 Discriminatory provisions could be found in the Wage Act 44 of 1937 and subsequently in the Wage Act 5 of 1957, which permitted differentiation between categories or classes of employees on the ground, *inter alia*, of the sex of those employees. This differentiation of classes formed the basis of differential treatment regarding wages, contained in determinations made by the Wage Board (sections 5 and 9(3) of the 1937 Act, and sections 4(3), 8(4) and 19(6) of the 1957 Act). Discriminatory measures based on an employee's sex were removed by the Wage Amendment Act 48 of 1981.
 - 2 Discrimination on the ground of sex is outlawed in respect of industrial council agreements concluded in terms of the Labour Relations Act 28 of 1956 (sections 24(2), 48(12) and 51(9)), and in determinations made in terms of the Wage Act 5 of 1957 (section 8(4)). Section 34(2) of the Basic Conditions of Employment Act 3 of 1983 provides that no exemption of a class of employees from the provisions of the Act may be by virtue of a differentiation based on sex. Section 37(3) of the Act provides that the Minister may apply any method of differentiation that he deems advisable when making regulations, with the exception of any differentiation based on sex.
 - 3 These were contained in the Public Service and Pension Act 27 of 1923 (section 35).
 - 4 These were contained in section 19(1) of the Public Service and Pension Act 27 of 1923, and in section 14(7) of the Public Service Act 54 of 1957.

been repealed, employment discrimination in the public service endures in the absence of statutory provisions outlawing it. Provisions of the Act are capable of being applied to permit sex-based discrimination, and are applied in that manner.⁵

Mention may also be made of the Workman's Compensation Act 30 of 1941, which provides for the payment of compensation to a workman, as defined, including the dependents of a dead or disabled workman.⁶ The discriminatorily titled statute⁷ draws a distinction in respect of the dependents of a (dead or disabled) "workman" (who may be male or female) who are entitled to compensation. A dependent includes, inter alia, a widow or invalid widower, but does not include a widower who is not an invalid. Where there is no widow, the dependent includes a woman with whom the workman was living as man and wife, but not a man with whom a female "workman" may have been living in this manner.⁸

A second category of legislation affecting the position of women in employment is the so-called protective legislation, which is aimed at protecting women against working conditions deemed to be unsuitable to them by virtue of their sex. Legisla-

5 Provisions include section 10 which stipulates the criteria to be taken into account when an appointment is made or a post is filled, section 35 which provides for the making of regulations by the State President based on the recommendations of the Commission for Administration, and section 36 which provides for the inclusion of recommendations or directions in the Public Service Staff Code. Section 35(2), which is applicable to sections 35 and 36, provides that different regulations may be made to suit the varying requirements of particular departments, or of particular classes of officers or employees, or particular kinds of employment in the public service. The Act does not prohibit discrimination on the ground of sex when distinguishing between classes of employees or kinds of employment. For an overview of the *de facto* position in the public service, see *Die Staatsampenaar* 3.

6 Section 3(c).

7 In 1987, Benjamin *New Legislation* 736 wrote: "The Act remains, in title, an Act for the compensation of workmen. It would seem appropriate for the legislature to remove this outdated and sexist appellation from the Act."

8 Section 4(1)(a) and (b).

tion of that nature tends, for example, to regulate the hours which female employees may work, to prescribe the nature of work which they may (or may not) perform, and to distinguish between the health and safety standards applicable to male and female employees. Although the provisions are aimed at protecting female employees, they tend to operate in a discriminatory manner. Relevant provisions of South African legislation -- the Basic Conditions of Employment Act 3 of 1983, the Machinery and Occupational Safety Act 6 of 1983 and the Minerals Act 50 of 1991 -- are discussed below.

Turning to legislation which prohibits discrimination, it is apparent that the Labour Relations Act 28 of 1956 is the primary statute in terms of which employment discrimination can currently be addressed. Industrial council and conciliation board agreements may not discriminate on the ground of the sex of employees. Although the Act contains no direct reference to sex discrimination within the context of the unfair labour practice definition, it is submitted that such conduct does fall within the ambit of the broadly formulated definition.⁹ The Industrial Court determines alleged unfair labour practices,¹⁰ with a right of appeal to the Labour Appeal Court.¹¹ The discussion below, on the prevention of work place discrimination, focuses on the LRA. Other statutory provisions are discussed at the appropriate points. They include provisions of the Basic Conditions Act 3 of 1983, the Wage Act 5 of 1967, the Machinery and Occupational Safety Act 6 of 1983 and the Unemployment Insurance Act 30 of 1966.

Mention may also be made of the common law. Although the common law provides

9 The definition is contained in section 1.

10 The establishment and functions of the Industrial Court are contained in section 17 of the LRA.

11 Section 17B(1) and section 17(21A).

no direct relief for an employee who believes that she has been discriminated against by her employer, certain general principles may be possible of application in this context. An employee may have either a contractual or a delictual claim against her employer. A claim in terms of the common law is particularly significant for those employees who are excluded from the ambit of the LRA. The viability of instituting a claim of that nature is discussed below.

In the discussion which follows, the scope and coverage of key labour statutes which affect female employees are explained. Thereafter, specific issues such as the nature of discrimination, pregnancy, sexual harassment, equal pay and affirmative action are discussed. Finally, the role of collective bargaining, the effect of a new constitution and the common law are considered.

B Key Labour Statutes Affecting Female Employees

1 The Labour Relations Act 28 of 1956 (LRA)

In 1979 the way was opened in the LRA¹² for the Industrial Court to address sex-based discrimination in employment. In that year, following the recommendations of the Wiehahn Commission,¹³ the court was established in its present form.¹⁴ One of the functions of the Industrial Court was to adjudicate on alleged unfair labour

12 In 1979 the Act was still called the Industrial Conciliation Act. Its name was changed in 1981 by the Labour Relations Amendment Act 57 of 1981. For the sake of convenience, the Act will be referred to as the Labour Relations Act (LRA), irrespective of whether the period before or after 1981 is being addressed.

13 The *Commission of Inquiry into Labour Legislation* submitted Part 1 of its report in May 1979, recommending, inter alia, the establishment of an Industrial Court to replace the existing Industrial Tribunal (paragraph 4.28).

14 In terms of Act 94 of 1979 (section 17 of the principal Act 28 of 1956).

practices. This concept¹⁵ was defined in the broadest possible terms as "any practice which, in the opinion of the industrial court, is an unfair labour practice". In 1980 this definition was replaced by a more structured one.¹⁶ The definition, however remained wide, and it was the task of the Industrial Court to determine which conduct fell within the ambit of the definition and to provide the appropriate relief.¹⁷ In doing so an extensive body of decisions was built up from 1980 - 1988. Of these, a handful dealt with discrimination.

In 1988 a fairly detailed definition replaced the 1980 one.¹⁸ That version consisted of a general provision which stated that unfair labour practice meant any act or omission which in an unfair manner infringed or impaired the labour relations between an employer and employee. Fourteen specific unfair labour practices were included in paragraphs (a) to (n) of the definition. A general "catch-all" provision, which was virtually identical to the definition which was in force prior to 1988, concluded the 1988 definition.¹⁹ Included in the list of specific unfair labour practices

15 Introduced by Act 94 of 1979 and defined in section 1 of the principal Act 28 of 1956.

16 The definition read as follows:

"Unfair Labour Practice means

- (a) any labour practice or any change in any labour practice, other than a strike or lock-out, which has or may have the effect that-
 - (i) any employee or class of employees is or may be unfairly affected or that his or their employment opportunities, work security or physical, economic, moral or social welfare is or may be prejudiced thereby;
 - (ii) the business of any employer or class of employers is or may be unfairly affected or disrupted thereby;
 - (iii) labour unrest is or may be created or promoted thereby;
 - (iv) the relationship between any employer and employee is or may be detrimentally affected thereby; or
- (b) any other labour practice or any change in any labour practice which has or may have an effect which is similar or related to the effect mentioned in paragraph (a)."

17 Regarding the power of the court when making unfair labour practice definitions, see *Trident Steel (Pty) Ltd v John NO* (1987) 8 ILJ 27 (W).

18 The definition in section 1 of the principal Act 28 of 1956 was substituted by the Labour Relations Amendment Act 83 of 1988.

19 Paragraph (o) of the definition.

was the following practice:

"the unfair discrimination by an employer against any employee solely on the grounds of race, sex or creed: Provided that any action in compliance with any law or wage regulating measure shall not be an unfair labour practice".²⁰

The term "discrimination" was not defined.

In 1991 the definition was again amended.²¹ The current definition is similar to the one which was in force from 1980 - 1988. It provides that:

"unfair labour practice means any act or omission, other than a strike or lockout which has or may have the effect that-

- (i) any employee or class of employees is or may be unfairly affected or that his or their employment opportunities or work security is or may be prejudiced or jeopardised thereby;
- (ii) the business of any employer or class of employers is or may be unfairly affected or disrupted thereby;
- (iii) labour unrest is or may be created or promoted thereby;
- (iv) the labour relationship between employer and employee is or may be detrimentally affected thereby."

Despite the removal of the specific provisions contained in the previous definition, practices which constituted unfair labour practices in terms of that definition may continue to constitute unfair labour practices.²² It is probable that unfair dis-

20 Paragraph (i) of the definition.

21 Section 1 of the principal Act 28 of 1956 was amended by the Labour Relations Amendment Act 9 of 1991.

22 This is by virtue of the provision contained in section 1(4) which provides: "The definition of "unfair labour practice" referred to in sub-section (1), shall not be interpreted either to include or exclude a labour practice which in terms of the said definition is an unfair labour practice, merely because it was or was not an unfair labour practice, as the case may be, in terms of the definition of "unfair labour practice", which definition was substituted by section (1)(a) of the Labour Relations Amendment Act, 1991..."

crimination based on the sex of an employee will remain an unfair labour practice.

a Ambit of the Act

As stated above, one of the functions of the Industrial Court is to determine alleged unfair labour practices.²³ It is therefore necessary to consider the ambit of the Industrial Court's jurisdiction to consider unfair labour practices. Two issues are significant here, namely, the existence of an employer - employee relationship, and the applicability of the LRA to particular industries.

The Industrial Court must determine whether or not an employer - employee relationship exists.²⁴ In order to do so the court considers, first, the common law and, secondly, the definition contained in the LRA.²⁵ At common law various tests have been applied to determine the existence of an employment relationship.²⁶ The so-called control test viewed the employer's right or power to control the employee's work as the distinguishing feature of the relationship.²⁷ Control was later seen as an important, rather than decisive, feature of the relationship and the courts began to apply a dominant impression test.²⁸ In terms of the test the significant features of

23 Sections 17(11)(a), 17(11)(bA), 17(11)(f).

24 *Gwensha v Gaspec* (1988) 9 ILJ 73 (N).

25 *Borchers v CIV Pearce and F Sheward t/a Lubrite Distributors* (1991) 12 ILJ 383 (IC). See also *Tuck v SA Broadcasting Corporation* (1985) 6 ILJ 570 (IC), and *Tshabalala v Moroka Swallows Football Club Ltd* (1991) 12 ILJ 389 (IC).

26 For a detailed discussion of the nature of employment see Brassy 889 ff. For a discussion of the tests which have been formulated in common law see Le Roux 50 ff.

27 The test was first endorsed by the Appellate Division *Colonial Mutual Life Assurance Society v MacDonald* 1931 AD 412. See also *Ongevalltkommissaris v Onderlinge Versekeringsgenootskap AVBOB* (1976 4 SA 446 (A).

28 *Smit v Workmans Compensation Commissioner* 1979 1 SA 51 (A) held that the right of supervision and control was "not the sole *indicium* but merely one of the *indicia*, albeit an important one, and there may also be important *indicia* to be considered depending upon the provisions of the contract in question as a whole" (at 62).

the particular contract are weighed up in order to determine whether the dominant impression is that the contract is one of employment.

The LRA defines an employee as:

"any person who is employed by or working for any employer and receiving or entitled to receive any remuneration, and... any other person whomsoever who in any manner assists in the carrying on or conducting of the business of an employer...."

An employer is defined in similar terms as:

any person whomsoever who employs or provides work for any person and remunerates or expressly or tacitly undertakes to remunerate him or who... permits any person whomsoever in any manner to assist him in the carrying on or conducting of his business...

"Employ" and "employment" have corresponding meanings.²⁹

The first part of the definition, which refers to a person who works for an employer and is remunerated, may be regarded as a reflection of the common law contract of employment. The second part is much wider and refers to any person who assists an employer in any manner. It extends the ordinary common law meaning of employee, and requires no binding contract and no obligation to work or to pay remuneration. The interaction between common law and the statutory definition of employment contained in the LRA (and similar formulations contained in the Wage Act 5 of 1957, the Basic Conditions of Employment Act 3 of 1983, the Machinery

and Occupational Safety Act 6 of 1986) has been explained as follows:

"[N]ow that the common law tests for the relationship by ordinary standards, there can be no harm if the two are equated; it is, after all, not unreasonable to assume that the employment to which a statute refers is, in the absence of contrary indications, ordinary employment. The [statutory] definitions would then play the role that was probably intended for them from the start: they would operate merely to negative those other requirements of common law employment... the binding contract, the obligation to work and the obligation to pay remuneration. The definitions will, in other words, continue to ensure statutory protection for people who work for others, like the family member in *R v Osman* who intermittently worked in the shop, writing out invoices and keeping the books; such people will continue to fall within the compass of the words "assist in the carrying on or conducting of the business of the employer". But those who are not truly employees, because they do not surrender their productive capacity to the employer but work for themselves, will be where, as independent contractors, they are intended to be -- outside the protective net."³⁰

The Industrial Court appears to have adopted the above approach. In *Tuck v SA Broadcasting Corporation*,³¹ for example, it applied a dominant impression test³² and found that the following factors pointed to an employment relationship: the respondent was not entitled to terminate the contract which existed between the parties at its sole discretion; the applicant could not perform any work of a similar nature without the prior written consent of the respondent; the applicant was paid a fixed sum of money at the end of each month, as opposed to an all-inclusive sum for services rendered; the written agreement between the parties provided for two weeks' written notice of intention to terminate the relationship; the applicant performed her duties under the control of a manager; and a quasi-disciplinary inquiry was held and an appeal procedure followed prior to termination of the applicant's services.

In *Borcherds v CW Pearce and F Sheward t/a Lubrite Distributors*³³ the Industrial

30 Brassey 935.

31 (1985) 6 *JLJ* 570 (IC).

32 The court referred to the "overall impression" (at 584).

Court again applied a dominant impression test in order to ascertain whether or not the applicant was an employee. It went on to state that the ordinary meaning of the words used in the definition of employee was extremely broad, and that it was necessary to limit the wide import thereof. It did so in the following manner: an employee assists an employer in carrying on its business, rather than merely performing work which is of some assistance to an employer; the assistance is repeated with some form of regularity; the assistance is not rendered at the sole will and discretion of the person rendering the assistance; and the obligation to assist does not arise from some other legal obligation to render that assistance.³⁴

A second jurisdictional pre-requisite is the applicability of the LRA to the industry in which discrimination is alleged to have occurred.³⁵ The Act does not apply to persons employed in farming operations, in domestic service in private households, or persons employed by the State. Persons who perform charitable work for which they receive no remuneration, and those who teach at schools and tertiary institutions, such as universities and technicons, are also excluded from the ambit of the Act.³⁶

33 (1991) 12 ILJ 383 (IC).

34 See also *Oak Industries (SA) (Pty) Ltd v John* (1987) 8 ILJ 756 (N), where the court accepted for purposes of the decision that there should be some limitation on the words contained in the definition. It has also been noted that the wide definition of employee is limited by the effect of section 1(3) of the LRA, which provides that a labour broker is deemed to be the employer of persons which it procures to work for a client (Strydom 44- 45). However, the Industrial Court has not permitted that provision to operate in a manner which disguises the existence of the true employer, where the facts indicate that apparent employment by a broker is really a sham. In *Buthelezi v Labour for Africa (Pty) Ltd* (1991) 12 ILJ 584 (IC), for example, the court referred to the labour broking contract as "a stratagem, a new subtlety, invented and contrived to evade the law and render employees who have undoubted rights remedyless" (at 596). See also *Shikwambana v Quantum Construction Holdings (Pty) Ltd* Unreported NH 11/2/2632 16 May 1990; *Addington v Foster Wheeler SA (Pty) Ltd* Unreported NH 13/2/3857 8 September 1988.

35 Strydom 36- 42.

36 Section 2(2).

The question of whether an operation is a farming operation is one of fact. An employer may be found to be engaged in a farming operation despite the fact that it performs a wide range of activities, such as packing, grading, cleaning, transporting and selling of produce.³⁷ On the other hand an employer engaging in several activities may be held to be engaged in two operations, of which one is a farming operation, while the other is not.³⁸ In that case it is necessary to determine in which of the two operations the employee is working.

The exclusion of domestic servants in private households implies the consideration of two issues by the Industrial Court, namely, the nature of the work performed (domestic service) and the place at which that work is performed (a private household). Common law ascribes a broad meaning to domestic service to include persons who do not work in private households.³⁹ But only those domestic servants who work in private households are excluded from the scope of the LRA. Persons performing work of a domestic nature, such as cleaning, cooking or laundry, in shops, offices or hotels, for example, are covered by the Act.⁴⁰ The exclusion of domestic workers in private household from the ambit of the LRA is significant. A vast number of women engaged in service employment are deprived of protection against unfair treatment, such as unfair dismissal, by their employers.⁴¹

37 *Tykela v Chickwick Poultry Farms (Pty) Ltd* (1988) 9 ILJ 725 (IC); *Gamtele v Medallion Mushrooms (Pty) Ltd* (1988) 9 ILJ 1109 (IC); *HL and L Timber Products (Pty) Ltd v Clegg* (1990) 11 ILJ 847 (IC); *Tonin v Atlas Sea Farms (Pty) Ltd* (1990) 11 ILJ 1345 (IC).

38 *Kahn v Rainbow Chicken Farms (Pty) Ltd* (1985) 6 ILJ 60 (IC); *Sweet Food and Allied Workers Union v Delmas Kuikens* (1986) 7 ILJ 628 (IC). For critical comment on these decisions see *Le Roux Farmworkers %*.

39 *Stuttaford v Batty's Estate* 1917 CPD 639; *Van Vuuren v Pienaar* 1941 TPD 122; *R v Bushveld Agencies Ltd* 1954 2 SA 457 (T).

40 *Diadla v Durban Country Club* Unreported NHN 13/2/988 13 June 1988; *Gladys v Rydal Mount Flats* Unreported NHN 13/2/1249 8 December 1988.

41 In 1980, 88% of Black women in South Africa were employed as domestic workers, cleaners and chars (Pillay 27). Domestic service provides the second largest source of employment -- domestic workers number about one million (Delpont 5). It may be mentioned that the posi-

The Act excludes employees of the State. The Industrial Court has held that the term is to be interpreted restrictively, to include only employees of central government departments and provincial administrations.⁴²

Finally, it is necessary to refer briefly to the territorial jurisdiction of the Industrial Court. Because the court is a creature of statute its territorial jurisdiction is determined by the LRA. Its jurisdiction to hear unfair labour practice disputes coincides with the jurisdiction of industrial councils and conciliation boards in that regard. The reason is that unfair labour practice disputes must, generally, first be referred to those bodies.⁴³

b Enforcement Procedures

Alleged unfair labour practices are determined by the Industrial Court, with a right

tion of domestic workers is particularly invidious as they are excluded from the majority of South African Labour legislation, including the Basic Conditions of Employment Act 3 of 1983, the Wage Act 5 of 1957, the Workmen's Compensation Act 30 of 1941, and the Unemployment Insurance Act 30 of 1966. They are, however, protected by the Machinery and Occupational Safety Act 6 of 1983. See Flint I 1- 15 and Flint II 187- 201 for a general discussion of the position of domestic workers. It may be noted that the National Manpower Commission has recommended that legislative measures be adopted for the protection of domestic workers. These include a limitation of hours of work, provision of compulsory meal breaks and tea times, regulation of overtime and work on Sundays and public holidays, granting of leave and sick leave, work during pregnancy and immediately after confinement and notice of termination of employment (see, in general, the commission's report on *Labour Legislation for Domestic Workers* August 1991).

42 *Tuck v SA Broadcasting Corporation* (1985) 6 ILJ 570 (IC).

43 In *Chemical Workers Industrial Union v Sopedog* (1988) 9 ILJ 846 (IC), the Industrial Court held that it did not have jurisdiction in respect of employees engaged on oil rigs in the high seas outside South Africa's territorial waters. The reason was that the Minister did not have the power to approve of the establishment of a conciliation board, and the court had no power to censure the failure of a party to apply for the establishment. See also *Chemical Workers Industrial Union v Sopedog cc* Unreported N11K 12/3/35 14 November 1989. The question of territorial jurisdiction has been problematic where the business of the employer is located in the independent or self governing states, where the LRA does not apply. For a discussion of this matter, see Strydom 47- 54.

of appeal to the Labour Appeal Court.⁴⁴ As is the case in the United Kingdom, enforcement lies largely in the hands of individual complainants. An applicant in the Industrial Court may be represented by a legal representative or by a member, official or office bearer of a registered trade union which is not a party to the dispute, provided that all other parties to the dispute consent to that representation. A party who does not consent to such representation must advise all other parties to the dispute as soon as practicable before the commencement of the proceedings.⁴⁵ The court has a discretion to allow representation despite objection by an opposing party.⁴⁶ It is suggested that it should exercise its discretion in favour of representation in sex discrimination cases. Research conducted in the United Kingdom has revealed that legal representation of individual applicants in sex discrimination cases increases their chances of success before industrial tribunals.⁴⁷ In South Africa, the statutory provisions which are capable of being applied to prevent sex discrimination in the work place are broadly formulated and it is probable that an individual applicant would have a greater chance of success if represented by a person with expert knowledge in that field, such as a union official or a legal representative. That is especially the case as the law regarding employment discrimination is at an early stage of development, and broader legal and policy issues need to be canvassed by the court.

44 Section 17(1) provides for the establishment of an Industrial Court. The functions of the court are set out in section 17(11). Section 17A of the Act provides for the establishment of a Labour Appeal Court. The functions of the Labour Appeal Court are set out in section 17B. In addition to deciding appeals, it may decide any question of law reserved under section 17(21)(a). The proceedings of the Industrial Court may also be brought under review before a Labour Appeal Court. There is a further right of appeal to the Appellate Division of the Supreme Court (section 17C).

45 Section 45(9).

46 *Moruli v President of the Industrial Court* (1986) 7 ILJ 690 (C).

47 Chambers and Horton 170.

The Industrial Court is a creature of statute. It is not a division of the Supreme Court, but is a quasi-judicial tribunal whose decisions are reviewable by the Supreme Court.⁴⁸ The functions of the court are stipulated in the Act.⁴⁹ The most significant functions for the purposes of this discussion are the following:

- to grant urgent interim relief until an order is made by the Industrial Court in terms of section 43(4);⁵⁰
- to consider and give a decision on any application made to it for an order under section 43 (the so-called status quo order);⁵¹ and
- to make determinations in terms of section 46(9).⁵²

Each of these functions relates to the court's unfair labour practice jurisdiction. They differ with regard to the expedition with which relief can be obtained and the nature of the relief. Both the urgent interim function and the order in terms of section 43 provide temporary relief. Permanent relief may be sought in terms of section 46(9).

As a rule, a dispute which is to be referred to the Industrial Court for final determination in terms of section 46(9) must first be considered by either an indus-

48 *SA Technical Officials' Association v President of the Industrial Court* (1985) 6 ILJ 186 (A); *National Union of Mineworkers v East Rand Gold and Uranium Company Ltd* (1991) 12 ILJ 1221 (A).

49 Section 17(11).

50 Section 17(11)(a).

51 Section 17(11)(bA).

52 Section 17(f).

trial council with jurisdiction, or by a conciliation board where there is no such council.⁵³ The purpose of this step is to attempt to settle the dispute before referral to the court for final adjudication. In conjunction with the attempt to settle the dispute, an aggrieved party may apply to the court for interim relief in one of two forms, namely, urgent interim relief in terms of section 17(11)(a) or a status quo order in terms of section 43(4). Under section 17(11)(a) the court may grant a remedy pending relief in terms of section 43(4).

Section 17(11)(a) relief may be granted if the action against which the relief is obtained constitutes an unfair labour practice which could eventually form the basis for a successful status quo application. It is distinguished from a status quo order by the element of urgency, and will be granted only if the elements of irreparable harm, no adequate alternative remedy and a favourable balance of convenience are met.⁵⁴

A party who has referred an alleged unfair labour practice to an industrial council or has applied for the establishment of a conciliation board may apply for a status quo order in terms of section 43.⁵⁵ The purpose of the order is to restore the status quo ante the introduction of the alleged unfair labour practice. It is intended to

53 Section 46(9)(a). In terms of section 46(9)(d) the parties to the dispute may agree to bypass the industrial council/ conciliation board stage and refer the matter directly to the Industrial Court. In practice this seldom occurs.

54 *Langeberg Foods Ltd (Bokshurg) v Food and Allied Workers Union* (1989) 10 ILJ 1093 (IC); *Twala v Box Craft (Pty) Ltd* (1990) 11 ILJ 831 (IC); *Hotel and Restaurant Workers Union v Karos Hotels (Pty) Ltd* (1990) 11 ILJ 182 (IC); *Garment and Allied Workers Union of SA v Industex (Pty) Ltd* (1990) 11 ILJ 335 (IC); *National Automobile and Allied Workers Union v ADE (Pty) Ltd* (1990) 11 ILJ 342 (IC); *Blair v STC Business Communications* (1991) 12 ILJ 629 (IC); *Food and Allied Workers Union v Sam's Foods (Grabouw)* (1991) 12 ILJ 1342 (IC); *Edgars Stores Ltd v SA Commercial Catering and Allied Workers Union* (1992) 13 ILJ 177 (IC); *Paper Printing Wood and Allied Workers Union v Tongaat Paper Company (Pty) Ltd* (1992) 13 ILJ 393 (IC). For a discussion of this remedy see Olivier *Dringende Tussentydse Regshulp* 393-396; 469-472; 553-557.

55 In terms of section 43(2) the application for a status quo order must be made within 10 days of the date of reference to a council or application for the establishment of a board.

eliminate the disadvantage under which an employee would labour if she was obliged to attempt to settle the matter against the background of a *fait accompli*.⁵⁶

Once the statutory conciliation procedures have been exhausted the matter may be referred to the Industrial Court for final determination in terms of section 46(9). The court must then determine the dispute on terms which it deems reasonable. The determination is not limited to reinstatement or compensation.⁵⁷ The court thus has a broad discretion to tailor its determination to the facts of the dispute and to grant appropriate relief. The court seldom awards costs in unfair labour practice cases, although it may do so according to the requirements of law and fairness.⁵⁸ If the court does not award costs, a successful applicant must offset expenses incurred in pursuing a discrimination case against the amount of compensation received.⁵⁹

It is apparent that the legislature intended the parties to attempt to settle a dispute which exists between them before referring the matter to the Industrial Court for final determination.⁶⁰ A similar intention may be discerned from the procedure for adjudication of discrimination cases in the United States. There the Equal Employ-

56 *Consolidated Frame Cotton Corporation v The President, Industrial Court* (1986) 7 ILJ 489 (A). For a discussion of this remedy, see Olivier *Status Quo Bevele* 721- 723; 798- 800; 875- 878.

57 Section 46(9)(c).

58 Section 17(12)(a). The section regulates the award of costs in section 17(11)(a) and section 46(9) proceedings. In status quo proceedings costs may be awarded on the grounds of unreasonableness and frivolity (section 43(4)(c)).

59 For a discussion of the remedy in terms of section 46(9), see Olivier *Onbillike Arbeidspraktyk-vasstellinge* 99- 102.

60 However, the statistics reflected in the 1991 Annual Report of the Department of Manpower do not suggest a high settlement success rate in respect of alleged unfair labour practices. During the period 1 November 1990 to 31 October 1991, 7 820 applications for the establishment of conciliation boards were successful (of a total of 11 114 applications). Of that number 1 619 disputes were settled by the boards. Altogether 5 209 disputes were referred to industrial councils. Of these, 2 101 were settled at council level.

ment Opportunities Commission attempts to resolve discrimination disputes through informal negotiation and conciliation prior to instituting an action in a federal court.⁶¹ In the United Kingdom a sex discrimination dispute which has been filed with an industrial tribunal is referred to ACAS for conciliation prior to consideration of the dispute by the tribunal.⁶²

Enforcement of anti-discrimination provisions by individual employees is an ineffective method of ensuring compliance by employers. Research conducted in the United Kingdom, where enforcement lies largely in the hands of individual complainants, has revealed a low success rate. It has also indicated that work place relationships tend to deteriorate after initiation of a case before a tribunal. Finally, successful applications have not necessarily brought about an improvement in the conditions of other employees.⁶³ It has been suggested that industrial tribunals have had little effect on wider employment practices.⁶⁴

In South Africa the matter is complicated by the existence of an array of procedural requirements which must be met prior to consideration of an alleged unfair labour practice by the Industrial Court. Unless it is agreed to refer a dispute involving an alleged unfair labour practice directly to the Industrial Court for final determination under section 46(9),⁶⁵ the dispute must first be referred to an industrial council which has jurisdiction or, in the absence of such a council, a conciliation board must

61 Section 706 of Title VII.

62 In terms of section 64 of the Sex Discrimination Act ACAS attempts to settle a dispute which has been referred to it if both parties to the dispute request it to do so, or if ACAS itself is of the opinion that there is a reasonable prospect of settling the dispute.

63 Chambers and Horton 5.

64 Chambers and Horton 4.

65 Section 46(9)(d).

be established to consider the dispute.⁶⁶ Referral to the council or board, as the case may be, must occur within 180 days of the date on which the alleged unfair labour practice commenced or ceased.⁶⁷ A party referring a dispute to a council or board must furnish the other party with a copy of the reference by registered post, or deliver it by hand, or transmit the particulars thereof by telegram, telex, telefax or any other printed form. Proof of transmission may be required.⁶⁸ If the dispute is not settled at the conciliatory stage within thirty days of referral, either party may, within ninety days, refer the dispute to the Industrial Court for determination.⁶⁹

A party wishing to apply for interim relief under section 43 may do so within ten days of the date on which the dispute was referred to the industrial council or application was made for the establishment of a conciliation board.⁷⁰ The application for interim relief must also occur within thirty days of the date on which notice was given of the alleged unfair labour practice or, in the absence of such notice, the date on which the practice was introduced.⁷¹ Technical provisions contained in the LRA

66 Section 46(9)(b). It may be noted that a council which has jurisdiction in the industry and area must consider disputes which arise in that industry and area, prior to referral to the Industrial Court for final determination under section 46(9) -- the council's jurisdiction in this regard extends to non-parties (*Photocircuit S.A (Pty) Ltd v De Klerk NO* (1991) 12 ILJ 289 (A)).

67 Section 27A(1)(d)(i) and section 35(3)(d)(i).

68 Section 27A(1)(c)(i) and section 35(2)(a).

69 Section 46(9)(b). For a discussion of the procedural requirements and the possibility of condonation of non-compliance by the Industrial Court, see Olivier *Onbillike Arbeidspraktikvystellings* 101- 102.

70 Section 43(2). In *Mobius Group (Pty) Ltd v Duff NO* (1991) 12 ILJ 314 (F) the Supreme Court held that the date of an application in terms of section 43(2) is the date on which the applicant dates her application. See also *Mlandu v Bulbulia NO* (1989) 10 ILJ 71 (W). An application for the establishment of a conciliation board is deemed to have been lodged on the date on which such application is received by the inspector defined by regulation (regulation 6(1)(b) of the Regulations published in terms of section 81 of the Labour Relations Act). In *Mobius Group (Pty) Ltd v Duff and Cory* Unreported A813/91 15 April 1992, the Supreme Court held that non-compliance with the ten day requirement contained in section 43(2) could be condoned.

71 Section 43(4)(a). Non-compliance with this requirement may also be condoned by the Industrial Court. The Act itself provides that no order may be made if the relevant application was

have been relied on to prevent access to the Industrial Court.⁷²

A further impediment in South Africa to effective mobilisation of provisions which can be utilised to prevent sex discrimination in the work place is the absence of an independent body responsible for administration and enforcement. In the United States the Equal Employment Opportunities Commission investigates and attempts to conciliate alleged contraventions of Title VII. It is also responsible for enforcing the Act, as no individual has the right to sue until the commission has relinquished its right to do so.⁷³ In the United Kingdom the functions of the Equal Opportunities Commission, the commission established in terms of the Sex Discrimination Act, are more limited. They entail monitoring legislation and adherence thereto, and proposing reform. The commission may litigate only in certain defined instances. The most significant cases are, first, where an employer has placed an advertisement which denotes an intention to discriminate,⁷⁴ and secondly, in the case of indirectly discriminatory practices where there is no identifiable victim.⁷⁵ The commission may also institute a formal investigation to determine the existence of discrimination into a general area of activity,⁷⁶ such as the legal profession, or with respect to a

not made within 30 days "unless the Industrial Court on good cause shown decides otherwise."

72 In *Tornado Transport (Pty) Ltd v Apostolen's NO* (1992) 13 ILJ 127 (LAC), the LAC stated that the existence of the jurisdictional facts referred to in section 43 had to be established by the Industrial Court. It held that section 43 required the Industrial Court to investigate whether a legally valid application for the establishment of a conciliation board had been lodged. The establishment of a conciliation board by the Department of Manpower did not preclude the Industrial Court from inquiring into the validity of the application for the establishment of the board. See also *Prime Cut Past Productions (Pty) Ltd v Louw NO* (1991) 12 ILJ 540 (T).

73 Section 706 of Title VII.

74 Section 38 of the Sex Discrimination Act.

75 Section 37 of the Sex Discrimination Act.

76 Section 53(1) of the Sex Discrimination Act.

specific employer's business.⁷⁷ If the investigation discloses unlawful discrimination, the commission may issue a non-discrimination notice directing the employer to desist from that conduct.⁷⁸ The commission has helped to create awareness of the legal provisions relating to sex discrimination and has published a Code of Practice in that regard. In a similar vein, in the United States, the Equal Employment Opportunities Commission has issued official guidelines which interpret significant provisions of Title VII. The provisions do not have the force of law in either country, but may be relied on in court proceedings.⁷⁹

In the United States the class action provides an effective means of enforcing compliance with the anti-discrimination provisions of Title VII. A class action has certain advantages over an action by an aggrieved individual. It reflects the social and collective nature of discrimination. It also provides a method whereby individual claims, which may be small in themselves, can be combined and can give rise to substantial legal liability for an employer. This may act as an incentive toward the adoption of a wider equal employment policy.⁸⁰

A class action may be instituted by an aggrieved individual or by the Equal Employment Opportunities Commission on behalf of a class of employees who have suffered a common or similar wrong. The action may be instituted where the large number of individuals within the class makes joinder impractical. Separate actions

77 Section 58(3A) of the Sex Discrimination Act.

78 Section 67 of the Sex Discrimination Act. There is no automatic sanction for failure to comply with a non-discrimination notice. The commission may institute a second investigation to ascertain whether the terms have been complied with, or it may institute a claim for persistent discrimination (section 71).

79 Section 56(A)(10) of the Sex Discrimination Act (United Kingdom). *Shulman and Abernathy* 1-22; *Griggs v Duke Paper Company* 401 US 424 (1971); *Abernale Paper Company v Moody* 422 US 405 (1975) (United States).

80 *Bourne and Whitmore* 2.

by individual members of the class should create the risk of inconsistent adjudications, and questions of law or fact common to members of the class should predominate over questions affecting individual members.⁸¹

In South Africa an action may be initiated by one or more employees, one or more trade unions, or one or more employees together with one or more unions.⁸² The Industrial Court Rules provide that a party who has a substantial interest in a dispute may be joined as a party in the proceedings.⁸³ However, the Industrial Court will not join respondent which was not a party before an industrial council or conciliation board.⁸⁴ Where a trade union is the applicant in section 46(9) proceedings, individual employees may be joined as additional applicants, irrespective of whether or not they were members of the trade union at the time that the alleged unfair labour practice was committed.⁸⁵ Disputes pending before the Industrial Court may be consolidated where the court deems consolidation to be expedient and just.⁸⁶ A question which arises is whether a trade union may institute an action where its members have been discriminated against by their employer. An action of that

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- 81 Class actions are governed by Rule 23 of the Civil Rules of Procedure. In *General Telephone Company v EEOC* 446 US 318 (1980) the Supreme Court held that the EEOC could seek class wide relief without being certified as a class representative in terms of Rule 23.
- 82 The action is initiated by referring the dispute to an industrial council with jurisdiction (section 27A) or by applying for the establishment of a conciliation board (section 35). Thereafter either party may refer the matter to the Industrial Court for final determination (section 46(9)(b)). Both parties may agree to bypass the conciliation stage and refer the matter directly to the Industrial Court (section 46(9)(d)).
- 83 Rule 11 of the Rules of the Industrial Court.
- 84 *National Union of Metalworkers of SA v Standard Brass and Iron Foundry Ltd t/a Malleable Castings* (1991) 12 ILJ 665 (IC).
- 85 *General Industries Workers Union of SA v LC van Aardt (Tvl) Pty Ltd* (1991) 12 ILJ 122 (LAC). The LAC went on to note that the application for joinder had not really been necessary, as it was appropriate in any event for a union to litigate for the benefit of its members (at 124).
- 86 Rule 12 of the Rules of the Industrial Court (No R 771 published in Government Gazette No 12408 of 5 April 1990).

nature would have a wider effect on an employer's discriminatory practices than an action by an aggrieved individual, and may be analogous to the class action recognised in the United States. Typically, it would be necessary to institute an action of that nature in respect of an indirectly discriminatory practice, where the victims of discrimination are not easily identifiable.

At common law a trade union has standing to institute a legal action in its own right or in a representative capacity where its members have been treated unlawfully.⁸⁷ It may act in its own right where it has an interest in the right which is the subject matter of the litigation, and not only a financial interest.⁸⁸ It may act in a representative capacity in the interest of members who have been treated unlawfully. In those instances it is not necessary for the union to prove that it suffered any special damage.⁸⁹ The reason is that the union acts as spokesman and agent for its members, unless its actions are unconstitutional or in conflict with its mandate from members.⁹⁰

To determine whether a trade union has *locus standi* in the Industrial Court in respect of members who have been discriminated against, one must determine the standing of the union to bring unfair labour practice proceedings. Both the Industrial Court and the Supreme Court have recognised that a trade union may act on behalf of its members in respect of alleged unfair practices, irrespective of whether

87 Van der Vyver 5- 13.

88 *United Watch and Diamond Company (Pty) Ltd v Disa Hotels Ltd* 1972 4 SA 409 (C) at 415; *Henry Viljoen (Pty) Ltd v Awerbuch Brothers* 1953 2 SA 151 (O) at 169.

89 This may be deduced from *Transvaal Indian Congress v Land Tenure Advisory Board* 1955 1 SA 85 (T) at 90, and *Industrial Council for the Building Industry (WPI) v Leon Pascall and Company (Pty) Ltd* 1951 3 SA 740 (C) at 744. See also Van der Vyver 12- 13.

90 *Amalgamated Engineering Union v Minister of Labour* 1949 4 SA 908 (A) at 910; *Amalgamated Engineering Union of SA v The Minister of Labour* 1965 4 SA 94 (T) at 97.

the union is registered or unregistered.⁹¹ The Appellate Division has accepted that the idea underlying the trade union system, a system which is recognised by the I.R.A. is that a trade union should act as the spokesman of its members between employers and employees.⁹² There is ample evidence, in the statutory provisions providing for dispute resolution, that a trade union should act on behalf of its members,⁹³ and the Industrial Court has stated that denial of a union's standing would defeat the objects of the Act.⁹⁴ A trade union which brings an action in its own right because it has the power in its constitution to do so and because it is the collective organ through which its members operate does not need the express authority of its members to do so.⁹⁵ The members need not be joined, even if they have a direct

91 *Metal and Allied Workers Union v A Mauchle (Pty) Ltd t/a Precision Tools* (1980) 1 ILJ 227 (IC); *National Union of Mineworkers v Marievale Consolidated Mines Ltd* (1986) 7 ILJ 123 (IC); *Marievale Consolidated Mines Ltd v The President of the Industrial Court* (1986) 7 ILJ 152 (T); *SA Chemical Workers Union v Sasol Industries (Pty) Ltd* (1989) 10 ILJ 1017 (IC); *National Union of Mineworkers v Buffelsfontein Gold Mining Company Ltd (Beatrix Mines Division)* (1988) 9 ILJ 341 (IC); *Vukani Guards and Allied Workers Union v Peninsula Security Guards* (1989) 10 ILJ 480 (IC); *General Industries Workers Union of SA v Eggo Sand* (1990) 11 ILJ 179 (IC); *National Union of Furniture and Allied Workers of SA v Paper Wood and Allied Workers Union* (1984) 5 ILJ 161 (W).

92 *Amalgamated Engineering Union v Minister of Labour* 1949 4 SA 908 (A).

93 A trade union may refer a dispute to an industrial council (section 27 (1)(a) and (c)(ii)), and may apply for the establishment of a conciliation board (sections 35(1) and 35(2)(c)). It may refer the dispute to the Industrial Court under sections 17(11)(a), 43(2) and 46(9)(b). See also section 45(9) regarding representation of parties in the Industrial Court, and section 66(2) dealing with victimisation. The definition of trade union in section 1 of the Act draws no distinction between registered and unregistered unions.

94 *National Union of Mineworkers v Marievale Consolidated Mines Ltd* (1986) 7 ILJ 123 (IC).

95 *National Union of Mineworkers v Buffelsfontein Gold Mining Company Ltd (Beatrix Mines Division)* (1988) 9 ILJ 341 (IC). A trade union would jeopardise its standing by acting unconstitutionally (*National Union of Furniture and Allied Workers of SA v Paper, Wood and Allied Workers* (1984) 5 ILJ 161 (IC)). It is, however, unlikely that that would be the case where the dispute is one concerning discrimination as a union's constitution is generally broadly formulated. In *National Union of Mineworkers v Buffelsfontein Gold Mining Company Ltd (Beatrix Mines Division)* (1988) (9) ILJ 341 (IC), for example, the court referred to the union constitution which stated its aims and objectives as follows: "to protect the job security of members, to advance their employment prospects and generally to do all things which will serve the interests of members in their individual and collective capacities". Those aims would cover protection against discrimination.

and substantial interest in the final judgment. Any benefit by virtue of the relief granted by the Industrial Court accrues directly to those members.⁹⁶

c Remedies

The Industrial Court has a broad discretion to tailor a remedy to the circumstances of a particular case. A status quo order under section 43 of the Act may be one which the court deems reasonable in the circumstances. One limitation is that the court may not award compensation or damages.⁹⁷ The purpose of the order is to restore the status quo ante in order to alleviate the disadvantage at which an employee would be placed if she were to attempt to negotiate a settlement against the background of an accomplished deed. One of the factors which the court considers when making an order is whether the applicant has endeavoured in good faith to settle the dispute. Other factors include the facts placed before the court by means of affidavits and oral evidence, and the expedience of granting an order.⁹⁸ The order remains effective until the dispute has been settled by an industrial council or conciliation board, or the Industrial Court has made a final determination.⁹⁹ Generally, costs are not awarded under section 43.¹⁰⁰

96 *National Union of Mineworkers v Marievale Consolidated Mines Ltd* (1986) 7 ILJ 123 (IC); *SA Chemical Workers Union v Sasol Industries (Pty) Ltd* (1989) 10 ILJ 1017 (IC); *Marievale Consolidated Mines v The President of the Industrial Court* (1986) 7 ILJ 152 (T); *General Industries Workers Union of SA v LC van Aardt (Tvl) (Pty) Ltd* (1991) 12 ILJ 122 (LAC).

97 Section 43(4)(b) provides that no party may be ordered to pay damages of any nature. It has been suggested that, in the context, the term damages is synonymous with compensation, which is the term used in section 46(9)(c). The reason is that the Afrikaans version of the Amending Act which introduced the concepts in the two sections uses the term "skadevergoeding" in both instances (Landman 9).

98 Section 43(4)(b).

99 Section 43(6)(a). The order is operative for a maximum period of ninety days, but may be extended for thirty day periods by the Industrial Court (section 43(6)(b)).

100 Section 43(4)(e) provides: "The industrial court shall not make any order as to costs in respect of any proceedings brought before it under this section, save on the ground of unreasonableness or frivolity on the part of a party to a relevant dispute."

The Industrial Court makes a final determination under section 46(9). It determines the dispute on the terms which it deems reasonable and may award reinstatement or compensation, but is not limited to do so.¹⁰¹ The award may not be binding from a date earlier than six months from the date prior to the date on which the award is made.¹⁰² The remedy may thus be tailored to accommodate the facts of the case. That flexibility is particularly useful in disputes involving discrimination where the conduct complained of may take one or more of an extensive range of forms.

An employer's discriminatory conduct may involve dismissal of an employee. Where an employee has been dismissed unfairly, the Labour Appeal Court has stated that, prima facie, reinstatement is the appropriate remedy. The employer must raise factors to dispute such inference.¹⁰³ The question then arises as to whether an order for reinstatement ought to be retrospective and whether compensation ought to be paid. The view of the Labour Appeal Court is that retrospectivity or compensation can be ordered only if the dismissed employee has suffered financial loss through her dismissal. The period of retrospectivity or the amount of compensation, as the case may be, depends on the extent of the loss. The dismissed employee is required to lead evidence to enable the court to make an order in that regard.¹⁰⁴ But it should be borne in mind that the compensation which the court may order is limited to six months' salary. The award should therefore be evaluated against that background. As explained by the Labour Appeal Court:

101 Section 46(9)(c).

102 Section 46(9)(c) read with section 49(3)(c).

103 *Sentraathwes Koöperatief Bpk v Food and Allied Workers Union* (1990) 11 ILJ 977 (LAC) at 994; *JB Haworth and Associates CC v Mpanya* (1992) 13 ILJ 604 (LAC) at 608.

104 *National Union of Metalworkers of SA v Haggie Rand Ltd* (1991) 12 ILJ 1022 (LAC) at 1030.

"There are two possible extreme cases. On the one hand one can visualise a serious breach of duty by the employer, coupled with a long period of service. On the other hand there is the possibility of a very superficial breach of the duty, giving rise to an unfair labour practice, coupled with a very short period of service. While it is not desirable to lay down any strict formula according to which awards of this kind should be made these awards must take account of the fact that the maximum award that can be made is the equivalent of six months' salary and that such award would be appropriate only in the more extreme circumstances. The range of possibilities then is limited by the limitation placed upon the extent of the award that can be made by the tribunal."¹⁰⁵

An employer's discriminatory conduct will not necessarily involve dismissal of the affected employee. She may have been demoted, transferred or refused a promotion. She may have been refused maternity benefits which other employees received, or treated differently regarding time off work around the time of confinement than a comparably incapacitated male employee would have been treated. Under those circumstances the court may order the employer to restore the status quo ante, or to grant the employee the benefit which she was denied. Furthermore, the environment in which an employee works may have been made unpleasant through sexual harassment. In that case the court may order an employer to take steps to remedy the situation. The environment may have been made so intolerable that the employee was left with no option but to resign. That may lead to an allegation of constructive dismissal. Any action on the part of an employer which drives an employee to leave her employment, irrespective of whether or not there is a form of resignation, amounts to constructive dismissal.¹⁰⁶ The court must determine the fairness of the dismissal. If it finds the dismissal to be unfair, reinstatement will be

¹⁰⁵ *Hoogenoeg Andolusiete (Pty) Ltd v National Union of Mineworkers* (1992) 13 ILJ 87 (LAC) at 96.

¹⁰⁶ *Howell v International Bank of Johannesburg Ltd* (1990) 11 ILJ 791 (IC) at 795. See also *Schana v Control Instruments (Pty) Ltd* (1991) 12 ILJ 637 (IC) at 642, where the court considered whether elements such as force, fear, pressure and undue influence were present in order to ascertain whether there had been constructive dismissal. The court also stated that an employee who alleges that she was forced to terminate her employment through coercion or improper pressure would be expected to raise the issue without undue delay.

the appropriate remedy.

As stated above, the Industrial Court has a broad discretion to grant a remedy which is appropriate in the circumstances. With regard to compensation, the court may compensate both past and future patrimonial loss,¹⁰⁷ subject to the six month limitation. It has been suggested that the court may also compensate non-patrimonial loss. The reasoning underlying that proposition is based on the fact that the court compensates employees who have been dismissed unfairly where the unfairness lies in the fact that the employer failed to follow the procedural guidelines laid down by the court.¹⁰⁸ Compensation for non-patrimonial loss is significant in cases of sexual harassment, where an employee has not been deprived of a tangible benefit.

The Industrial Court may award costs according to the requirements of the law and fairness,¹⁰⁹ but seldom does so. The two elements which afford grounds for awarding costs under section 43, namely frivolity and unreasonableness, also apply to section 46(9) proceedings.¹¹⁰ The Appellate Division of the Supreme Court has

¹⁰⁷ Landman 10. In *Howell v International Bank of Johannesburg Ltd* ((1990) 11 ILJ 791 (IC), for example, the applicant was compensated for money lost and expenses incurred in respect of registration of a new bond.

¹⁰⁸ Landman 11 states: "It is common practice for the Industrial Court to award an amount to an applicant in respect of the failure of the respondent to follow the procedure laid down by the Court or for the failure to follow a statutory procedure. Surely the Court is in these circumstances awarding the applicant a "solatium" (a solace) for "loss" or "damage"? In other words the court is in fact granting compensation for non-patrimonial loss." That line of reasoning was reiterated by the Industrial Court in *Prinsloo v Harmony Furnishers (Pty) Ltd* NHK 11/2/1579(CT) Unreported 9 July 1990. The court stated that compensation was nothing more than an award for damages. It went on to explain that damages at common law could be either sentimental or patrimonial; that sentimental damages were damages awarded as a solatium for wounded feelings or for mental pain and suffering; and that sentimental damages were awarded at common law where the wrong complained of constituted an iniuria. The court then stated that on the facts before it, the respondent's conduct did constitute an iniuria. It concluded that: "If an aggrieved party is in such circumstances entitled to damages at common law I see no reason why he should not be compensated by an order of this court where the conduct complained of constituted an unfair labour practice" (at 10 of the unreported judgment).

¹⁰⁹ Section 17(12(a)).

endorsed the following approach:

"In this regard public policy demands that the Industrial Court takes into account considerations such as the fact that justice may be denied to parties (especially individual applicant employees) who cannot afford to run the risk of having to pay the other side's costs. The Industrial Court should be easily accessible to litigants who suffer the effects of unfair labour practices, after all, every man or woman has the right to bring his or her complaints or alleged wrongs before the court and should not be penalised unnecessarily even if the litigant is misguided in bringing his or her application for relief, provided the litigant is bona fide..."¹¹¹

d The onus of proof in the Industrial Court

The onus of proof has been described as:

"a legal mechanism used to determine which party will succeed in a dispute in the situation where the evidential scales are evenly balanced and the Court cannot reach a conclusion as to which factual version (ie that of the applicant or the respondent) is the correct one. The party on whom the onus rests to prove a certain set of facts will fail if the Court is in doubt as to which version is the correct one."¹¹²

American courts have developed a formal structure regarding the burden of proof in matters involving employment discrimination. The employee is required to establish a prima facie case of direct discrimination. The employer is then required to show that it had a non-discriminatory reason for the conduct complained of, and that it would have made the same decision if gender had not played a role. The employer's burden is an evidentiary one -- it is required to lead evidence to rebut

110 *Schana v Control Instruments (Pty) Ltd* (1991) 12 ILJ 637 (IC) at 644.

111 *Chamber of Mines of SA v Council of Mining Unions* (1990) 11 ILJ 52 (IC) at 77, endorsed by the Appellate Division in *National Union of Mineworkers v East Rand Gold and Uranium Company Ltd* (1991) 12 ILJ 1221 (A) at 1242. See also *Moodley v Seasand Investments* (1989) 10 ILJ 1129 (IC) at 1131; *SA Chemical Workers Union v Sasol Industries (Pty) Ltd* (1989) 10 ILJ 1031 (IC) at 1060; *Bhengu v Union Co-operative Ltd* (1990) 11 ILJ 117 (IC) at 122; *Schana v Control Instruments (Pty) Ltd* (1991) 12 ILJ 637 (IC) at 644.

112 *Le Roux Onus of Proof* 100.

the prima facie case made out by the employee. The employee retains the ultimate burden of proving that the employer's decision was based on unlawful gender considerations.¹¹³ Where indirect discrimination is alleged a similar pattern is followed. But the employee need not show that the employer had a discriminatory motive. She must provide prima facie proof that an employer's conduct has a disparate impact on female employees, and that the conduct is the employer's standard operating procedure (for example, a standard selection procedure for hiring people), rather than a random or sporadic act. The employer is required to show that the particular policy is related to the job in question -- that is a business necessity. The employee may then attempt to show that an alternative device exists which protects the employer's interests but has a lesser impact on female employees (such as an alternative method of selecting employees).

One way in which the disparate impact of an employer's standard procedure may be established is by comparing the number of female employees who are affected with the total number of employees affected thereby. A statistical analysis is made.¹¹⁴ Statistics must reveal a substantial disproportional impact in order to establish a prima facie case.¹¹⁵

Although the procedure for proving discrimination in the United Kingdom has not

113 The procedure for establishing prima facie proof of discrimination was formulated in *McDonnell Douglas Corporation v Green* 411 US 792 (1973). The nature of the employer's burden was explained in *Texas Department of Community Affairs v Burdine* 450 US 248 (1981), and *Price Waterhouse v Hopkins* 109 S Ct 1775 (1989).

114 *International Brotherhood of Teamsters v United States* 431 US 324 (1977); *Hazelwood School District v United States* 433 US 299 (1977).

115 *Abermale Paper Company v Moody* 422 US 405 (1975); *Dothard v Rawlinson* 433 US 321 (1977). The EEOC proposes a four fifths rule in its Uniform Guidelines on Testing and Employee Selection 29 CFR 1607 (1979), in terms of which a practice is discriminatory if it selects women at less than four fifths of the rate at which it selects men.

been formalised in the manner done in the United States, the burden of proof does not differ significantly. Discrimination cases are civil cases which must be proved on a balance of probabilities. The employee bears the burden of proof. The burden does not shift, but where the employee provides facts which indicate that the employer has discriminated, the employer must provide an explanation for its conduct. Because the employer has the information needed for proving discrimination at its disposal, the Sex Discrimination Act provides a procedure for questioning the employer to obtain that information.¹¹⁶ The tribunal hearing the matter may order discovery of information which is needed to dispose of the matter fairly. Statistical evidence cannot provide conclusive evidence of discrimination as the Act requires less favourable treatment of a particular individual.¹¹⁷ Unlike American law, discrimination cannot be proved by indicating a pattern or practice of discrimination without showing that a particular employee was affected thereby.

In South Africa, comments by the Industrial Court on the burden of proof in respect of alleged unfair labour practices have usually occurred in the context of unfair dismissal. Generally, the court has been able to evaluate the evidence before it and reach a decision as to whether the factual version of the employer or the employee is the most probable -- it has decided the issue on a balance of probabilities. The Supreme Court and the Industrial Court have suggested that the incidence of the burden of proof, as it is understood in civil cases, plays no role in Industrial Court proceedings. Each party has been expected to advance sufficient evidence, in the form of an evidentiary burden, to substantiate its respective version.¹¹⁸ Yet the

116 Section 74 of the Sex Discrimination Act.

117 *West Midlands Passenger Transport Executive v Singh* (1988) 1RLR 186 (CA).

118 *Olivier Burden of Proof* 649. See also *Kloof Gold Mining Company Ltd v National Union of Mineworkers* (1986) 7 ILJ 665 (T). The Industrial Court adopted a similar approach in *Medupe v Golden Spur* (1987) 8 ILJ 376 (IC).

Industrial Court has, by implication, placed the burden of proof on the applicant by holding that the applicant will fail if the court is unable to make a determination on the facts before it.¹¹⁹

It is submitted that it is necessary for the Industrial Court to work with the principle of the burden of proof.¹²⁰ Where the facts before the court indicate that one version is probably the correct one the onus of proof plays no role. But where the court is unable to make a determination on the facts before it the losing party is by implication the one which bears the burden of proof. It has been suggested that while the formal rules of evidence should not apply to a body such as the Industrial Court, the court is entitled to determine the onus of proof in accordance with principles of fairness.¹²¹ The question which arises is what the principles of fairness would indicate. The approach which the Industrial Court has adopted thus far (albeit in the context of unfair dismissal) does not differ greatly from the approach adopted by industrial tribunals in the United Kingdom in respect of discrimination.

119 The court in *Medupe v Golden Spur* (1987) 8 ILJ 376 (IC) at 378 summed its position up as follows: "The industrial court does not function as a court of law even when it discharges functions of a judicial nature.... In my view and because of the particular nature of s 46(9) hearings which in essence are akin to arbitration hearings, the incidence of the burden of proof in civil cases should play no role therein. The industrial court must determine whether an unfair labour practice has taken place and, to empower it to do so, both parties to the proceedings must adduce such evidence as to enable the court to arrive at a finding or to make a determination. The parties to s 46(9) proceedings would be well advised to place such facts and information which are particularly within their own knowledge before the court, and not to omit to do so for strategic reasons, ie, in the belief that the adversary will not be able to prove any issue in dispute. *Should, on the evidence before it, the court be unable to make such a determination the applicant in such proceedings must obviously fail.* Neither party, however, bears (apart from evidentiary burdens) an onus of proof in the strict sense applied in civil law" (own emphasis).

120 *Le Roux Onus of Proof* 105 explains that the need for the mechanism "is not derived from any legal principle but is due to the practical needs of a situation where a body... has to make a decision based on the evidence before it."

121 *Olivier 32*. The approach is supported by *Le Roux Onus of Proof* 107, where it is stated that: "...there could be little objection to determining the onus of proof on the grounds of fairness or broader public policy considerations. Indeed, it has been stated that the rules for determining the incidence of the onus of proof in litigation before the ordinary courts depend "for their ultimate basis upon broad and undefined reasons of experience and fairness".

The court decides conflicts of fact on a balance of probabilities. Where it is unable to do so the applicant is usually unsuccessful.¹²²

It should not be overlooked that in cases of discrimination the employer will generally have the information necessary to prove the incidence of discrimination at its disposal. For that reason the British system provides a procedure for questioning the employer and for discovery by the tribunal. In South Africa the Industrial Court is given broad powers to investigate facts and to subpoena and interrogate witnesses.¹²³ Its powers include the right to subpoena any person who may be able to give material information concerning the subject of the inquiry, or who possesses any book or document which may have a bearing on the subject, to be interrogated or to produce the book or document.¹²⁴ In cases involving allegations of discrimination against female employees the court should not hesitate to utilise these powers

122 *Medupe v Golden Spur* (1987) 8 ILJ 376 (IC) at 378; *Commercial Catering and Allied Workers Union of SA v Wooltru Ltd t/a Woolworths Randburg* (1989) 10 ILJ 311 (IC) at 312-313; *Tlou v Ismail's Shop* (1989) 10 ILJ 1185 (IC) at 1187.

123 Section 17(14), (17) and (20) of the LRA.

124 Section 17(17)(a) and section 12(4)(a). The Supreme Court in *Kloof Gold Mining Company Ltd v National Union of Mineworkers* (1986) 7 ILJ 665 (T) appeared to suggest (in the context of applications for status quo orders) that the Industrial Court should utilise its investigatory powers in order to obtain sufficient information to enable it to reach a decision, thereby eliminating the need to work with a burden of proof. The court stated: "It seems to me to be inappropriate to speak of a burden of proof on the merits of a section 43(4) proceeding. Admittedly all the parties concerned in such an application would have a duty to place before the industrial court facts relevant to their representations. The industrial court, however, does not function as a court of law even when it discharges functions of a judicial nature.... The industrial court is a quasi-judicial body.... In terms of s 17(14) and (17) it may *mero motu* embark upon an investigation of facts; it may subpoena and interrogate witnesses; it may consult and obtain information from certain authorities (s 17(20)).... There is no duty or obligation on the industrial court to investigate the facts any further than they were advanced by the parties, but it is entitled to do so. In my view the proceedings are rather in the nature of an enquiry than a trial. The Act is silent on the question of onus. The mere fact that one of the parties to a dispute may apply for an order is in itself insufficient reason to hold that such a party carries a burden of proof as opposed to a duty to place facts before the industrial court in support of his application. Accordingly I hold that ... none of the parties carries an onus in the sense of finally satisfying the industrial court that such party is entitled to succeed on the application as opposed to an evidentiary burden of adducing evidence in support of his contentions or submissions to the industrial court" (at 674).

in order to obtain the information necessary to make a determination, particularly if requested to do so by an applicant in the proceedings before it. However, it may still be necessary for the Industrial Court to rely on the onus of proof where it is unable to reach a conclusion as to which party's version is more probable.¹²⁵ Where it is unable to decide which is the most probable version, it is likely that the court will adopt the approach adopted thus far in unfair dismissal cases and refuse to come to the assistance of the applicant -- thereby placing the onus of proof on her.

2 *The Basic Conditions of Employment Act 3 of 1983 (BCEA)*

The BCEA provides basic rights for employees with regard to employment conditions such as hours of work,¹²⁶ meal intervals,¹²⁷ overtime,¹²⁸ work on Sundays and public holidays,¹²⁹ annual leave¹³⁰ and sick leave.¹³¹ The Act does not draw any distinction with regard to the sex of employees in the application of these rights. The Act also regulates the employment of female employees around the time of confinement.¹³² The Minister may exempt any employer or employee or category of

125 As Olivier *Burden of Proof* explains: "Although there is much to be said in favour of an approach that both parties should adduce sufficient evidence (in the form of an "evidentiary burden") to substantiate their respective versions, as well as that the Industrial Court and, for that matter also an arbitrator, can *mero motu* embark upon a further investigation of the facts... it does not solve the problem of what the court or arbitrator must do if it cannot come to any conclusion as to whose version is more probable. It appears that it has to rely on a burden of proof where it is unable to choose between the parties' respective versions" (at 649).

126 Sections 2- 6.

127 Section 7.

128 Sections 8- 9.

129 Sections 10- 11.

130 Section 12.

131 Section 13.

132 Section 17(1)(b)

employer or employee from any of the provisions of the Act, provided that he does not differentiate on the basis of sex in doing so.¹³³ The Minister is also permitted to make regulations regarding matters which are to be prescribed for the purposes of the Act.¹³⁴ The regulations may differentiate on any ground which the Minister deems advisable, but may not differentiate on the basis of sex.¹³⁵

The definition of employer in the BCEA is virtually identical to that contained in the LRA.¹³⁶ The definition of employee is also similar to the definition in the LRA, although an additional aspect, namely, that of "direction or supervision" has been added to the definition. An employee is:

"any person who is employed by or working for an employer and receiving or entitled to receive any remuneration or who works under the direction or supervision of an employer, or any other person who in any manner assists in the carrying on or the conducting of the business of an employer".

The Act excludes the same categories of persons as are excluded from the ambit of the LRA, namely, persons employed in farming operations, in domestic service in private households, in educational institutions maintained wholly or partly from State funds and employees of the State.¹³⁷

133 Section 34(2).

134 Section 37(1).

135 Section 37(3).

136 An employer is defined as: "any person whomsoever who employs or provides work for any person and remunerates or expressly or tacitly undertakes to remunerate him, or who permits any person in any manner to assist him in the carrying on or the conducting of his business."

137 Section 1(2)(b)- (c). Other persons who are excluded from the ambit of the Act are persons performing charitable work for which they are not remunerated (section 1(2)(a)), university students whose work forms part of the university curriculum (section (1)(2)(f)), persons temporarily employed at agricultural, horticultural, industrial or similar shows (section (1)(2)(m) and persons whose employment is subject to certain other specified statutes (section 1(2)(g)- (m)).

Finally, it may be mentioned that the application of provisions of the BCEA are subject to similar provisions contained in the LRA. The Act thus applies only to matters which are not regulated under the LRA.¹³⁸

3 The Wage Act 5 of 1957

While the BCEA specifies minimum standards which must be complied with, the Wage Act provides for the creation of machinery which can be used to determine minimum wages and conditions of employment. It provides for the establishment of a Wage Board¹³⁹ which may make an investigation concerning any trade specified by the Minister,¹⁴⁰ and make recommendations on matters specified in the Act.¹⁴¹ In conducting the investigation and making recommendations the board may not distinguish on the basis of the sex of employees.¹⁴² Matters on which recommendations may be made include, inter alia, the amount and method of the payment of remuneration,¹⁴³ the regulation of overtime work,¹⁴⁴ proportional employment of classes of employees,¹⁴⁵ the place of work,¹⁴⁶ and employment on a contract¹⁴⁷ or

138 Section 1(3).

139 Section 3.

140 Section 4.

141 The matters on which the board may make recommendations are stipulated in section 8 of the Act.

142 Sections 4(3) and 8(4).

143 Section 8(1)(a)- (h), (m), (p), (q).

144 Section 8(1)(r).

145 Section 8(1)(l).

146 Section 8(1)(k).

147 Section 8(1)(v).

piece work basis.¹⁴⁸ The Minister may make a binding determination in accordance with a recommendation made by the board.¹⁴⁹ The Minister may exempt persons or classes of persons from the ambit of any determination, but may not distinguish on the ground of sex in doing so.¹⁵⁰

Remuneration is defined broadly as:

"any payment in money or in kind or both in money and in kind, made or owing to any person, which arises in any manner whatsoever out of employment."¹⁵¹

The Act applies to employers and employees. The definitions of employer and employee¹⁵² are the same as those contained in the LRA. Persons excluded from the ambit of the Act are, again, farmworkers, domestic servants in private households, employees of the State and State funded educational institutions, and persons who work for charitable organisations and are who not remunerated for that work.¹⁵³ Any provision contained in a wage board determination is subject to a similar provision contained in an agreement, notice, determination, order or award which is binding in terms of the LRA.¹⁵⁴

148 Section 8(1)(j).

149 Section 14.

150 Section 19(6).

151 Section 1(1).

152 Section 1(1).

153 Section 2(2).

154 Section 2(3).

4 The Machinery and Occupational Safety Act 6 of 1983 (MOSA)

MOSA applies to all work places which do not fall under the Minerals Act 50 of 1991. It aims to provide for the safety of persons in the work place, in connection with the use of machinery, and in the course of employment generally. It provides, inter alia, for the establishment of an advisory council on occupational safety,¹⁵⁵ technical committees,¹⁵⁶ safety committees¹⁵⁷ and the designation of safety representatives.¹⁵⁸ The Minister is given the power to make regulations on any matter which is necessary or advisable in the interest of the safety of persons at a work place, in connection with the use of machinery, or in the course of employment.¹⁵⁹ One matter which is identified specifically is "the performance of work in hazardous or potentially hazardous conditions or circumstances".¹⁶⁰ Regulations may also provide for the "safety and health measures to be taken by employers and the users of machinery".¹⁶¹ Regulations are not prevented from differentiating on the ground of the sex of affected employees. The Act provides that the competent minister is authorised to apply any method of differentiation which is deemed to be advisable, other than race or colour.¹⁶²

The definitions of employer and employee in MOSA¹⁶³ are similar to those con-

155 Section 2.

156 Section 8.

157 Section 11.

158 Section 9.

159 Section 35(1).

160 Section 35(1)(b)(vi).

161 Section 35(1)(b)(iv).

162 Section 35(3).

163 Section 1(1).

tained in the LRA and BCEA. The exclusion of categories of persons found in most labour statutes is not contained in MOSA. The Act thus applies to all employees, including farmworkers, domestic servants in private households and employees of the State and State funded educational institutions.

5 The Minerals Act 50 of 1991

The Act "consolidates all aspects of legal control of the mining industry, including the regulation of health and safety, into a single statute."¹⁶⁴ With regard to health and safety matters, it provides, inter alia, for the establishment and functions of a mine safety committee¹⁶⁵ and for inquiries to be held into accidents.¹⁶⁶ The Act also prohibits underground work by certain juveniles and females.¹⁶⁷

6 The Unemployment Insurance Act 30 of 1966 (UIA)

The purpose of the UIA is to provide for the payment of benefits to persons who are able and willing to work, but are unable to find suitable employment. It also assists persons who are unable to earn their usual salary due to illness or pregnancy. It provides for the establishment of an unemployment insurance fund.¹⁶⁸ Money con-

164 Benjamin 476. Besides health and safety of persons concerned in mines and works, the Act also regulates matters such as prospecting for, exploitation, processing and utilisation of minerals, and utilisation and rehabilitation of land surfaces during and after prospecting and mining.

165 Section 26.

166 Section 28.

167 Section 32.

168 Section 6.

tained in the fund is utilised for the payment of benefits under the Act.¹⁶⁹ The fund is financed by means of contributions by employers, contributors and from public funds.¹⁷⁰ A contributor who is unemployed is entitled to receive unemployment benefits, illness benefits, maternity benefits or adoption benefits as the case may be, depending on the reason for unemployment.¹⁷¹

A contributor is defined as:

"any person who has entered into or works under a contract of service or of apprenticeship or learnership, with an employer, whether the contract is express or implied, is oral or in writing, and whether his earnings are calculated by time or by work done..."¹⁷²

The following persons are not regarded as contributors:

- persons who must leave the country once their contracts of employment, apprenticeship or learnership are terminated;
- Persons who earn more than R 40 248 per year;
- persons employed casually and not for the purpose of the employer's business;
- persons whose income consists solely of a share in the takings or of commission;
- persons who make up, finish or adapt for sale articles or materials given to them

169 Section 7.

170 Section 29.

171 Section 34(1).

172 Section 1.

by an employer, or otherwise work at a place not under control of the employer;

- persons employed for less than one day or less than eight hours per week;
- domestic servants in private households;
- the husband or wife of an employer working for that employer;
- persons employed in agriculture, other than forestry;
- employees of the State;
- provincial administration employees;
- persons employed under various statutes applicable to education;
- seasonal workers.¹⁷³

C A Comparative Analysis of Key Issues

The Industrial Court has not yet consciously considered the meaning of discrimination. It has not grappled with the concepts of direct and indirect discrimination, nor has it considered possible defences to allegations of discrimination. The reason is that very few discrimination cases have been referred to the court. It has, however, considered issues which give an indication of its approach. The court has accepted, for example, that the failure to remunerate employees equally for equal work is

¹⁷³ Section 1(2)(a)-(r).

unfair. It has rejected the so-called separate but equal doctrine, and has held that sexual harassment, whether or not it results in the loss of a tangible job benefit, is unacceptable. It has also formulated principles in cases other than those involving allegations of discrimination, which may have a bearing on the determination of sex discrimination cases. This has occurred, for example, in relation to access to employment, termination of employment, differentiation in remuneration on the basis of merit, the evaluation of positions held by employees, and pensions.

The context in which the above issues have been dealt with by the Industrial Court, as well as the implications of its decisions, are discussed below. The effects of statutory provisions other than those contained in the LRA are discussed at the appropriate points.

1 Access to Employment and Promotion

International norms, such as the Discrimination (Employment and Occupation) Convention 111 of 1958 and the European Economic Community's Equal Treatment Directive 1976, provide for equality at every stage of employment, including access to employment, promotion, vocational training and terms and conditions of employment.¹⁷⁴ Likewise, in the United Kingdom the Sex Discrimination Act covers direct and indirect discrimination at every stage of the employment process, from recruitment to the termination of employment.¹⁷⁵ In the United States Title VII outlaws discrimination at every stage of employment. American courts have interpreted the statute as preventing both direct and indirect discrimination (termed

174 Article 1(3) of the Convention and article 1 of the Directive.

175 Section 6 of the Sex Discrimination Act. The Equal Pay Act covers discrimination in respect of terms and conditions of employment.

disparate treatment and disparate impact, respectively). The context in which indirect discrimination has been alleged most frequently is that of selection procedures for hiring and promotion. That in turn prompted the Equal Employment Opportunities Commission to formulate Guidelines on Testing and Employee Selection, to indicate to employers the proper manner in which recruitment should occur.¹⁷⁶

In South Africa a dispute concerning an alleged unfair labour practice must be referred for conciliation to an industrial council which has jurisdiction or, where no such council exists, to a conciliation board which has been established for that purpose.¹⁷⁷ The dispute must be one between an employee or a trade union on the one hand and an employer or employers' organisation on the other.¹⁷⁸ An employer is defined as any person who employs or provides work for any person and remunerates him, and an employee as any person who is employed by or working for any employer and receiving or entitled to receive remuneration.¹⁷⁹ The definition does not extend to prospective employees, that is, to applicants for employment. It thus appears that the Industrial Court does not have jurisdiction to consider an alleged unfair labour practice relating to an employer's failure to hire someone. The reason is that the person who has not been hired is not an employee as defined. That has the effect of curtailing the Industrial Court's ability to curb discrimination. An employer which is prevented from discriminating with regard to terms and conditions of employment and dismissal can avoid an allegation of discrimination simply by not hiring women. That perpetuates occupational segregation which

176 29 CFR Part 1607.

177 Section 46(9)(a).

178 Section 27A(1)(a) and section 35(1).

179 Section 1.

makes the attainment of equality in employment impossible.

One situation in which the Industrial Court may consider an allegation of discrimination with regard to hiring of employees is where a trade union alleges that a hiring practice amounts to an unfair labour practice because labour unrest may be promoted or created thereby.¹⁸⁰ In that case the dispute is one between an employer and a trade union. It may therefore be referred to an industrial council or a conciliation board, and subsequently to the Industrial Court. A court which finds that an employer's hiring practice is unfair may order the employer to cease that practice.

A recent decision of the Industrial Court appears further to have limited the court's potential to prevent discrimination in the work place, by denying jurisdiction in respect of an alleged unfair labour practice pertaining to promotion. In *Van Zyl v GEC Alstom SA (Pty) Ltd (Machines Division)*¹⁸¹ an employee who had worked for the company for approximately three years was appointed to a more senior position, that of general manager, for a probationary period of six months. At the end of the six month period he was to be considered for permanent appointment to the position, together with other applicants therefor. He was not appointed in a permanent capacity at the end of six months, but continued to act as general manager for several months. The newly appointed managing director of the company then informed him in writing that he would not be promoted to the position of general manager, but would revert to his original position as financial manager. He alleged that the employer had committed an unfair labour practice. On the facts the Industrial Court found that that was not the case.

180 Paragraph (iii) of the unfair labour practice definition.

181 Unreported NH 13/2/6015 28 January 1992.

The court then considered another point, namely, that of the applicant's capacity to allege the unfair practice. It referred to the definitions of employer and employee in the LRA, and noted that applicants for employment are not covered by the Act. It adopted the reasoning of the Supreme Court in *Wellington Municipality v Deputy Minister of Labour*¹⁸² and *Port Elizabeth Municipality v Minister of Labour*.¹⁸³ In *Wellington Municipality* the employer did not appoint an employee to a vacant more senior position. The employee objected and a conciliation board was appointed by the minister to consider the dispute. Under section 35(4)(a) of the Industrial Conciliation Act (as it then was) a board could be appointed where a dispute existed in respect of a matter concerning the relationship between an employer and an employee. The Supreme Court set aside the decision of the minister to appoint a conciliation board on the basis that the dispute did not arise out of an employer-employee relationship. The employee who had applied for the vacant post was, in that respect, in no better position than an outside applicant for the vacancy. In *Port Elizabeth Municipality* the Supreme Court again stated that an employee who applied for a vacant position within an enterprise did so as an applicant and not as an employee. Any dispute in that respect did not concern an employer-employee relationship since it had nothing to do with an existing relationship. In both decisions the argument which was accepted was based on the contractual position of the employee applying for promotion, namely, that such employee had no contractual entitlement to promotion. At that stage the Industrial Court did not exist in its present form, and the unfair labour practice concept had not yet been legislated. It is therefore doubtful that the Industrial Court's reliance on those decisions in *Van Zyl* is correct. The very purpose of the court's unfair labour practice jurisdiction is to provide relief where an employee has been treated unfairly -- not merely where contractual rights

182 1963 4 SA 353 (C).

183 1975 4 SA 278 (E).

have been breached.¹⁸⁴

The Industrial Court also referred to the decision of *Borg-Warner SA (Pty) Ltd v National Automobile and Allied Workers Union*,¹⁸⁵ where the Labour Appeal Court held that the failure to re-employ a dismissed employee (in accordance with an agreement to do so) could not constitute an unfair labour practice because no employment relationship existed at that stage. But that situation differs from one where an employer fails to promote an employee to a higher position. In the latter instance an employer-employee relationship, which may be affected in the manner envisaged in the unfair labour practice definition, does exist.

For the above reasons it is felt that the approach of the Industrial Court in *Van Zyl* is incorrect. If adopted in cases where discrimination is alleged it would greatly impair the court's ability to curb conduct of that nature.

184 This was confirmed by the Appellate Division of the Supreme Court in *National Union of Mineworkers v East Rand Gold and Uranium Company Ltd* (1991) 12 ILJ 1221 (A) at 1237, where the court stated: "In the exercise of its powers and the discretion given to it, the industrial court is obliged to have regard not only or even primarily to the contractual or legal relationship between the parties to a labour dispute. It must have regard to the application of the principles of fairness. I agree with the observation made in *Brassey et al* at 354-5 that - "it is indeed peculiar to an unfair labour practice determination that it may have the effect of suspending the common law and law of contract consequences." For criticism of the *Van Zyl*-decision see *Cheadle, Le Roux, Landman and Thompson 17*, where it is stated that: "While it is submitted that the court should be careful not to intervene too readily in disputes regarding promotion, especially to senior management positions, and should regard this as an area where managerial prerogative should be respected unless bad faith or improper motives such as discrimination (own emphasis) are present, this decision seems to be incorrect. The argument seems to be that where there is no contractual entitlement there can be no unfair labour practice. The above decisions (*Wellington Municipality* and *Port Elizabeth Municipality*) must be seen within the context of the Act as it existed at that time -- when the unfair labour practice concept was not part and parcel of the Labour Relations Act. The whole purpose of the unfair labour practice is to provide remedies where no contractual protection or entitlement exists."

185 (1991) 12 ILJ 549 (LAC).

2 Discrimination During Employment

*Chamber of Mines v Mineworkers Union*¹⁸⁶ concerned an allegation of race discrimination by fellow employees. It is noteworthy for the nature of the conduct which the court regarded as unfair. The members of the applicant, an employers' association, wished to provide employees defined under the country's race laws as coloured, with the necessary training to enable them to become winding engine drivers. This involved, inter alia, the training of those employees by the Mineworkers Union, a White racially exclusive union. The union refused to allow its members to train Coloured employees. The issue to be determined by the Industrial Court was whether the refusal of the union to permit its members to assist in the training of Coloured persons in order to satisfy the requirement set for winding engine drivers, constituted an unfair labour practice. There was no requirement in terms of a service contract or conditions of service to assist in the training of those employees. But there had been a labour practice for more than 25 years in terms of which members of the union assisted so-called scheduled persons who were White, to gain the experience required by the regulation to become winding engine drivers. The reasons advanced on behalf of the union for refusing to train Coloured workers were, inter alia, that training would cause the union's members to feel threatened in their work security in so far as numbers were concerned (that is, over training), and the fact that the employer would employ Coloured scheduled persons at a lower wage or subject to other conditions of service than those applicable to White members of the union, thus threatening the latter's employment security. The court regarded the reasons advanced by the union as hypothetical, speculative and not supported by any evidence submitted to the court, and stated that should the events transpire, the union would not be without a remedy. It held that one race group

186 (1989) 10 ILJ 133 (IC).

could not be protected against fair competition by another. The union's refusal to assist in the training was discriminatory and constituted an unfair labour practice. It concluded that the refusal:

"results in partial and unequal treatment to a substantial degree between different sections of the community, ie between Coloured and White persons. Not only is there no authority for this in the Mines and Works Act, but in fact the Act authorises that these Coloureds may be candidates for the winding engine driver's certificate of competency."¹⁸⁷

The court's finding of unfairness seems to rest on the partial and unequal treatment of the Coloured employees by virtue of the union's refusal. Without the training, which necessitated the union's assistance, Coloured employees could not qualify as winding engine drivers. There was no alternative training route for those employees. Therefore the union's refusal resulted in partial and unequal treatment of Coloured employees which was unfair. There was no legislative authority for such treatment. The court's approach reflects the approach adopted in a line of Supreme Court decisions to which it referred. That approach was explained in *R v Abdurahman*,¹⁸⁸ where it was stated that there were two questions to be considered when deciding whether or not discriminatory regulations were ultra vires. The first was whether the application resulted in partial or unequal treatment between members of different races, rendering them unreasonable and void. The second was whether partial or unequal treatment was authorised by the enabling legislation, in which case the regulation would not be void, despite its partial and unequal effect. Partial or unequal treatment was thus impermissible unless authorised by legislation.¹⁸⁹

187 At 167.

188 1950 3 SA 136 (A). There the Appellate Division held that the reservation by regulation of a portion of trains for the exclusive use of White persons, without restricting members of that race to that portion, was ultra vires the enabling legislation, and was void.

189 See also *Mphahlele v Springs Municipality* 1928 TPD 50; *Minister of Posts and Telegraphs v Rasool* 1934 AD 167; *S v De Wet* 1978 2 SA 515 (T); *Vereeniging City Council v Rhema Bible Church, Walkerville* 1989 2 SA 142 (T).

The *Chamber of Mines* decision is interesting, not merely because it stated, in accordance with the Supreme Court, that discrimination is not permissible where it is not authorised by legislation, but particularly for the meaning which it attached to the concept of discrimination. The court apparently assumed, in accordance with the Supreme Court's approach, that discrimination lay in partial or unequal treatment. Although it was not specifically stated, it seems probable that separate but equal treatment would not have been regarded as unfair by the Industrial Court, for example, had an alternative but equal training route been available to the Coloured employees. A year later the fairness of separate but equal treatment was rejected by the court.¹⁹⁰ The court pointed out that it wished:

"to unequivocally state that any labour practice... which rests on the principle underlying the "separate but equal" doctrine will, no doubt be branded an unfair labour practice...."¹⁹¹

The statement was made in the context of race discrimination. But there is no reason why the separate but equal doctrine should not be regarded by the Industrial Court as unfair where sex discrimination is alleged in areas such as training, promotion and remuneration. The separate but equal doctrine is based on the assumption that all members of a group conform to stereotyped characteristics of that group, for example that it would be more appropriate for an employer to train women in the field of administrative skills than technical skills. Arguments of that nature were expressly rejected by the court in the *Chamber of Mines* decision (for example, that the employer would pay suitably trained Coloured employees less than White employees), despite the court's apparent acceptance of the separate but equal doctrine.

190 *Chamber of Mines of South Africa v Council of Mining Unions* (1990) 11 ILJ 52 (IC).

191 At 72.

3 Termination of Employment

The Termination of Employment Recommendation 119 of 1963 of the International Labour Organisation states that termination of employment at the initiative of the employer should not take place unless there is a valid reason for such termination connected with the capacity or conduct of the worker, or based on the operational requirements of the undertaking.¹⁹² The sex of an employee is not regarded as a valid reason for termination of employment.¹⁹³

A woman whose services have been terminated by her employer may allege, either that the dismissal was unfair because it did not comply with the general guidelines of the Industrial Court, or that it was discriminatory. The Industrial Court has not yet considered an allegation of discrimination involving the termination of employment, but has referred to the provisions of recommendation 119 when dealing with the termination of employment at the initiative of the employer for other reasons.¹⁹⁴ It is submitted that the court should consider the provisions of the recommendation when dealing with sex based dismissal, for example, the dismissal of an employee due to pregnancy.

An area which may prove contentious is termination in the context of retrenchment. The reason is that length of service is generally accepted as a fair criterion for selecting employees for retrenchment. But that may affect female employees

192 Article 2(1).

193 Article 3(d).

194 See, for example, *Metal and Allied Workers Union v Stobar Reinforcing (Pty) Ltd* (1983) 4 ILJ 84 (IC); *Van Zyl v O'Okiep Copper Company Ltd* (1983) 4 ILJ 125 (IC); *Lefu v Western Areas Gold Mining Company Ltd* (1985) 6 ILJ 307 (IC); *National Union of Mineworkers v Kloof Gold Mining Company Ltd* (1986) 7 ILJ 375 (IC); *Mahtlangu v CIM Deltak* (1986) 7 ILJ 357 (IC); *King v Beacon Island Hotel* (1987) 8 ILJ 485 (IC).

unfairly where they were excluded from certain jobs in the past and therefore do not have the length of service of their male colleagues. In the United States an allegation of discrimination in that context would probably prove unsuccessful because seniority is accepted as a defence to an allegation of discrimination.¹⁹⁵ In the United Kingdom the debate involves a determination of whether a practice is justifiable.¹⁹⁶ It is justifiable if it corresponds to a real need on the part of the undertaking and is appropriate and necessary.¹⁹⁷ Selecting employees for retrenchment on a last in first out basis would usually be justifiable, despite its disparate effect on female employees, because it is the basis which is most likely to be acceptable to the work force as a whole. But if an employer is able to achieve its objective in another less discriminatory manner the practice would be regarded as convenient rather than necessary and would be unlawful.

4 Pregnancy

Two issues are discussed here, namely, the benefits to which a pregnant employee is entitled around the time of the birth of her child, and the treatment of a pregnant employee in respect of working conditions which may prove harmful to the health of the woman or the unborn fetus.

Internationally two approaches to the treatment of pregnant employees around the time of birth can be discerned. In terms of the so-called equal treatment approach pregnancy is to be treated in exactly the same manner as any similar form of incapacity. That approach has been adopted on a federal level in the United States.

195 Section 703(h) of Title VII.

196 Section 1(1)(b)(ii) of the Sex Discrimination Act.

197 *Bilka-Kaufhaus GmbH v Weber von Hartz* Case 170/84 1986 ECR 1607/ (1986) IRLR 317 (European Ct).

There, under Title VII of the Civil Rights Act, an employer may not treat a disability related to pregnancy differently from any other disability.¹⁹⁸ A similar approach may be discerned in terms of the Sex Discrimination Act 1975 in the United Kingdom. That statute has been interpreted as requiring an employer to treat a pregnant employee in the same manner as it would treat any employee who, in a similar manner, is unable to work.¹⁹⁹ A second approach, the so-called special treatment approach, seeks more than identical treatment. It recognises pregnancy as a unique condition and requires it to be treated accordingly. That approach has been adopted on a state level in the United States, where certain state laws provide for maternity leave around the time of confinement. Similarly, in the United Kingdom, employees who have been employed for the statutory qualifying period may rely on the Employment Consolidation Protection Act 1978 which protects employees from dismissal on the ground of pregnancy. The Employment Act 1980 provides for time off of work for ante natal care and for a period of paid maternity leave around the time of birth, provided that the employee meets the statutory service and notice requirements.

In South Africa two statutes deal specifically with the treatment of pregnant employees. They are the Basic Conditions of Employment Act 3 of 1983 (BCEA), which deals with employment around the time of birth, and the Unemployment Insurance Act 30 of 1966 (UIA), which provides for the payment of maternity benefits.

In terms of the BCEA an employer may not allow an employee to work during the period commencing four weeks prior to the expected date of her confinement and

198 Section 701(k) of Title VII.

199 *Hayes v Malleable Working Men's Club and Institute* (1985) IRLR 367 (EAT); *Webb v EMO Air Cargo (UK) Ltd* (1990) IRLR 124 (EAT).

ending eight weeks thereafter.²⁰⁰ This is not a statutory leave of absence as the legislation does not require the employer to remunerate the employee during the defined period, nor does it entitle the employee to resume employment at the end of the period. An employer may not compel an employee to work during the twelve week period, but apparently it may terminate her services quite lawfully at the commencement of or during such period.

The UIA provides for the payment of benefits in respect of unemployment, illness, maternity and adoption at a rate of 45% of normal weekly earnings.²⁰¹ A woman is entitled to maternity benefits for a period of 26 weeks from the date on which she is deemed to have become unemployed.²⁰² She is deemed to have become unemployed on the date on which her contract of service is terminated or the date from which she receives one third or less of her normal earnings from her employer.²⁰³ In order to be eligible for maternity benefits a woman must have been employed for at least 13 weeks in the 52 week period preceding the expected date of confinement, or preceding the actual date of birth if benefits are applied for on or after the date of birth.²⁰⁴

As far back as 1980 the Wiehahn Commission proposed a more equitable dispensation for pregnant employees. It made the following suggestions:

- * That the period of pre-confinement leave be raised from four to six weeks;

200 Section 17(b) of the BCEA.

201 Section 34(1) and (2)(a).

202 Section 37(1).

203 Section 37(6).

204 Section 37(5).

- That remuneration during leave due to pregnancy be raised to 60% of an employee's normal earnings;
- That the termination of employment due to pregnancy be prohibited, and that employers be required to reinstate employees at the end of an approved leave of absence.²⁰⁵

All of these recommendations were rejected by the government. The reasoning underlying the rejection was the potential hardship which could result for employers. The government, commenting on the recommendation regarding job security, stated:

"The Government cannot support the Commission's recommendation... that the termination of employment of female workers as a result of pregnancy be prohibited... and that employers be required to reinstate the employees at the end of the approved absence from work. Such a provision would result in serious complications for employers, especially for the small employer who has to employ substitute labour when an employee takes maternity leave and who cannot afford to increase his labour complement by reinstating the employee concerned. The Government would nevertheless urge employers to give cases of this nature their most sympathetic consideration and where possible to act in the spirit of the recommendation".²⁰⁶

South African legislation thus provides special treatment for pregnant employees, but not in the manner envisaged by advocates of special treatment -- here pregnancy is treated less favourably than any comparable form of incapacity. The BCEA does not provide for the payment of wages or for employment security during the statutory leave of absence. But the BCEA does oblige an employer to grant an employee who is absent from work as a result of incapacity, a minimum of thirty

205 Part 5 of the report of the *Commission of Inquiry into Labour Legislation* submitted in November 1980 (paragraph 5.15.6).

206 White Paper on Part 5 of the *Report of the Commission of Inquiry into Labour Legislation* (paragraph 4.63).

working days' fully paid sick leave per three year cycle.²⁰⁷ Incapacity is defined as the inability to work owing to sickness or injury other than sickness or injury caused by an employee's own misconduct.²⁰⁸ It is submitted that, at the very least, a woman who is unable to work as a result of childbirth should receive an equivalent amount of "sick" leave.

A pregnant employee who feels that she has been treated unfairly (albeit lawfully) may allege that the treatment constituted an unfair labour practice and approach the Industrial Court for relief. She may allege that the treatment amounted to unfair sex discrimination, or she may allege simply that the treatment was unfair. An allegation of the latter nature was considered by the Industrial Court in *Randall v Progress Knitting Textiles Ltd.*²⁰⁹ The employee, who was pregnant, alleged that her dismissal was unfair. The court stated that its judgment was based on the merits of the matter and not on any question of law. It found the dismissal of the pregnant employee to be unfair because the employer was unable to justify its decision on the basis of operational requirements, and because the dismissal was a departure from an existing precedent.

The judgment casts no light on the approach which the Industrial Court may adopt where it is alleged that the dismissal of an employee because she is pregnant amounts to discrimination. Alleged unfair treatment due to pregnancy will not necessarily be limited to dismissal but could cover a broad spectrum of action by an employer, including a failure to promote the woman or denying her access to training. Where sex discrimination is alleged the court will have to decide who the com-

207 Section 13(1).

208 Section 13(6)(c).

209 (1992) 13 /LJ 200 (1C).

parator should be. If the employee works in an environment in which there is no male comparator, the court will have to decide whether it will allow a comparison with a hypothetical male. If a male comparator exists, the question arises as to how the comparison should be made. The woman's condition may be compared to that of a similarly incapacitated male colleague as has been done in Britain under the Sex Discrimination Act and on a federal level in the United States. That approach assumes that pregnancy is an unnatural condition comparable to illness.

The International Labour Organisation's Maternity Protection Convention (Revised) 103 of 1952 proposes certain rights which are required to be included into national legislation. These include paid maternity leave for a minimum period of twelve weeks, additional leave for illness arising out of pregnancy, and medical benefits for pre-natal, confinement and post-natal care.²¹⁰ While on maternity leave the woman is to be remunerated at a rate of at least two thirds of her salary.²¹¹ A woman may not be dismissed or given notice of dismissal while on maternity leave.²¹² The convention also provides for time off during working hours for nursing mothers.²¹³

It is submitted that it is essential to protect the job security of pregnant employees, and to ensure that discrimination in recruitment and career advancement does not occur. Unfavourable treatment of an employee because she is pregnant should not be tolerated. *Unfavourable* treatment rather than *less favourable* treatment should

210 Articles 3 and 4. Cash and medical benefits are to be provided by means of compulsory social insurance or from public funds. Employers are not expected to be individually liable for the cost of medical benefits due to women in their employ (article 4(2) and (8)).

211 Article 4(6).

212 Article 6.

213 Article 5.

be proscribed, thereby eliminating the problems associated with finding an appropriate male comparator. An employer should be required to provide adequate maternity leave to protect the health of the mother and child, and time off for ante natal and post natal care. Financial benefits which enable a woman to take adequate time off work for birth and care of her infant must be provided. Employers should not be expected to bear the entire financial burden. An employer may be expected to grant and finance a period of leave to which any similarly incapacitated employee would be entitled. A further period should be financed through a state controlled fund, such as the existing unemployment insurance fund. Although it is equitable to require a woman to show commitment to her job in order to qualify for maternity benefits, constraints should not result in the exclusion of large numbers of female employees, as has occurred in the United Kingdom.²¹⁴

An area which has proved contentious in Britain and America is that of fetal protection. The question which arises is whether an employer may exclude all women who may become pregnant from the work place because of hazards which may prove detrimental to reproductive capacity and to the health of an unborn fetus. Hazards include physical conditions (such as radiation, heat stress, vibration and noise) and chemical substances.²¹⁵ Employment in an environment involving potentially hazardous chemical substances has been particularly contentious. In the United States the exclusion of female employees of child bearing capacity has been held to constitute overt sex discrimination.²¹⁶ In the United Kingdom the question

214 For a discussion of current maternity protection available to employees in South Africa see Epstein 303 ff.

215 Chemical substances include teratogens, which are substances that can interfere with the development of the fetus after conception via the mother's bloodstream and the placenta, and mutagens, which change the genetic material of living cells resulting in spontaneous abortions or genetic defects, including mental and physical defects (Finneran 224).

216 *International Union, UAW v Johnson Controls Incorporated* 111 SCt 1196 (1991).

has not been answered finally, although there are indications that female employees may be excluded in accordance with scientific fetal protection policies.²¹⁷ However, where male employees are subject to the same risks, the exclusion of female employees may be regarded as unfair.²¹⁸

With regard to physical conditions, the Wiehahn Commission proposed the introduction of legislative measures requiring employers to assign light duties to pregnant employees where questions of health and safety were relevant.²¹⁹ The government rejected the recommendation as it did not regard the implementation or administration of such legislation as feasible. It did, however, "[urge] all employers to implement this recommendation of their own accord".²²⁰ It is submitted that the recommendation of the Wiehahn Commission, while commendable on the face of it, would probably lead to further discrimination against female employees, and particularly against pregnant employees, as employers could elect to employ persons in respect of whom special measures were not applicable. A legislative provision of the nature suggested would be feasible only if it formed part of a comprehensive body of law prohibiting discrimination against female employees at every stage of employment, and specifically against pregnant employees.

One statute which may have a bearing on the nature of the work performed by preg-

217 In the United Kingdom employers are obliged to ensure the health, safety and welfare of their employees (section 2(1) of the Health and Safety at Work Act 1974). An employer who breaches its duty of care toward a pregnant employee is liable for damages in respect of a child who is born disabled as a result of that breach (section 1 of the Congenital Disabilities (Civil Liability) Act 1976).

218 Article 2(3) of the Equal Treatment Directive; *Johnston v The Chief Constable of the Royal Ulster Constabulary* Case 222/84 (1986) ECR 1651/ (1986) IRLR 263 (European Ct).

219 Part 5 of the *Report of the Commission of Inquiry into Labour Legislation* submitted in November 1980 (paragraph 5.15.8).

220 White Paper on Part 5 of the *Report of the Commission of Inquiry into Labour Legislation* (paragraph 4.65).

nant employees is the Machinery and Occupational Safety Act 6 of 1983 (MOSA). It provides for the safety of persons at a work place, in the course of their employment and in connection with the use of machinery. The General Safety Regulations published in terms of the Act²²¹ may regulate any matter which the competent minister deems necessary or desirable for the purposes of the Act,²²² including health and safety measures to be taken by employers and users of machinery,²²³ the exposure of employees and other persons to hazardous or potentially hazardous articles,²²⁴ and the performance of work in hazardous or potentially hazardous conditions.²²⁵ The regulations may not prescribe different treatment of employees on the ground of race or colour, but are not prohibited from differentiating on the ground of sex.²²⁶ None of the General Safety Regulations specifically refer to hazards related to pregnancy. But regulation 2(1) is broadly formulated and may be interpreted as requiring employers to apply special treatment in respect of female employees on the basis of potential harm to reproductive capacity or to an unborn fetus. The regulation provides that:

"... every employer... shall make an evaluation of the risk attached to any condition or situation which may arise from the activities of such employer... and to which persons at a work place or in the course of their employment or in connection with the use of machinery are exposed, and he shall take such steps as may under the circumstances be necessary to make such condition or situation safe."

The regulation appears to have the very effect sought by the Wiehahn Commission

221 Section 35 of MOSA.

222 Section 35(1)(a)(j).

223 Section 35(1)(a)(iv).

224 Section 35(1)(a)(v).

225 Section 35 (1)(a)(vi).

226 Section 35(3).

in respect of its recommendation regarding the assignment of light duties to pregnant employees, despite rejection of that recommendation by the government. The comments made above in respect of the Wiehahn Commission's recommendation are equally relevant here -- standing as it does in a virtual statutory vacuum, the regulation has the potential to increase discriminatory treatment of female employees. The same might be said of the Lead Regulations. The regulations provide, inter alia, for compulsory blood and urine testing to determine blood lead levels, and the suspension of employees from exposure to lead once levels reach the proscribed concentration. The level of concentration at which women are to be suspended is far lower than that of men.²²⁷ Pregnant employees are required to notify their employers of their condition, upon which they must immediately be suspended from lead exposed work. The regulations do not provide for job security. As a result employers are not prevented from dismissing pregnant employees and those whose blood lead levels have reached the proscribed concentration point. The regulations have been criticised in the following terms:

"For women, notification of pregnancy could lead to loss of their jobs. In most countries where lead regulations have been promulgated during the last decade, one of the principal effects has been to remove women from exposed jobs, either because it has been specifically required by the regulations or because of corporate "voluntary" restriction policies. The scientific basis of these exclusions has come under increasing criticism as reproductive hazards are revealed as equally damaging to male and female reproductive ability. Exposure of men to lead is increasingly linked to spontaneous abortion in their spouses. Also, lead stored in the bones of women workers can be released during pregnancy to poison the fetus, rendering the precaution of removal at the beginning of pregnancy less relevant."²²⁸

227 As Lewis 484 explains, the "medical removal triggers for women are twice as restrictive as those for men."

228 Lewis 490- 491. The author goes on to state that: "Compulsory biological testing, lack of medical removal protection, and discrimination against female workers add up to serious contraventions of medical ethics, and human rights in the medical screening provision in the South lead regulations. These affect the areas of (a) the integrity of the person; (b) equality of opportunity and freedom from discrimination; and (c) the right to privacy (linked to freedom from discrimination)" (491).

A question which arises is whether a woman who is of the opinion that she has been discriminated against, for example, due to exclusion from a division of the work place or dismissal, will be successful in an allegation that the employer has committed an unfair labour practice. Women who are employed, but are refused employment in a particular division of a business or in respect of a specific type of work, and those who have been demoted or dismissed may allege that they have been treated unfairly. It is submitted that the most equitable approach is to require protection in the work place for all employees. Physical conditions such as heat stress, noise and vibration, and chemical substances such as lead and asbestos may affect an unborn fetus as well as employees of both sexes. Fetuses carried by pregnant employees or fathered by employees who have been exposed to hazardous chemical substances may be affected equally.²²⁹ The exclusion of women reinforces negative stereotypes while failing to protect all employees who may be affected by hazardous substances.

Finally, it is probable that most male and female employees wishing to have children would refuse jobs in a toxic environment or postpone having children if they understood the potential risks. Employers should therefore be required to inform all employees of the hazards associated with toxic exposure, to provide the maximum protection for all employees and, where feasible, to allow employees wishing to parent children to transfer to safer working areas.²³⁰

229 Van de Waerdt 159. The author at 159- 160 explains: "Studies have shown, for example, that the wives of men who work with asbestos, lead, beryllium and other organic solvents are more likely to miscarry, and that their children are subsequently more likely to contract mesothelioma (a fatal form of cancer), lead poisoning, and other diseases just as are the workers themselves. Additional studies show that not only do women exposed to anesthetic gases in operating rooms experience up to twice the rate of miscarriages of women in the general population, but also that the wives of male operating room personnel experience a 25% greater rate of miscarriages, and that wives of workers exposed to vinyl chloride have higher than normal rates of miscarriages and birth defects." See also Lewis 491.

230 The Lead Regulations do provide for education and training of the work force in respect of potential health risks, precautions to be taken by employees who are exposed to lead and recognition of the symptoms of lead poisoning.

5 Sexual Harassment

Sexual harassment of female employees is a frequent occurrence in the work place in South Africa. Yet few cases of that nature have been referred to the Industrial Court. The inference which can be drawn is that harassed employees either are not aware of their rights or do not wish to exercise those rights, and would rather seek a transfer or resign than take legal steps to rectify the situation.²³¹

Sexual harassment has been recognised as a form of sex discrimination in employment in the United States and Britain, both where a refusal to submit to sexual demands leads to deprivation of a tangible job benefit (quid pro quo harassment), and where harassment creates a hostile or abusive work environment although there has been no such loss.²³² The point at which sexual interaction is classified as harassment has been considered. American courts have tended to accept that quid pro quo harassment may involve a single incident, but have tended to characterise abusive environments by multiple incidents of offensive conduct. An ad hoc approach had been adopted in respect of the view point from which the determina-

231 *Dancaster Harassment* 449 refers to a 1990 survey which revealed that 76% of women have been subjected to sexual harassment, and that "most would rather resign than make a fuss". Sutherland (at 19- 20 of her report) advances two theoretical models which assist in explaining the reason for the occurrence of harassment. The sociocultural model suggests that "culturally legitimated" differences affect the perception of women in the work place and encourage sexual harassment. Women are accorded less power and status within society. Social arrangements ensure that women are "evaluated in terms of their sexuality; gain status through men (eg husbands); are accorded little control over their own lives; and are burdened with negative stereotypes which perpetrate the notion of their dependent, child like nature... In relation to sexual harassment, it is the power disparity with regard to sexuality which is of particular importance. ...women are evaluated largely in terms of their sexual desirability, or by sexual stereotypes." The organisational model, on the other hand, focuses on the distribution of organisational power in the work place. It suggests that women as a group have less organisational power than men and, for that reason, are targets for sexual harassment.

232 *Meritor Savings Bank FSB v Vinson* 477 US 57 (1986) (United States); *Strathclyde Regional Council v Porcelli* (1986) IRLR 134 (SCS) (United Kingdom).

tion should be made (that is, the view of the reasonable employer, the reasonable employee or the particular employee).²³³ In the United Kingdom the question is considered from the viewpoint of the reasonable employee.²³⁴

In South Africa an employee may allege that sexual harassment constitutes an unfair labour practice. It appears from the decisions of the Industrial Court, in line with the approach adopted in Britain and America, that both quid pro quo harassment and the creation of a hostile work environment are regarded as unacceptable. *J v M Ltd*²³⁵ was the first case in which the Industrial Court considered the nature of sexual harassment. J, a senior manager, was dismissed after allegedly fondling a female employee and making suggestive remarks to her. The dismissal followed previous counselling and warnings by the employer. The court considered the kind of behaviour which could be said to constitute sexual harassment, and stated that it included any unwanted sexual behaviour or comment which had a negative effect on the recipient, and could range from innuendo, inappropriate gestures, suggestions or hints, to fondling without consent and, at worst, rape. It was not necessary that the conduct be repeated. Furthermore, the court did not regard counselling of the offender or warnings regarding behaviour of that nature as necessary prior to dismissal, particularly at senior management level. It stated:

"Sexual harassment, depending on the form it takes, will violate the right to integrity of the body and personality which belongs to every person and which is protected in our legal system both criminally and civilly.... The victims of harassment find it embarrassing and humiliating. It creates an *intimidating, hostile and offensive work environment*. Work performance may suffer and career commitment may be lowered. It is indeed not uncommon for employees to resign rather than subject themselves to further sexual harassment" (own emphasis).²³⁶

233 Abrams 1202.

234 *Wiliman v Milinec Engineering Ltd* (1988) IRLR 144 (EAT).

235 (1989) 10 ILJ 755 (IC).

236 At 757-758.

It is important to determine the point of view from which the conduct is to be evaluated, that is, the point of view of the reasonable employer or employee, or of the affected employee. As has been explained,

"The distinction becomes very important in the case of sexual harassment, for conduct which an employer regards as within the bounds of reasonableness may be taken by a particular female employee to constitute sexual harassment, while the same conduct in relation to another female employee might not be regarded by her as sexual harassment."²³⁷

It has been suggested that evaluation of the conduct from the point of view of the reasonable employee is the most equitable approach to adopt as it establishes a standard by which an employer may test its conduct.²³⁸

The Industrial Court in *J v M*, however, appeared to regard the test for sexual harassment as a subjective one, that is, the effect of the behaviour was determined from the point of view of the harassed employee. The subjective approach is suggested by the use of phrases such as "unwanted sexual behaviour", "negative effect on its recipient" and "victims... find it embarrassing and humiliating".²³⁹

The court again appeared to adopt a subjective approach in *Jerry Mampuru v*

237 Mowatt 647.

238 Mowatt 647 submits that "if the Industrial Court applies the approach of the subjective view of a particular applicant as to what is "fair" or "unfair", the employer may have to walk through the proverbial minefield in his approach to his employees", while evaluation from the point of view of the reasonable employee ensures that "the employer will at least have some standard by which he may test his conduct."

239 *Dancaster Harassment* 462 states that it is "doubtful that the court... was in fact adopting a subjective approach" in view of the petition signed by employees, and because the affected employee later withdrew her complaint as she felt that the harasser had not intended to harass her. But, as is pointed out in the decision itself, the facts were not withdrawn -- the withdrawal of the complaint because the employee felt sorry for the harasser "proves no more than that she is a nice person" (at 760).

PUTCO.²⁴⁰ The male applicant, who was employed as a store manager, was dismissed for making suggestions of a sexual nature to three female employees. These included calling the employees "skattie" and "liefie", suggesting that they accompany him to casino hotels in Bophutatswana, and touching and pulling them. Most of this conduct took place while he was alone with a particular female employee. His behaviour both terrified and humiliated the employees. The court stated that:

"sexual harassment may take on many forms. It may be verbal but gross, or it may be physical, again varying from trivial to gross. It may be a single act or the act may be repeated. The actions as such disclose a total *disregard for the feelings and integrity of the recipient*" (own emphasis).²⁴¹

The court thus considered the nature of the conduct and effect of that conduct on the recipient. A similar approach has been adopted by the European Commission. Its Code of Practice on measures to combat sexual harassment emphasises the subjective nature thereof. The Code provides that :

"Sexual harassment means unwanted conduct of a sexual nature, or other conduct based on sex affecting the dignity of women and men at work. This can include unwelcome physical, verbal or non-verbal conduct."

The reference to conduct which is "unwanted" and "unwelcome", implies that the recipient is to determine whether behaviour is acceptable or offensive.

It appears from the above decisions that the Industrial Court has adopted a broad view of sexual harassment. It has not required a sexually harassed employee to suffer any detriment regarding remuneration, promotion, training, continued employ-

240 Unreported NH 11/2/2136 24 September 1989.

241 At 18- 19 of the unreported judgment.

ment or any other tangible benefit. An offensive or hostile work environment, resulting from sexual harassment, has been regarded as unacceptable. That conduct resulting in detriment would also be regarded as unfair by the Industrial Court is evident from the decision of *G v K*.²⁴² There, a female employee was dismissed by the company, having had an affair with a senior director of the company. The court regarded her dismissal as unfair, holding that there was no basis for the proposition that an employer could dismiss an employee with whom he had had an affair once the affair was over on the basis that that employee's continued presence was a source of embarrassment to him. It concluded that:

"for this court to approve of the applicant's dismissal would be tantamount to rendering every female employee vulnerable and expendable once she has slept or cavorted with her employer. It would also imply that in any amatory situation it is the employee who is to be regarded as the party who bears the guilt and, therefore, the one who must come out worst for it. Such discriminatory treatment would be completely at variance with the standard of fairness and equity laid down by this court in its numerous decisions."²⁴³

It must be borne in mind that the cases considered thus far by the Industrial Court have involved a determination of the fairness of the dismissal of the alleged harasser. But that will not always be the case. The court may be called upon to determine the (un)fairness of an employer's failure to discipline an alleged harasser, to prevent harassment from occurring, to grant a benefit which was denied where quid pro quo harassment is alleged to have occurred, or to award compensation for injury to the feelings of the victim of harassment. In cases of that nature it will be necessary for the court to decide the liability of an employer for acts of its managerial and supervisory employees, and of fellow employees of the complainant. In the United States a strict liability approach has been adopted in respect of quid

242 (1988) 9 ILJ 314 (IC).

243 At 316-137.

pro quo violations by a manager or supervisor. The reason is that the employer granted the manager or supervisor the power to control the terms, conditions and privileges of employment, which made the demanded pay-off possible. The employer is not required to be aware of the harassment to render it liable. The manager/ supervisor is regarded as the agent of the employer.²⁴⁴ In the hostile environment situation employees have on occasion been required to prove that higher management knew or should have known of the sexual harassment before the employer will be held liable for the manager's actions.²⁴⁵ The reason is that the employer has not delegated some authority, such as the ability to promote, hire or fire, which makes the harassing conduct possible. It is submitted that the reasoning ignores the fact that managers and supervisors always have a measure of authority in the day to day operation of a business and in fact structure the work environment. The distinction between employer liability in the two situations is thus an artificial one. The distinction is not drawn in the United Kingdom, where an employer's liability for acts of its employees is statutorily regulated. Anything done by a person in the course of his employment is regarded as having been done by his employer as well as by him.²⁴⁶ In the context of sexual harassment, an employer is liable for all acts of harassment by persons employed in managerial or supervisory positions, irrespective of whether or not the employer was aware of the harassment. But it does have a defence where it can prove that it took steps which were reasonably practicable to prevent the sexual harassment from occurring.²⁴⁷ The defence has been broadly interpreted and, generally, an employer which has an equal opportunity policy in operation, and who has brought the provisions of that policy to

244 *Horn v Duke Motor Homes* 755 F.2d 599 (7th Cir 1985); *Atlanasio* 32.

245 *Henson v City of Dundee* 682 F.2d 897 (11th Cir 1982).

246 Section 41 of the Sex Discrimination Act.

247 The defence for employer liability is contained in section 41(3) of the Sex Discrimination Act.

the attention of employees would probably succeed in a defence, provided that it took prompt action on complaints.²⁴⁸

The approach in the United States to a complaint of harassment by a fellow employee is that the employer is liable if it was aware or should have been aware of the harassment, and failed to take steps to correct the situation.²⁴⁹ That effectively places the onus on the employee to bring conduct of which she disapproves to the attention of her employer. The latter is required to take steps to remedy the situation. The approach is equitable. Fellow employees have not been placed in a position which enables them to abuse authority. The United Kingdom applies a stricter standard as it does not distinguish between employer liability for acts of managers and those of co-employees. The key issue is whether harassment by the co-employee occurred in the course of employment.²⁵⁰

In South Africa the Industrial Court appears to have accepted that an employer has a duty to ensure that employees can work in an environment which is free from sexual harassment. The court in *J v M*²⁵¹ stated:

"Sexual harassment, whether between members of the opposite sex or between members of the same sex is, despite the fact that it is often a subject for uncouth jokes, a serious matter which does require attention from employers.... An employer undoubtedly has a duty to ensure that its employees are not subjected to this form of violation within the work-place."²⁵²

248 *Balgobin and Francis v London Borough of Tower Hamlets* (1987) IRLR 401 (EAT).

249 The approach is suggested by the EEOC in paragraph 11(d) of its Guidelines on Sexual Harassment (29 CFR 1604).

250 That is by virtue of the liability of the employer imposed by section 41 of the Sex Discrimination Act.

251 (1989) 10 ILJ 755 (IC).

252 At 757-758.

The extent of the employer's duty was not canvassed. But it did recognise that an employee who was subject to unwelcome sexual advances by a superior was in an invidious position, and that the fear of complaining to a higher level of management would often compel an employee to suffer in silence.²⁵³

The LRA provides for criminal liability of employers for acts of managers, agents or employees which constitute an offence under the Act. Acts of that nature are presumed to have been committed by an employer unless it is proved that:

- (a) in doing or omitting to do that act the manager, agent or employee was acting without the connivance or permission of the employer; *and*
- (b) all reasonable steps were taken by the employer to prevent any act or omission of the kind in question; *and*
- (c) it was not under any condition or in any circumstance within the scope of the authority or in the course of the employment of the manager, agent or employee to do or omit to do an act, whether lawful or unlawful of the character of the act or omission charged" (own emphasis).²⁵⁴

While sexual harassment is not an offence under the LRA, it may constitute a criminal offence at common law. The aggrieved victim may lay a criminal charge of rape, assault, indecent assault, *crimen injuria* or extortion.²⁵⁵ It is submitted that an approach to employer liability in respect of sexual harassment, which is analogous to the approach contained in the LRA in respect of liability for statutory offences, is appropriate.

In practice an employer should, at the very least, be expected to have an express

253 At 578.

254 Section 72(1).

255 For a discussion of the criminal remedies available to the aggrieved employee, see Rademan 21- 22 and *Dancaster* 463- 465.

anti-discrimination policy, which includes an express prohibition on any form of sexual harassment. The policy must have been communicated to all employees in order to ensure that they are familiar with it. In addition, the employer should have an established grievance procedure which employees feel comfortable utilising. Reaction to complaints should be prompt, and all complaints should be investigated thoroughly. However, where a manager or supervisor abuses his position of authority and sexually harasses female employees, an employer should not automatically escape liability on the ground that it was unaware of the harassment. The European Commission's Code of Practice in fact recommends that managers and supervisors should be responsible for ensuring that sexual harassment does not occur in areas of the work place which fall under their control, and that they should receive specialist training in that regard.²⁵⁶

6 Equal Pay

The first categoric rejection of (unfair) discrimination by the Industrial Court was in *SA Chemical Workers Union v Sentrachem Ltd*,²⁵⁷ which dealt with equal pay. The court held that the payment of different wages to persons doing the same job, based on race, "or any other differences between the workers concerned other than their skills and experience",²⁵⁸ amounted to discrimination and constituted an unfair labour practice. The Supreme Court added seniority to the list of factors which could justify a wage differential.²⁵⁹

256 The Code of Practice, as well as a European Commission Recommendation on the Dignity of Women and Men at Work, are discussed by Rubenstein 70 ff.

257 (1988) 9 *ILJ* 410 (IC).

258 At 429.

259 On review, the principle was accepted by the Supreme Court in *Sentrachem v John NO* (1989) 10 *ILJ* 249 (T). The court stated that: "It was common cause between the parties that any practice in which a black person is paid a different wage than the white person doing the same job having the same length of service, qualification and skills is a labour practice of wage dis-

The court used the term "discrimination" rather than "unfair discrimination", by implication attaching to it the negative rather than the neutral connotation. The unfairness lay in the payment of unequal wages for performance of the *same* work. On the facts, it was not necessary to consider the effect of a wage discrepancy in respect of work which was not identical but was alleged to be equivalent to or to have equal value. But where unequal pay occurs by virtue of sex discrimination, as opposed to race discrimination, it is quite probable that the work performed by the respective male and female employees will not be identical. As has been stated previously, there is a high degree of occupational segregation between men and women.²⁶⁰ Women tend to be concentrated in certain types of industries, such as the manufacturing industry, where wages are typically low. They also tend to perform certain types of work, such as nursing and teaching, which are seen as extensions of domestic functions, and are therefore poorly remunerated. Due to traditional family and child care roles, women also tend to dominate part-time work. The problem has been outlined as follows:

"Women as a group have historically received significantly lower wages than men. Many believe that this occurs because women face two distinct forms of wage discrimination. The first type, payment of lower wages for substantially *equal* work, is relatively easy to detect and remedy.... The second form of discrimination occurs when an employer segregates members of different sexes into different job categories involving work that is different in character. In many such cases, even though the work performed by women may make an equal contribution to the organization, the employer will pay substantially less for that work than it pays for the work performed in male dominated categories. This form of discrimination is much harder to isolate and more expensive to eradicate, and its detection is made more difficult by its intermingling with complex market forces that influence the setting of wage rates."²⁶¹

crimination based on race and it constitutes an unfair labour practice. Like them I have no doubt that that is a correct exposition of the law."

260 In the United States, for example, about half of employed women work in occupations that are 80% female and half of all men work in occupations that are 80% male (Eichner 1397). For an analysis of female participation in the labour market in the United States, Canada and the United Kingdom, see Jain and Sloane 2- 21. Pillay 22- 23 analyses the position in South Africa.

261 Scheibal 265- 266.

For the above reasons, the principle of equal pay for work of equal value has been widely accepted. The International Labour Organisation's Equal Remuneration Convention No 100 of 1951 provides for equal pay for work of equal value, as does Article 119 of the Treaty of Rome, read with the Equal Pay Directive 1975. The British Equal Pay Act contains a similar provision,²⁶² but allows a defence where an employer pays different wages and the differential is due to a material factor which is not the sex of the affected employee.²⁶³ The defence may succeed where a personal attribute such as seniority or merit justifies the differential.²⁶⁴ It may also be based on extrinsic factors such as skill shortages and other market forces, provided that it is in pursuit of an objective which corresponds to a real need on the part of the undertaking, is an appropriate way of achieving that objective and is necessary.²⁶⁵

In the United States claims for equal pay for work of equal value (or comparable worth as it is referred to in that country) have been rejected by the Supreme Court.²⁶⁶ The reason for rejection has been the courts' hesitance to become involved in the process of evaluation of work of equal value. Opponents of the prin-

262 Section 1(2)(b) of the Equal Pay Act. The statute was amended to incorporate the concept after the decision of the European Court of Justice in *Commission v The United Kingdom* Case 61/81 (1982) ECR 2601/ (1982) IRLR 333 (European Ct).

263 Section 1(3) of the Equal Pay Act.

264 In *Clay Cross (Quarry Services) v Fletcher* (1978) IRLR 361 (CA) the Court of Appeal found that the payment of a higher wage to a man than to a woman performing similar work would be legitimate if the man had longer service, superior skill or qualifications, or was more productive.

265 The test was developed by the European Court of Justice in *Bilka-Kaufhaus GmbH v Weber von Hantz* Case 170/84 (1986) ECR 1607/ (1986) IRLR 317 (European Ct). It was accepted by the House of Lords in *Rainey v Greater Glasgow Health Board* (1987) IRLR 26 (HL).

266 The American Equal Pay Act permits claims for equal pay for work which is substantially equal (section 206(d)(1)). Comparable worth claims under Title VII of the Civil Rights Act 1964 have not been successful (*County of Washington v Gunther* 452 US 161 (1981)).

ciple have also criticised it for failing to allow employers to pay what the market dictates.²⁶⁷ The view of the theory's critics is summed up in the following statement:

"In summary, as I see it, the adoption of a comparable worth theory would require the courts to supervise all compensation policies and job evaluation systems. It would cause permanent damage to market pricing concepts and result in massive new costs at a time when our economy can ill afford it.... The comparable worth standard would destroy historical incentives and differentials; discriminate against other higher paid employees who would be made to suffer; and hamper US ability to compete with foreign labour."²⁶⁸

The criticism is not insurmountable. First, the very purpose of equal pay for work of equal value is to prevent the perpetuation of past inequities ("historical incentives and differentials"), as a result of which women were crowded into certain jobs which were compensated at a lower rate than traditionally male jobs of equal value to the employer.²⁶⁹ Secondly, permitting employers to adhere to market rates perpetuates past inequities. In the United Kingdom, consideration of market forces is permitted only where it is objectively necessary for the employer to do so. It may be noted that the International Labour Organisation's Equal Remuneration Convention permits no exception to the principle of equal pay. Finally, an unwillingness on behalf of the courts to become involved in the process of job evaluation is no reason to disallow the application of the principle. In the United Kingdom, for example, the industrial tribunal makes a preliminary assessment of the viability of an equal pay claim. If it finds that there are reasonable grounds for the claim, it commissions a report from a panel of independent experts.²⁷⁰ Jobs are analysed under a number of headings,

267 Berger 430- 431.

268 Spelfogel 39.

269 Katz 207 explains: "Substantial sex-based pay differentials continue to plague the US marketplace, despite the prohibition of wage discrimination by both the Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964.... As recently as 1982, women working full-time were paid an average of only 62 cents for every dollar paid to men. Recent efforts to combat this severe, persistent problem have focused on the theory of 'comparable worth'."

270 Section 2A(1)(a) and (b) of the Equal Pay Act.

such as effort, skill and decision. In the light of the report, the tribunal decides whether the jobs of the man and the woman are of equal value to the employer.²⁷¹ In the United States, although courts have refused to evaluate jobs or to order job evaluations, voluntary job evaluations carried out by employers have been accepted as evidence in Title VII cases,²⁷² and conflicting evaluation study results presented as evidence have been considered and a selection made.²⁷³ In equal value cases, a court would be required to proceed one step further and commission a job evaluation study, which would form part of the evidence before it.²⁷⁴ It may also be noted that the comparable worth principle has been accepted in many states.²⁷⁵

In South Africa the Industrial Court has considered an employer's voluntary job

271 Section 1(2)(c) of the Equal Pay Act.

272 *American Federation of State, County and Municipal Employees v State of Washington* 770 F.2d 1401 (9th Cir 1985).

273 *Taylor v Charley Brothers* 25 Fair Empl Prac Cas (BNA), cited in Scheibal 282.

274 The operation of job evaluation has been explained in the following manner: "The value of an employee... can be measured scientifically.... this value depends on the level of skill, effort and responsibility that the job requires, and on the conditions in which the employee must work. With the help of consulting firms, comparable worth advocates have devised a method of pure job evaluation that assigns all occupations points in these four categories.... For example, this method of evaluation allowed the city of San Jose to determine that its painters had approximately the same worth as its secretaries. The work of secretaries and painters is completely different, of course, but the evaluation revealed that the two jobs require approximately equal know-how and problem solving ability, and that although secretaries' working conditions are better (secretaries received no points for adverse working conditions, while painters received 14), the accountability demands on a secretary are worth about 11 points more than a painter's demands. The two occupations therefore have approximately the same score" (Flick 27).

275 Goldstein 538 notes that "the right to receive equal pay for work of comparable value appears to be increasing in prevalence as a legal right of state employees." Berger 439- 440 explains that states have addressed comparable worth through legislation and by other means. The state of Minnesota, for example, has enacted laws, while New York state has concluded agreements with state trade unions in terms of which it undertakes to advance towards comparable worth pay scales in jobs dominated by women. Other states which have accepted so-called pay equity programmes include Washington, Iowa, Wisconsin, Ohio, Connecticut and Massachusetts (Goldstein 538).

evaluation study on one occasion. *SA Yster, Staal en Verwante Nywerhede Unie v Yskor Bpk*²⁷⁶ did not involve an allegation of discrimination, but the case is significant because it is indicative of the court's attitude to job evaluation schemes. In terms of the job evaluation scheme operative in the company, the jobs of maintenance foremen and senior planners had been placed in job category J2, while production foremen had been placed in a higher category (P1). Employees in category P1 received a superior remuneration package as well as certain other benefits. The union, on behalf of the employees in the lower grade (J2), asked for an order directing the employer to refrain from its practice of distinguishing between the two job categories, to regrade category J2 as the equivalent of P1, and to compile and distribute the job description and duties for category J2. It attacked the scheme, inter alia, on the following grounds:

- * The qualification requirements for grade J2 were higher than those for P1;
- * Grade P1 was operative in only one trade, while J2 was required to supervise 7 trades/ disciplines;
- * Grade P1 was not required to work overtime;
- * Grade P1 did not involve any stand-by duty obligations;
- * Only grade J2 involved continuous work obligations.²⁷⁷

The respondent raised a preliminary point. It alleged that consideration of the dis-

276 (1991) 12 *ILJ* 1038 (IC).

277 At 1041.

pute fell beyond the court's jurisdiction because it did not pertain to the interpretation or adjudication of existing rights, but was a dispute of interest, that is, one which involved the creation of new rights.²⁷⁸ This point was upheld by the court. It found that the employer's refusal to comply with the demand to combine the two job categories did not affect existing rights because employees in the lower category (J2) had never had the rights which were claimed, nor could they reasonably expect those rights. The claim was really one for an improved wage package, which entailed the creation of new rights which the employees had not enjoyed before and could not lay claim to. The court went on to state that scheme had been compiled by experts, which graded posts independently of the persons who filled them.²⁷⁹ (It appears from the judgment that the scheme emanated from the employer itself -- there is no indication that jobs were graded by an outside person.)

The approach of the Industrial Court, if extended to situations involving wage discrimination, would wreak havoc with the attainment of equal pay. It would effectively limit claims for equal pay to situations where employees are performing identical work. An employer could evade equal remuneration for jobs which are

278 The court referred to *Rycroft and Jordaan 129* who distinguish between disputes of right and disputes of interest as follows: "In some legal systems a clear distinction is made between disputes of right and disputes of interest. Disputes of right concern the application or interpretation of existing rights embodied in a contract of employment, collective agreement or statute, whilst disputes of interest (or "economic disputes") concern the creation of fresh rights, such as higher wages, modification of existing collective agreements, etc. Collective bargaining, mediation and arbitration are generally regarded as appropriate avenues for the settlement of conflicts of interest, whilst adjudication is normally seen as the appropriate for the resolution of disputes of right" (1044). Cameron, Cheadle and Thompson 96 explain the distinction in the following manner: "The distinction between disputes of right and disputes of interest lies at the heart of the matter: "Conflicts of right (or "legal" disputes) are those arising from the application or interpretation of an existing law or collective agreement (in some countries of an existing contract of employment as well), while interests or economic disputes are those arising from the failure of collective bargaining, ie when the parties negotiations for the conclusion, renewal, revision or extension of a collective agreement end in deadlock." (The authors quote from International Labour Office *Conciliation and Arbitration Procedures in Labour Disputes* (Geneva, 1980) 5.)

279 At 1045.

substantially equal by devising a job evaluation scheme which places jobs into different categories with different remuneration packages. The employer's scheme in the American case of *Taylor v Charley Brothers*²⁸⁰ serves as a perfect example here. The employer created two separate divisions within its warehouse, and established a remuneration package for the so-called female health and beauty aids division which was about thirty percent lower than that of the so-called male dry grocery division. Most of the jobs in the warehouse were identical in content. But some jobs in the female division required slightly less effort than those of their male counterparts, while a few had no male counterparts. Regarding these jobs the employees provided expert job evaluation testimony that the minor differences in job content could account for a fraction of the total wage difference. The court found that the employer had engaged in intentional sex discrimination in segregating the jobs and then paying a lower wage for jobs which it classed as female jobs. The court inferred that the same impermissible motive explained the pay disparity for those jobs which were similar but not identical. It relied on the expert job evaluation evidence to refute the employers submission that the difference in job content accounted for the wage difference. Finally, it estimated the appropriate relative pay for the female jobs in order to formulate a remedy for the violation.

If the approach in the *Yskor*-case was applied strictly to a situation such as this one, the employees would not be able to approach the Industrial Court for relief. The dispute would be categorised as a dispute of interest as the female employees would merely be regarded as requesting a higher wage. Even within the confines of the facts before the court in *Yskor*, it is submitted the court erred in categorising the dispute as one of interest. The union advanced specific reasons for its submission that the job evaluation scheme operating within the company was unfair, for example,

280 25 Fair Emp Prac Cas (BNA), cited in Scheibal 282.

higher education requirements and greater responsibility for the jobs in the lower grade. It thereby established a basis for the employees' reasonable expectation of obtaining the benefits attached to the higher job grade. The fact that a finding of unfairness would result in higher wages for a particular category of employees does not automatically make the dispute one of interest. Furthermore, the court's apparent reluctance to become involved in the process of evaluation does not justify its refusal to consider the fairness of a job evaluation scheme on the basis of objective criteria such as education requirements and responsibility.

As stated above, job evaluation schemes are an established feature of British anti-discrimination law. An industrial tribunal may consider the fairness of a study undertaken voluntarily by an employer. An employee who shows that the study is discriminatory, for example, because it attaches disproportionate weight to masculine attributes such as physical strength, may institute an equal value claim.²⁸¹ If the tribunal finds that there are reasonable grounds for the claim, it commissions a job evaluation report from a member of a panel of independent experts.²⁸² The tribunal determines the relative value of the woman's work in the light of the report. It is apparent that the tribunal does not become involved in the process of evaluation, but considers job evaluation studies as evidence where unfair pay disparity is alleged. It is suggested that provision should be made for the Industrial court to adopt a similar approach. The court could probably adopt that approach under the LRA as it is. One of the functions of the court is:

*"generally to deal with all matters necessary or incidental to the performance of its functions under this Act."*²⁸³

281 Section 2A(2) and (3) of the Equal Pay Act.

282 Section 2A(1)(b) of the Equal Pay Act.

283 Section 17(11)(h).

The provision is broadly formulated and the court could probably rely on it to commission a job evaluation study. But practical problems may arise, such as funding of the study. It is therefore submitted that statutory regulation of the matter is apposite.

In *Mthembu v Claude Neon Lights*²⁸⁴ the Industrial Court again considered the issue of equal pay. The case did not involve an allegation of discrimination based on the sex (or any other immutable characteristic) of the affected employees, but involved a consideration of pay disparity based on merit. The employer had granted annual wage increases in accordance with an industrial council agreement. Thereafter it granted further increases based on merit. These increases were negotiated and consented to by the recognised and representative trade union. The manner in which the merit of employees was determined was by means of an evaluation by management. The court held that the employer had acted fairly. It found that it would be contrary to the interests of employers, employees and society in general to rule that an employer could not differentiate between employees on the basis of their productivity. An employer was entitled to reward employees which increased productivity. The court was clearly influenced by the fact that the representative trade union had been consulted, and the fact that employees who felt aggrieved because they did not receive increases could state their cases by utilising the company's grievance procedure.

The Industrial Court's acceptance of merit and productivity as justifiable grounds for pay disparity is in accordance with the British and the American approach. In Britain the Court of Appeal accepted that personal characteristics, such as merit or seniority, could justify a pay differential.²⁸⁵ The American Equal Pay Act permits a

284 (1992) 13 ILJ 422 (IC).

285 *Clay Cross (Quarry Services) v Fletcher* (1978) IRLR 361 (CA).

pay differential pursuant to seniority, merit, productivity, or any factor other than sex²⁸⁶ (provided that it is significant and relevant to the requirements of the job).²⁸⁷ The Industrial Court should, however, accept only those merit/ productivity increases which are based on objective evaluations and which are capable of being challenged by affected employees. It has been noted:

"Employers should however be careful not to perceive productivity or, more broadly, merit as a universally fair ground of differentiation. Productivity and especially merit are subject to the dual demands of reasonableness (ie objective criteria that are objectively applied)."²⁸⁸

Any other factor leading to pay disparity, such as a formal qualification, must be necessary for proper performance of the job in order to be acceptable.²⁸⁹

Generally, remuneration is seen as including not only an employee's basic salary, but all benefits to which she is entitled by virtue of her position as employee. In terms of the International Labour Organisation's Equal Remuneration Convention 100 of 1951, "remuneration" includes any additional emoluments, whether in cash or in kind, which are directly or indirectly payable to an employee.²⁹⁰ Article 119 of the Treaty of Rome defines "pay" in a similar manner. On several occasions the European Court of Justice was called upon to decide whether occupational pension

286 Section 206 of the Equal Pay Act. The defences were incorporated into Title VII by means of the Bennett Amendment (section 703(h) of Title VII).

287 *Strecker v Grand Forks County Social Service Board* 640 F.2d 96 (8th Cir 1980).

288 Campanella 30.

289 Campanella 29- 30 refers to factors which are "directly relevant to the performance of the job, or are necessary to the needs of the business or appropriate in the light of a valuable social policy."

290 Article 1(b) of the Convention.

schemes fell within the ambit of pay as defined. The reason was that schemes tended to discriminate against female employees in respect of retirement age, contributions to pension funds and benefits obtainable after retirement. The European Court ruled that occupational pension schemes fell within the ambit of pay as contemplated in Article 119.²⁹¹ That rendered discrimination in respect of such schemes impermissible. A similar approach was adopted in the United States.²⁹²

Discrimination against female employees is a common feature of pension schemes in South Africa.²⁹³ Areas in which discrimination may occur are include eligibility (female staff members have a longer waiting period before being able to join the scheme than males), contributions, retirement age and benefits receivable on retirement. The reasons advanced for the discriminatory practices are based on stereotyped perceptions. Where females are required to wait before being allowed to join a pension fund, a reason advanced by employers is that "females do not stay with the company." Certain employers require a smaller contribution from female employees, who then receive less after retirement. The reason is that the male is presumed to be the breadwinner. That supposes that he is the only person with dependent children, and that he requires a pension for his widow. One reason suggested for requiring women to retire at a younger age than men is that it is assumed that a wife is younger than her husband and wishes to retire at the same time that he does.²⁹⁴

291 *Bilka-Kaufhaus GmbH v Weber von Hartz* Case 170/84 (1986) ECR 1607/ (1986) IRLR 317 (European Ct); *Defrenne v Belgium* (No 1) Case 80/70 (1971) ECR 445; *Barber v Guardian Royal Exchange Assurance Group* Case 262/88 (1990) IRLR 240 (European Ct).

292 *Los Angeles Department of Water and Power v Manhart* 435 US 702 (1978); *Arizona Governing Committee v Norris* 463 US 1073 (1983).

293 Potter 26- 29 discusses the findings of a survey undertaken in a cross section of commerce to examine discrimination or differences in the treatment of women under such schemes.

294 Potter 26- 27.

Before discussing the role of the Industrial Court, it is apposite to give a brief explanation of the operation of pension funds in South Africa. Pension funds are governed by legislation²⁹⁵ and by the rules of the fund. The Pension Funds Act 24 of 1956 regulates the establishment and administration of the fund, while the Income Tax Act 58 of 1962 provides tax saving incentives to encourage employees to contribute to funds in order to provide for their retirement. For the purposes of this study pension fund rules are more significant than legislative provisions. The reason is that, generally, the rules are drafted by employers. The Pension Funds Act specifies matters which are to be included in the rules of a pension fund, but does not specify how key issues such as admission to membership, termination of membership, conditions for entitlement to benefits and the extent of such benefits, should be dealt with.²⁹⁶ As a result employers effectively control the operation of

295 The two most significant statutes pertaining to retirement schemes are the Pension Funds Act 24 of 1956 and the Income Tax Act 58 of 1962.

296 Section 11 of the Pension Funds Act specifies that the following matters are to be included in the rules of a fund:

- (a) the name of the fund and the situation of its registered office;
- (b) the objects of the fund;
- (c) the requirements for admission to membership and the circumstances under which membership is to cease;
- (d) the conditions under which any member or other person may become entitled to any benefit and the nature and extent of any such benefit;
- (e) the appointment, removal from office, powers and remuneration (if any) of officers of the fund;
- (f) the powers of investment of funds;
- (g) the manner of determining profits and losses and of disposing of such profits or providing for such losses;
- (h) the manner in which contracts and other documents binding the fund shall be executed;
- (i) in the case of a fund with share capital, the amount of such share capital and the division thereof into shares of a fixed amount, whether the liability of a shareholder for the debts of the fund is limited or unlimited, the conditions relating to participation in the profits of the fund by the shareholders, subject to the condition that such participation shall not in any one year exceed an amount equal to five percent, of the paid up share capital, the conditions of redemption or repayment of shares, the conditions relating to calls on shares, the manner of transfer and transmission of shares, the manner of forfeiture of shares, and the manner of alteration of share capital;
- (j) the manner of altering and rescinding any rules, and of making additional rules;
- (k) the appointment of the auditor of the fund and the duration of such appointment;
- (l) the manner in which any disputes between the fund and its members or between the fund and any person whose claim is derived from a member shall be settled;

funds.²⁹⁷ Control by employers may be reduced by the effects of collective bargaining. It is probable that an employer's refusal to bargain on this issue would constitute an unfair labour practice. A pension fund benefit is specified as an issue which may be included in an industrial council or conciliation board agreement.²⁹⁸

An employee may challenge the operation of a pension fund on two grounds. In the first instance she may allege that the rules of a fund are unfair. Secondly, she may allege that the application of the rules by an employer is unfair. One question which arises is whether the Industrial Court has the jurisdiction to consider disputes relating to the alleged unfairness of pension fund rules. The reason for the uncertainty is that the LRA limits disputes which may be processed in terms of its unfair labour practice mechanism to those between employers and employees.²⁹⁹ A pension fund is not an employer for the purposes of the type of dispute referred to above. An employee must seek redress against her own employer.³⁰⁰ In *Jarvis v Dano Textile Industries (Pty) Ltd*³⁰¹ the practice complained of derived from the rules of the pen-

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- (m) the custody of any title deeds and other securities belonging to or held by the fund;
 - (n) subject to the provisions of this Act, the manner in which and the circumstances under which the fund shall be terminated or dissolved;
 - (o) the appointment of a liquidator;
 - (p) such other matters as the registrar may approve."

297 Sephton, Cooper and Thompson 3 explain that "the rules of funds have generally remained within the preserve of managerial prerogative and they have been sculpted accordingly."

298 Sections 24(1)(r) and 35(1)(b) of the Labour Relations Act.

299 Section 27(A) (industrial councils) and section 35 (conciliation boards).

300 Van Niekerk 87 explains that employers "have been wont to raise, by means of a point *in limine*, the court's lack of jurisdiction by seeking to differentiate between themselves and the fund, a separate legal persona. These points have not always succeeded; the court has indirectly exercised jurisdiction over the management of a fund by virtue of the employment relationship and where the employer is party to a process of collective bargaining regulating the management of the fund."

301 Unreported NHN 11/2/637 19 June 1989.

sion fund.³⁰² The question was whether it could amount to an unfair labour practice in terms of the LRA. On the evidence before it the court found that it was not an unfair labour practice. But the court did mention that the effect of the practice flowed from the rules of the fund *and, indirectly*, from the employer's actions. It did not elaborate on this observation. It has been suggested that the court's concession that the employer's actions were the indirect cause of the (unfair) practice provides scope for significant development. It provides a basis for the argument that an employer's failure to implement fair rules (which, in respect of female employees, includes non-discriminatory rules) amounts to an unfair labour practice.³⁰³

The viability of the above argument was reinforced by the decision of the Industrial Court in *Chamber of Mines of SA v Council of Mining Unions*.³⁰⁴ The amendment of (racially) discriminatory pension fund rules was the subject of dispute. The rules of the Mine Employees Pension Fund did not permit the admission of Black, Coloured or Asian employees as members. The racially exclusive Council of Mining Unions (CMU) refused to amend the rules to admit persons who were not White, to the fund. The Chamber of Mines, an employer's organisation, asked the court to declare that "the refusal of the respondent, the CMU, to agree to admit as members of the Mine Employees Pension Fund (the MEPF), Black, Coloured and Asian employees in occupations, which if undertaken by Whites, would qualify them as members of the fund", constituted an unfair labour practice, and to direct the respondent to take the steps necessary to procure the admission of those employees

302. The alleged unfair practice did not relate to sex discrimination by the employer, but to the payment of benefits upon retrenchment. The employee complained about the fact that he did not receive the benefit of the employer's contribution to the fund upon his retrenchment -- the contribution remained in the fund.

303. Field 977. The author suggests that the case law in respect of disciplinary codes may be analogous.

304. (1990) 11 *ILJ* 52 (IC).

to the fund. The CMU's refusal to amend the pension fund rules to admit the excluded persons was held to constitute an unfair labour practice, and it was ordered to take steps to admit those persons. The decision is significant because Industrial Court was prepared to order the party which controlled the rules to amend a discriminatory rule. By analogy, the court should not hesitate to order an employer which controls pension fund rules to amend a rule which has the effect of discriminating against female employees.³⁰⁵

The decision of the Industrial Court was taken on appeal to the Labour Appeal Court, where the jurisdiction of the lower court was challenged.³⁰⁶ There it was argued that the union had exercised a right which it had in terms of the pension fund rules, and that the Industrial Court could not deprive it of that right. The argument was rejected by the Labour Appeal Court, which stated, *inter alia*:

"The argument, however, completely overlooks the nature, purpose and scope of the Act. It assumes that as long as the appellant does nothing unlawful, it can never be ordered by the industrial court to do anything. That of course is not correct...."

It is clear that there is a dispute between the appellant, a workers' organization, and the respondent, an employer organization, about the question if the appellant's refusal to agree to an amendment is unfair or not. There is no dispute that it is a labour practice in the sense that it is a device employed in the labour field. It was found by the court *quo* that the appellant is using the rules of the fund to compel the respondent to discriminate between employees purely on the basis of race and that that conduct is unfair.... The court *quo*'s reasoning in this respect cannot be faulted.³⁰⁷

305 Commenting on the decision, Field 979 states: "It is illuminating, however, that the industrial court was prepared to order a party which controls the rules to amend an oppressive rule. This opens the way for members or their trade unions to compel the amendment of a range of other oppressive or discriminatory rules."

306 *Council of Mining Unions v Chamber of Mines of SA* (1991) 12 ILJ 796 (LAC).

307 At 800- 801. See also *Archibald v Bankorp (Ltd) (Now ABSA Ltd)* Unreported NH 11/2/8872 24 August 1992, where the Industrial Court commented on the role of the employer with regard to pension fund rules and the operation thereof in the following manner: "I cannot, however, agree with the submission that a dispute does not exist between the applicant and the first respondent [the employer]. It is common cause that at the instance of the first respondent, membership of the Pension Fund (the second respondent) was made compulsory for the applicant and that the Board of Trustees of the Fund consists of 12 trustees of whom six were nominees of the first respondent. The question arises whether the employer in deciding to

The court will not only intervene where the rules of a pension fund are unfair, but also where an employer applies the rules unfairly. In *Van Copenhagen v Shell and BP SA Petroleum Refineries*³⁰⁸ the employer was granted the right, in terms of the pension fund rules, to exercise its discretion to permit deferment of an employee's pension. The employee applied for deferred pension due to early retirement, but the employer refused to give its consent as required in the rule. The Industrial Court distinguished between the source of the employer's right to exercise its discretion (namely, the pension fund rules) and the actual exercise of that discretion. It found that the dispute concerned the exercise of the employer's discretion. As the dispute arose out of the employment relationship and existed between the employer and employee as such, the court held that it had jurisdiction to consider whether the employer had exercised its discretion fairly. On the facts it found that the employer had not done so, because its sole motive had been the protection of its own interests, to the detriment of the employee. To grant permission would have had no adverse effect on the pension fund. The employer was ordered to consent to deferment.

Similarly, *SA Vereniging van Munisipale Werknemers (Nie-politiek) v Ventersdorp Munisipaliteit*,³⁰⁹ dealt with the application of pension fund rules by an employer. The court found that the employer had acted unfairly in terminating the services of an employee without considering the effect of its action on the employee's pension

retrench the applicant had given any consideration to the question of compensating him for loss of his long-term pension benefits to which he would have been entitled had he not been prematurely retrenched. *In my view a failure or refusal of an employer to take steps to amend the pension fund rules so that a retrenched employee is not unfairly penalised could give rise to an unfair labour practice especially in circumstances where the employer enjoys strong representation on the board of trustees of the pension fund and is able to influence the board's decision*" (own emphasis) (at 13-14 of the unreported decision).

308 (1991) 12 ILJ 620 (IC).

309 (1990) 11 ILJ 1155 (IC).

entitlement. Although the effect of termination on pension benefits (namely, the forfeiture of benefits) stemmed from the rules, the employer's failure to consider those effects was found to be unfair. The court did not order an amendment of the rules because it was able to eliminate the unfairness of the employers action by means of an order which had the effect of a reinstatement order -- the employer was ordered to pay the applicant her salary for two years, that is, until she qualified for pension. The significance of the decision lies in the fact that the court expected the employer, and not the employee, to bear the cost of the unfair pension fund rules.³¹⁰

Regarding the Industrial Court's decisions in respect of pension and provident funds, it has been said:

"Notwithstanding its discomfort with some of the relatively new concepts it has had to grapple with in this area, the industrial court has shown clear indications that it will be prepared to use its unfair labour practice jurisdiction to grant relief to aggrieved pension and provident fund members who can show employer perpetrated inequities. It is now up to the employees, trade unions and practitioners to attempt to crystallise these emergent, tentative rulings into fixed rights."³¹¹

The Industrial Court has indicated that it will intervene both where pension fund rules are formulated unfairly and where they are applied unfairly. It is suggested that the problems with which the court has grappled regarding jurisdiction would be

310 It may be noted that, following the decision of the Labour Appeal Court in *Hoogenoeg Andolusiete (Pty) Ltd v National Union of Mineworkers (1)* (1992) 13 ILJ 87 (LAC), the court may award reinstatement which may not be retrospective for more than six months, or an amount of compensation equivalent to not more than six months' salary. In terms of that approach, an award as extensive as the one granted in the *Ventersdorp Municipaliteit* case may not be possible. The decision in *Ventersdorp Municipaliteit* was taken on review to the Labour Appeal Court. The application for review was successful only because the LAC was of the opinion that the Industrial Court had decided on the unfairness of the pension fund rules without affording the parties an opportunity to lead evidence (*Ventersdorp Town Council v President of the Industrial Court, SAAME and Du Plessis* Unreported NH 11/2/3408 14 August 1992).

311 Field 983.

eliminated in respect of sex discrimination disputes, if it accepted, in accordance with the European approach, that an employee's pension benefits are part of her remuneration. That would accord with the definition of remuneration contained in the LRA itself.³¹² Remuneration is defined as:

"any payment in money or in kind or both in money and in kind, made or owing to any person, which arises in any manner whatsoever out of employment..."

If pension benefits were regarded as part of an employee's remuneration, the obligation to contribute to the fund and subsequent entitlement to pension would constitute conditions of employment. Clearly, discrimination in that regard would be impermissible.

7 Affirmative Action

Affirmative action, which addresses the effects of traditional institutional practices, is advocated in the Discrimination (Employment and Occupation Convention) 111 of 1958 and has been accepted in both the United Kingdom and the United States. The emphasis in the United Kingdom is on preferential training for female employees. In the United States it may be implemented as a court ordered remedy or it may be adopted voluntarily by an employer. Voluntary affirmative action is permitted in order to break down patterns of segregation and hierarchy, provided that it does not unduly trammel the rights of unprotected employees.

It is submitted that the Industrial Court should not regard affirmative action by an employer as discrimination (against male employees). The court may impose the same standard as that which is generally accepted, namely, that the action should be

a temporary measure and that it should not show undue disregard for the rights of unprotected employees.

However, it is felt that employers should not only be permitted, but should be obliged, to implement affirmative action programmes in order to increase career opportunities and to allow women to catch up on the basis of individual ability. Because affirmative action is results orientated, employers should be required to set objectives which are flexible (as opposed to rigid quotas), and timetables for meeting those objectives. Here the Canadian approach seems viable. Under the Canadian Employment Equity Act objectives are set through collective bargaining.³¹³ The employer draws up a plan setting out its goals and a timetable for the implementation of those goals.³¹⁴ Compliance is monitored by the state.³¹⁵

The measures set out in the Namibian Draft Bill on Affirmative Action in Employment are indicative of the type of action required of employers.³¹⁶ It includes:

- * a procedure to inform and consult employees and their representatives about the affirmative action programme;
- * a work force analysis to determine whether women are reasonably represented in the various positions of employment;
- * an evaluation of existing employment practices to identify those which tend to discriminate against or exclude women;

313 Section 4.

314 Section 5.

315 Section 6.

316 Section 37(1) of the Draft Bill. The action is required to be taken on the basis of the sex, gender or physical disability of employees.

- * action to eliminate, amend or revise employment practices which tend to discriminate against or to exclude women;
- * special training to enable female employees to acquire the necessary skills and qualifications to be recruited by or to advance their careers with the relevant employer;
- * the preferential recruitment or promotion of suitably qualified women to ensure equitable representation;
- * the setting of numerical goals and objectives that the employer intends to achieve;
- * the establishment of a timetable for attainment of those goals;
- * an internal procedure to monitor and evaluate the implementation of the affirmative action programme.

In conclusion it may be said that an affirmative action programme for women should focus on vocational training, a more equitable distribution of occupational and domestic responsibilities, working conditions and the need to make employers and employees generally more aware of working women's problems.

8 Protection of Female Employees

So-called protective legislation is aimed at protecting female employees against working conditions deemed to be unsuitable to them by virtue of their sex. It includes legislation which seeks to entrench the role of females as home-makers, and therefore seeks to regulate the hours which they may work, for example, by limiting their hours of overtime or by outlawing night work. The International Labour Organisation's Night Work (Women) Convention 89 of 1948, which was ratified by South Africa before the country terminated its membership in 1966, provides that:

"Women without distinction of age shall not be employed during the night in any public or private industrial undertaking, or in any branch thereof, other than an undertaking in which members of the same family are employed."

Despite ratification of the convention, there are no longer any statutory provisions of this nature in South Africa. The BCEA regulates the hours of overtime of all employees who are covered by the Act, and does not distinguish with regard to the sex of employees.³¹⁷ The Mines and Works Amendment Act 13 of 1991 removed the restriction on women working at night in mines or works.³¹⁸

During 1990 two International Labour Organisation instruments amended the approach of that organisation to night work. The 1990 Protocol to the 1948 Night Work (Women) Convention provides for the lifting of the prohibition on night work by female employees, subject to certain conditions being imposed by national governments. The conditions relate largely to protection during pregnancy and maternity, and require, inter alia, that women should not work at night around the time of confinement, that job security should be guaranteed, and that an adequate income should be maintained. The Night Work Convention 171 of 1990 applies to all employees who work at night. It requires protection in areas such as meeting of family and social responsibilities, occupational advancement and compensation. None of these safeguards are contained in the South African legislation.

317 Section 8. Regulations made by the competent Minister in terms of section 37 may not differentiate on the ground of an employee's sex. The BCEA replaced the Shops and Offices Act 75 of 1964 and the Building Work Act 22 of 1941, both of which prohibited night work by women.

318 The Act amended the Mines and Works Act 27 of 1956. It was the predecessor of the Minerals Act 50 of 1991. It may also be mentioned that discrimination on the ground of an employee's sex is not permitted in industrial council agreements concluded in terms of the Labour Relations Act 28 of 1956 (sections 24(2), 48(12) and 51(9)), nor in determinations made in terms of the Wage Act 5 of 1957 (section 8(4)). For a discussion of the statutory regulation of night work see Murray 47- 60 and Benjamin 476- 481.

Protective legislation also includes legislation which seeks to protect women as the frailer sex. These provisions result in a distinction between the health and safety standards legislated for male and female employees. In terms of the Minerals Act 50 of 1991, for example, women may not work underground in a mine, subject to certain limited exceptions.³¹⁹ Provisions of the General Safety Regulations published in terms of the Machinery and Occupational Safety Act 6 of 1983 (MOSA), dealing with rest and dining rooms and the provision of seats, distinguish between the facilities which are to be made available to male and female employees.³²⁰ The reasoning underlying the latter provisions appears to be that natural differences between men and women should not be disregarded, and that courtesy should be maintained. This reasoning is unacceptable as it reinforces stereotypical perceptions. Initially, the Court of Appeal in the United Kingdom adopted a similar line of reasoning. The court found that an employer's practice of allowing female employees to leave work five minutes before their male counterparts did not amount to unlawful sex discrimination (against male employees), as it was no more than a manifestation of common courtesy.³²¹ The court's reasoning was criticised as it could justify all kinds of disadvantage based on consideration for the so-called weaker sex.³²² The finding was later disapproved by the same court.³²³

319 Section 32(2). The exceptions are (a) females holding positions of management and who do not perform manual work; (b) females employed in health and welfare services; (c) females who in the course of their studies have to spend a period underground in a mine for training or research purposes; (d) any other females who may occasionally have to go underground in a mine for the purposes of a non-manual occupation.

320 Section 35 of this statute empowers the Minister to make regulations pertaining to a wide variety of matters. Discrimination on the grounds of race and colour is outlawed but not on the ground of sex (section 35(3)). Examples of provisions of this nature can be found in the regulations regarding health and welfare which were made in terms of the repealed Factories, Machinery and Building Work Act 22 of 1941, and which are now deemed to have been made under MOSA (see, for example, regulation B.8 which provides for rest and dining rooms, and regulation B.10 which deals with the provision of seats).

321 *Automotive Products Ltd v Peake* (1977) IRLR 365 (CA).

322 Ellis 77 stated that the court's reasoning could "drive a horse and coaches through the Sex Discrimination Act".

Protective legislation may also be enacted to protect women with regard to pregnancy and maternity. In the United Kingdom an employer is permitted to discriminate against female employees where its action complies with a statutory requirement regarding pregnancy or maternity or other risks specifically affecting women (such as lead or ionising radiation).³²⁴ This is the only category of protective legislation which remains applicable, following the amendment of the Sex Discrimination Act in accordance with the provisions of the European Equal Treatment Directive 1976.³²⁵ It is limited to protection of a woman's physical condition and is not intended to permit assumptions about the type of work which is suitable for women based on traditional stereotypes. Where male employees are at equal risk, they must be protected accordingly -- under those circumstances it is discriminatory to apply protective measures only to female employees.³²⁶ In South Africa the BCEA prohibits an employer from allowing a pregnant employee to work during the period commencing four weeks before the expected date of her confinement and ending eight weeks thereafter.³²⁷ This is one of only a few statutory provisions pertaining to pregnancy.³²⁸ While it is necessary to protect a woman's biological condition, the provision, appearing as it does in a virtual statutory vacuum, it is capable of being applied to discriminate against pregnant

323 *Ministry of Defence v Jeremiah* (1979) IRLR 436 (CA).

324 Section 51 of the Sex Discrimination Act.

325 Directive 76/207. Section 51 of the Sex Discrimination Act was amended following the decision of the European Court of Justice in *Johnston v The Chief Constable of the Royal Ulster Constabulary Case 222/84* (1986) ECR 1651/ (1986) IRLR 263 (European Ct).

326 *Johnston v The Chief Constable of the Royal Ulster Constabulary Case 222/84* (1986) ECR 1651/ (1986) IRLR 263 (European Ct).

327 Section 17(b).

328 The other provisions, contained in the Unemployment Insurance Act 30 of 1966 (section 37) and, it is submitted, the Labour Relations Act 26 of 1956 (the unfair labour practice definition in section 1) are discussed in the context of pregnancy discrimination.

employees.

Although protective legislation is aimed at protecting female employees, it tends to operate in a discriminatory manner. Legislative provisions regulating hours of work, and health and safety at work, should be enacted to protect both male and female employees. Distinction between the protection afforded on the grounds of an employee's sex, enables employers to justify differential treatment with regard to employment opportunities. Special treatment due to pregnancy and maternity is necessary, provided that it is adequately formulated to protect only a woman's physical condition. It should not permit stereotypical assumptions about the type of work which is suitable for women.

In the United States there is no federal protective legislation. Initially, many states sought to protect women by restricting the type of work which they were allowed to perform and the hours which they were allowed to work.³²⁹ The conduct authorised in terms of state laws constituted unlawful discrimination in terms of Title VII (which takes precedence over state laws), unless it could be said to fall within the bona fide occupational qualification (BFOQ) defence provided in Title VII.³³⁰ A BFOQ exists where an employer can show that all, or substantially all, women are unable to perform essential job duties safely and efficiently. It cannot be established merely by showing that a significant number of women are unable to perform essential job duties. An employer is prohibited from basing the defence on a stereotyped assumption about the capabilities of women.³³¹

329 Player 290.

330 Section 703(e)(1) of Title VII.

331 The Supreme Court in *Dothard v Rawlinson* 433 US 321 (1977) sanctioned the narrow approach contained in the EEOC's interpretative guidelines on sex discrimination.

D The Role of Collective Bargaining

The role of collective bargaining cannot be overlooked. It can play a significant role within and outside the collective bargaining structures created by the LRA. The premise upon which the LRA is based is that collective bargaining is the most effective way of resolving disputes between employers and employees and of formulating terms and conditions of employment.³³²

The Act provides for the establishment of industrial councils and conciliation boards. An industrial council is a permanent body. It is formed by parties to the council signing its constitution, followed by registration of the council under the Act.³³³ The duties of the council are to endeavour, by the negotiation of agreements or otherwise, to prevent disputes from arising, to resolve disputes which have arisen, and to regulate matters of mutual interest to employers and employees.³³⁴ The Act sets out the matters which may be dealt with by an industrial council agreement, including, for example, the minimum rate of remuneration of employees, the establishment of pension, sick, medical, unemployment, holiday, provident, and other insurance funds and the levying of contributions toward such funds, and the regulation of overtime work. The broadly formulated list of matters which an agreement may cover concludes with a general provision, permitting an agreement to deal with any matter of mutual agreement to employers and employees regarding terms and conditions of employment.³³⁵ An agreement may not distinguish between

332 In *National Union of Mineworkers v East Rand Gold and Uranium Company Ltd* (1991) 12 ILJ 1221 (A) the Appellate Division of the Supreme Court stated that: "The fundamental philosophy of the Act is that collective bargaining is the means preferred by the legislature for the maintenance of good labour relations and for the resolution of labour disputes" (at 1236-1237).

333 Section 18(1).

334 Section 23(1).

335 Section 24(1).

employees on the ground of sex.³³⁶

A conciliation board is an ad hoc body which is established in order to attempt to settle a dispute between an employee and/ or trade union on the one hand and an employer on the other³³⁷ A conciliation board agreement may deal with the same matters as those which may be dealt with in an industrial council agreement, and may not differentiate between employees on the ground of sex.³³⁸

In the absence of broad anti-discrimination legislation, collective bargaining provides a way of securing basic rights for female employees. If anti-discrimination legislation were in place, collective bargaining could play a supplementary role with regard to specific issues. Because it constitutes a consensual approach to resolving conflict, rules resulting therefrom are likely to reflect the needs of the employer as well as its employees in a given situation. It should be borne in mind, however, that the viability of resolving conflicts between work and domestic responsibilities through collective bargaining depends on the number of females employed, and the female percentage of union membership and leadership.³³⁹

336 Section 24(2).

337 Section 35(1).

338 Section 36(1)(b).

339 Myakayaka-Manzini 14 states that substantial gains have been procured for female employees through collective bargaining, particularly in respect of parental responsibility. The author refers to agreements reached by SACCAWU/ CCAWUSA and employers. The Draft Code of Practice to End Unfair Discrimination in Employment Practices, proposed by NUMSA to SEIFSA contains a broad spectrum of anti discrimination and equal employment provisions.

E The Effect of a New Constitution

In the United States the Fifth and Fourteenth Amendments to the constitution provide for equal protection of the laws. The provisions have been invoked to challenge sexual classifications in legislation, and have been relied on directly by employees of the state to challenge discriminatory employment practices. It is possible that a future South African constitution will contain similar protection.

The draft Bill of Rights of the African National Congress provides that no individual or group should receive privileges or be subjected to discrimination, domination or abuse on the ground, *inter alia*, of gender.³⁴⁰ It also states that all men and women should have equal protection under the law.³⁴¹ Under the heading "Worker's rights", the draft provides for equal pay for equal work, and equal access to employment.³⁴²

The Bill of Rights proposed by the South African Law Commission states that everyone has the right to equality before the law. No legislation or executive or administrative act may directly or indirectly favour or prejudice any person on the ground, *inter alia*, of sex.³⁴³ In order to attain equality before the law, affirmative action is possible to ensure that all citizens have equal opportunities to develop their talents and potential through education and training, financing programmes and employment.³⁴⁴ The proposed list of "Employees' rights" includes the right to "receive

340 Article 1(2).

341 Article 1(3).

342 Article 6(11).

343 Article 3(a).

344 Article 3(b).

equal payment with other employees for corresponding production of an acceptable quality, due regard being had to such aspects as qualifications, experience, the means of an employer and the forces of supply and demand in the labour field".³⁴⁵

F Common Law

Many employees, including farmworkers, domestic servants in private households and employees of the state, are excluded from the ambit of the Labour Relations Act. They are unable to approach the Industrial Court for relief in respect of employment discrimination, and must rely on the common law. It is therefore necessary to consider whether the common law could be utilised to counter discrimination in the employment sphere.

A claim at common law could be based either on contract or on delict. A contract of employment, which can be formulated in a manner which includes, for example, work place regulations or an employment code, may prohibit discrimination in the work place.

In the absence of a contractual provision it would be necessary to consider whether the conduct complained of constituted a delict. A delict may be defined as conduct which in a wrongful and blameworthy way causes harm to another.³⁴⁶ It is apparent from the definition that a delict consists of five elements, namely, conduct, wrongfulness, fault, harm and causation.³⁴⁷

345 Article 28(d).

346 Neethling Potgieter and Visser 4; Van der Walt 2.

347 Neethling Potgieter and Visser 4; Van der Merwe and Olivier 26; Van der Walt 20.

A delict may cause patrimonial damage (*damnum iniuria datum*) or injury to the personality (*iniuria*). The action which is instituted will depend on the form of the delict. A plaintiff may rely on the *actio legis Aquiliae* to claim damages for patrimonial loss which was caused wrongfully and culpably (intentionally or negligently). She may rely on the *actio iniuriarum* to claim solace (*solatium*) for wrongful and intentional injury to personality.³⁴⁸ A woman who alleges that she has been discriminated against by her employer may rely on one of these actions, depending on the nature of the conduct. All five elements of a delict would have to be present for her to succeed. The question of whether conduct,³⁴⁹ fault,³⁵⁰ harm³⁵¹ and causation³⁵² can be present would probably not be in dispute (although the fac-

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- 348 Neethling Potgieter and Visser 5; Van der Merwe and Olivier 15; Van der Walt 2.
- 349 Conduct consists of voluntary human conduct in the form of either an act or omission (Neethling Potgieter and Visser 21; Van der Merwe and Olivier 27; Van der Walt 57).
- 350 Van der Walt 60 describes fault as "the subjective element of a relict." He explains: "There is fault on the part of the defendant if he acted either in a reprehensible state of mind or with insufficient care. Fault in the form of a reprehensible state of mind is intent or dolus. Fault in the form of inadequate care is negligence or culpa. The existence of either intent or negligence on the part of a defendant is the basis for imputing his wrongful conduct to him." Neethling Potgieter and Visser 110 explain that motive should not be confused with intent. He states: "In general motive indicates the *reason* for someone's conduct and must not be confused with intent. Intent is a technical legal term which, as stated earlier, denotes willed conduct which the wrongdoer knows is wrongful; motive, on the other hand, refers to the reason why a person acts in a particular way, that is the object he wants to achieve, his desire, or the facts behind the formation of his will. A person may thus, despite the fact that in his opinion he has a good motive, still act with intent..."
- 351 Harm may be in the form of patrimonial loss or an injury to the personality (Neethling Potgieter and Visser 5; Van der Merwe and Olivier 182; Van der Walt 20).
- 352 The conduct of the defendant must be the factual as well as the legal cause of the harm suffered by the plaintiff. Various theories have evolved in order to determine whether there is a nexus between the act and the harmful consequence. The *sine qua non* theory is generally applied to determine the existence of factual causation. Van der Merwe and Olivier 197 explain the test as follows: "Hiervolgens is 'n handeling oorsaak van 'n gevolg indien die handeling nie weggedink kan word sonder dat die die gevolg tegelyk verdwyn nie. Die handeling moet met ander woorde *conditio sine qua non* vir die gevolg wees." (For criticism of the theory, see Neethling Potgieter and Visser 147- 153.) The other theories limit the potentially expansive ambit of this one, and are applied to establish legal causation. In terms of the adequate causation theory a wrongdoer is responsible only if the consequence is adequately connected to the conduct (Neethling Potgieter and Visser 156). According to the direct consequences theory the wrongdoer is held responsible for the all direct physical consequences of his conduct, provided that there have been no independent intervening events, and provided that the harm was foreseeable (Neethling Potgieter and Visser 158- 159). Van der Merwe and

tual existence would have to be proved). The question which arises is whether the discriminatory conduct complained of could be regarded as wrongful. Conduct is wrongful if it infringes a legally recognised right, or breaches a legal duty (which may be imposed by a statute or by the common law).³⁵³ Neither common law nor any statute of general application³⁵⁴ imposes a duty upon an employer not to discriminate. The question to be determined is thus whether an employer's discriminatory conduct would be regarded as a breach of a subjective right.

The doctrine of subjective rights was recognised by the Supreme Court in *Universiteit van Pretoria v Tommie Meyer Films (Edms) Bpk.*³⁵⁵ The court found that the nature of a subjective right was determined by the nature of the object of that particular right. Four categories of rights were distinguished, namely, real rights, personality rights, immaterial property rights and personal rights. The objects of the rights were identified as things (tangible objects), aspects of personality (such as physical integrity, honour, good name and privacy), immaterial property (such as an invention, a work of art or a trade mark) and acts and performances (human acts which may be claimed by another, such as delivery of an object sold or rendering of services by an employee).³⁵⁶ In *Hawker v Life Offices Association of SA*³⁵⁷ the

Olivier 194 propose that an actor should be held responsible only for those consequences in respect of which he had fault. They regard legal causation as an unnecessary element. The generally accepted test is that of foreseeability, which Van der Walt 100 explains as follows: "The foreseeability test requires only the general nature or the kind of harm which actually occurred to have been reasonably foreseeable. The precise extent or manner of occurrence need not have been reasonably foreseeable."

353 Neethling Potgieter and Visser 29; Van der Merwe and Olivier 52; Van der Walt 21.

354 The provisions of the Labour Relations Act 28 of 1956 are not under discussion here.

355 (1976) 4 SA 376 (T).

356 At 382. See also Neethling Potgieter and Visser 42- 43.

357 (1987) 8 JILJ 231 (C).

Supreme Court recognised a fifth category of subjective rights, namely, personal immaterial property. The objects are intangible products of the human mind which are connected with personality, and include earning capacity and creditworthiness.³⁵⁸ The recognition by the Supreme Court of the right to earning capacity, the so-called right to exercise a chosen calling, is significant here.

The employer in the *Hawker* case had placed the name of its former employee on an industry "blacklist" following disciplinary action against him. The court considered the wrongfulness of the employer's conduct. It held that in the absence of legal and contractual restrictions the employee had the subjective right to exercise his chosen calling without unlawful interference from others. Earning capacity as a legal object was found to contain both "factors of personality" and a "monetary component".³⁵⁹ Interference by the employer (blacklisting) was equated to unlawful interference with a trader's right to goodwill. The court found that the interference with the employee's right to earn his livelihood in his chosen sphere was unlawful.³⁶⁰

It may be argued, by analogy, that unfavourable treatment of an employee based on the sex of that employee amounts to unlawful interference with her subjective right to exercise her chosen calling. The court in *Hawker* stated that if interference with another's subjective right was unreasonable according to the standard of the *boni mores* of the community, it was unjustifiable and thus unlawful.³⁶¹ It can be argued

358 Neethling Potgieter and Visser 43.

359 At 780.

360 See Neethling and Le Roux 719 ff for a discussion of, and exhaustive comment on, the *Hawker* decision.

361 At 235. The court went on to state that: "Whether the respondent's action in the present matter was unreasonable and thus unlawful involves a weighing-up of the particular conflicting interests of the parties, their relationship to one another, the circumstances of the case and considerations of social policy..."

that interference with an employee's earning capacity based on any individual quality or attribute which is immutable, including the sex of an employee, would offend the *boni mores* of society. Internationally, conduct of that nature is regarded as unjust. It is proscribed in international instruments of the International Labour Organisation and, on a regional level, the European Economic Community. Legislation in the United States and Britain has branded it unlawful. In South Africa, as explained above in this chapter, it would be regarded as unfair by the Industrial Court.

An employee may institute a claim for patrimonial or pecuniary loss suffered, or for sentimental damages due to an injury to a personality interest. Pecuniary loss is generally regarded as a diminution of the patrimony.³⁶² In the context of discrimination an employee may allege that she suffered patrimonial loss, for example, because she was not paid as much as a male colleague or because she was demoted, dismissed or not promoted. On the other hand, she may allege that there has been an injury to an interest of personality.³⁶³ In the context of sexual harassment, for example, an employee may seek to recover damages from her employer for defamation,³⁶⁴ insult³⁶⁵ or impairment of her physical-mental integrity.³⁶⁶

362 Van der Merwe and Olivier 181. However, as Necthling Potgieter and Visser 183 explain: "It should be remembered that both the infringement of a patrimonial right (for example the right to a thing) as well as the infringement of a personality right (for example the right to bodily integrity) may be relevant in a case of pecuniary loss. Where a person is, for example, injured to such an extent that he has medical expenses, a personality right has been infringed but the damage is still of a pecuniary (or patrimonial) nature. From this it may be concluded that *pecuniary loss* does not necessarily imply that a *patrimonial* right must have been infringed or a patrimonial interest impaired.

363 In that case the employee's loss would not have been pecuniary. Visser 121 describes non-pecuniary loss as "the harmful impairment (or factual disturbance) of the legally protected personality interests of a person which does not affect his economic position."

364 Defamation entails infringement of the plaintiff's right to her good name or reputation (*jama*) (Necthling Potgieter and Visser 196; Van der Merwe and Olivier 394).

365 Necthling Potgieter and Visser 197 describe insult as "the infringement of the subjective feelings of the individual involved". Van der Merwe and Olivier 394 explain: "So... word die skending van 'n persoon se reg op sy goeie naam as "laster" bestempel, terwyl die aantasting van die

Finally, mention may be made of the position of employees who are covered by the Public Service Act 111 of 1984. In terms of the Act the State President may make regulations based on the recommendations of the Commission for Administration.³⁶⁷ Those regulations may be included in the Public Service Staff Code.³⁶⁸ Different regulations may be made to suit the varying requirements of particular departments, or of particular classes of employees, or particular kinds of employment within the public service.³⁶⁹ Discrimination on the ground of sex is not prohibited when distinguishing between classes of employees or kinds of employment. The position of female employees, particularly those who are married, is in fact invidious. One reason is that the traditional concept of the male breadwinner is utilised to determine entitlement to benefits.³⁷⁰ As a result married women do not receive a housing subsidy, nor are their spouses and dependent children registered as dependents for the purposes of medical aid membership. Pension benefits are also less beneficial than those of their male counterparts. Unmarried women who become pregnant are not entitled to maternity benefits (such as compensation for

reg op die *dignitas* weer as 'n "belediging" of "*iniuria* in enger sin" aangemerkt word."

- 366 This may include a claim for pain, suffering and discomfort as well as shock. Neethling Potgieter and Visser 199 explain that impairment of interest here may take the form of "a physical impairment of feelings or infringement of the emotions and consciousness through pain caused by physical injury and through nervous (emotional) shock".
- 367 Section 35.
- 368 Section 36.
- 369 Section 35(2).
- 370 *Die Staatsamptenaar 3* explains: "Daar word met die broodwinnerbeginsel tot uitsluiting van sekere voordele vir getroude vroue gewerk. Daar word nl. veronderstel dat behalwe vir 'n enkele uitsondering die getroude man in die eerste plek vir 'n gesin se onderhoud sorg en dat so 'n persoon op sekere voordele tot die uitsluiting van die getroude vrou daarvan, geregtig is. Om hierdie resultaat te bereik werk die Staatsdiens met die omskrywing van "huishouding" en "afhanklike" wat 'n getroude vrou behalwe vir 'n enkele uitsondering as afhanklike tipeer." The only exception to reliance on the traditional male breadwinner concept is in the case of a female employee whose husband is permanently disabled.

the cost of confinement), while male employees whose partners became pregnant before marriage are not excluded.³⁷¹

It can be argued that regulations made in terms of the Public Service Act which discriminate against female employees are in fact ultra vires and void. In *R v Abdurahman*³⁷² the Appellate Division of the Supreme Court stated that partial or unequal treatment between different classes of the community could not be prescribed by regulation unless authorised by legislation. In the absence of authorisation by the enabling legislation, provisions of that nature would be void. It explained that:

"It is the duty of the Courts to hold the scales evenly between the different classes of the community and to declare invalid any practice which, in the absence of the authority of an Act of Parliament, results in partial and unequal treatment to a substantial degree between different sections of the community...."³⁷³

The Supreme Court has also stated that a statute does not authorise discrimination merely by giving the competent minister wide powers to make regulations. The power to discriminate must be granted by express authority or by necessary implication. Unless that is done, the presumption is that regulations may not discriminate.³⁷⁴ The Public Service Act does not authorise partial or unequal treat-

371 *Die Staatsamptenaar* 3. Maternity benefits do not include entitlement to maternity leave. The position is explained as follows: "Slags die vrou kan geboorte aan kinders gee maar ten spyte hiervan gebeur dit by herhaling dat die werkgewer (departemente) weier om aan vroue verlof toe te staan. Waar sodanige verlof nie toegestaan word nie, moet die vroue met die oog op die bevalling bedank. Indien verlof dan wel toegestaan word, kan vroue hoogstens hulle opgeloopte vakansieverlof en daarna verlof sonder betaling neem. Die werkgewer staan egter daarteenoor spesiale verlof met volle betaling vir studie, sport- en ander doeleindes geredelik toe" (4).

372 1950 3 SA 136 (A).

373 At 145.

374 In *S v De Wet* 1978 2 SA 515 (T) the court stated that: "Racial discrimination of this kind... is permitted only if the Act authorises such discrimination either by express words or by necessary implication. The Act does not authorise racial discrimination by merely giving the Minister wide powers. Unless the contrary appears it is to be presumed that the legislature intended such powers to be exercised impartially and without racial discrimination. It is the duty of the

ment on the ground of employees' sex. It may therefore be argued that it is to be presumed that regulations made in terms of the Act may not discriminate in that manner, and that discriminatory regulations are void because they are ultra vires the enabling statute.

Courts to hold the scales evenly between the different classes of the community and to declare invalid any condition imposed by the Minister which in the absence of the authority of the Act results in partial and unequal treatment to a substantial degree between different sections of the community' (at 517- 518). See also *Mphahlele v Springs Municipality* 1928 TPD 50; *Minister of Posts and Telegraphs v Rasool* 1934 AD 167; *Vereeniging City Council v Rhema Bible Church, Walkerville* 1989 2 SA 142 (T).

CHAPTER SEVEN

CRITICAL OVERVIEW AND RECOMMENDATIONS

A Introduction

Various theories of equality, international norms and principles encompassed in national legislatures were discussed in the preceding chapters. It is apposite at this point to highlight salient themes emerging from the British and American legislatures, against the background of existing theories, with a view to suggesting a general approach to law reform in South Africa.

This chapter will focus on the theoretical approach underlying the British and American systems, as opposed to specific legislative provisions. A comparison of specific provisions of those systems with principles of South African law which may be applicable in areas such as access to employment, discrimination during employment, termination of employment, pregnancy, fetal protection, sexual harassment, equal pay and affirmative action was undertaken in the preceding chapter. Those principles will not be considered at length in this discussion. The aim of this chapter is to consider underlying themes and to suggest an approach which the South African legislature should adopt. Interpretation of legislative provisions should be considered against the background of the preceding discussion.

B Conceptions of Equality

The sexual division of labour and associated discriminatory treatment of women in the work place is linked to a myriad of factors.¹ Social as well as economic reasons

have been advanced. The origins have been sought in biological forms rooted in prehistoric cultures; religious and cultural institutions; the structure of the family and the division of household labour; the associated distinction between production which is seen primarily as the task of males, and reproduction which is the domain of females. Employment discrimination has been seen alternatively as basis of inequality and as a manifestation of inequality.² Against this background of structural social and economic discrimination, any attempt to address inequality in the work place without addressing other areas of employment can be only partly effective.

One of the primary determinants of the successfulness attributed to laws dealing with discrimination in employment is the theoretical approach to equality adhered to. There are two broad theoretical approaches to equality. They are the liberal theory of equality, on the one hand, and the radical theory, on the other.³ Supporters of the liberal theory seek equality of opportunity for men and women (that is, equal treatment), while those who espouse the radical approach demand equality of outcome (treatment as an equal).⁴ The distinction between the two approaches is illustrated in the following passage:

"There are two different sorts of rights.... The first is the right to *equal treatment*, which is the right to an equal distribution of some opportunity or resource or burden. Every citizen, for example, has a right to an equal vote in a democracy; that is the nerve of the Supreme Court's decision that one person must have one vote even if a different and more complex arrangement would better secure the collective welfare. The second is the right to *treatment as an equal*, which is the right, not to receive the same distribution of some burden or benefit, but to be treated with the same respect

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- 1 The origins of and reasons for discrimination are discussed in chapter 2 paragraphs A and B above.
 - 2 Mazumdar and Sharma 185.
 - 3 See chapter 2 paragraph C above for a discussion of these theories.
 - 4 See, in general, Townshend-Smith 21- 26; Kenney 393;- 394; Schmidt (ed) 32; Curtin 19- 20; Boyd and Sheehy 295; Sheppard 196- 197; Jewson and Mason 308.

and concern as anyone else. If I have two children, and one is dying from a disease that is making the other uncomfortable, I do not show equal concern if I flip a coin to decide which should have the remaining dose of a drug. This example shows that the right to treatment as an equal is fundamental, and that the right to equal treatment is derivative. In some circumstances the right to treatment as an equal will entail a right to equal treatment, but not, by any means, in all circumstances.⁵

Both the British and American legislatures appear to have been motivated by the notion of equality of opportunity⁶ (although they do show signs of a more radical approach in respect of certain provisions, for example, pertaining to equal pay, pregnancy, and sexual harassment). Generally, those anti-discrimination laws have been formulated to accommodate the perceived differing needs of men and women, after which they are expected to compete freely and equally on the basis of merit.⁷ Legislation is framed in comparative terms: it proscribes *less* favourable treatment, as opposed to *unfavourable* treatment. An employer acts unlawfully if it treats a woman less favourably than it would have treated a similarly situated man. A male model has thus been relied on in the formulation of a policy of equality.⁸ Reliance on that model has been criticised. The reason for the criticism is that anti-discrimination laws which depend on compliance with a male norm, effectively exclude women who cannot conform to the norm from the ambit of protection afforded. It has been said that:

5 The passage by Ronald Dworkin is cited by O'Donovan and Szyszczak 6.

6 MacKinnon 1287 explains that: "Rather than designing an indigenous solution to the problem of sex inequality, the early feminist legal view was, implicitly, that if equality meant being the same as men -- and being different from men meant either no rights at all or sex-based deprivation circumscribed and rigidified by inadequate and patronizing compensation -- women would be the same as men."

7 O'Donovan and Szyszczak 3- 4 explain the significance which liberal writers attach to the distinction between need and merit: "Competition on merit is what equal opportunity is all about. To overcome the question of the relationship between need and merit liberal writers advocate minimal state provision for need, after which all compete on merit. Thus intervention because of need or inequality is a justification for state action, regulation or legislation. Thereafter the role of the state is to hold the ring for free competition."

8 Lacey 416- 417.

"Legislation framed in terms of equality based on a male norm is therefore fundamentally limited: it can assist the minority who are able to conform, but cannot reach the structural underlying impediments."⁹

An example of the weakness inherent in the formulation of legislation which focuses on a male standard is to be found in both the American and British approaches to discrimination because of pregnancy. Initially, discrimination on that ground was not regarded as unlawful because there was no male with whom a pregnant woman could be compared. A pregnant woman could not be treated less favourably than a comparable male simply because pregnancy was recognised as a unique condition. A distinction was drawn between pregnant and non-pregnant persons, rather than between men and women, and discrimination against pregnant persons was not regarded as unlawful.¹⁰ American courts subsequently held that neutral pregnancy related rules could constitute indirect discrimination if they had an unjustified disproportionate impact on women.¹¹ Finally both systems evolved to prohibit discrimination based on pregnancy, where an employer would have treated a man in a similar position, for example a man in a state of ill health, more favourably.¹² Conduct of that nature constituted direct sex discrimination. The approach is based on the false assumption that pregnancy is an unnatural condition comparable to illness.¹³ The search for a male comparator thus resulted in a distortion of reality. It is suggested that, in the absence of statutory reform, discriminatory treatment due to pregnancy should rather be conceptualised as indirect discrimination: it is treatment which affects more women than men and cannot be justified.

9 Fredman 121.

10 *Turley v Allders Department Stores Ltd* (1980) IRLR 4 (EAT); *General Electric Company v Gilbert* 429 US 125 (1976).

11 *Nashville Gas Company v Satty* 434 US 136 (1977).

12 *Hayes v Malleable Working Men's Club and Institute* 1985 IRLR 367 (EAT); Pregnancy Discrimination Act 1978, enacted as section 701(k) of Title VII of the Civil Rights Act.

13 Lacey 417 states that the approach "presents an inaccurate and damaging image of pregnant women as genuinely comparable with sick or other abnormally situated men."

The emphasis would then shift from the perception of pregnancy as an unnatural condition, to justification of the employer's conduct. Justification should be possible only where the practice complained of is necessary for the operation of the business.

Laws dealing with pregnancy discrimination provide the most obvious example of the inadequacy of reliance on a male standard. Similar problems exist with regard to statutory service requirements which have to be met in order to qualify for maternity rights under the British Employment Protection (Consolidation) Act 1978. Requirements regarding a minimum number of years of continuous service with a single employer, and a minimum number of hours worked per week, are based on a male pattern of employment. They effectively exclude many women whose work tends to be interrupted and who tend to work part time.¹⁴

Not only legislative provisions, but all service requirements, pertaining to continuous employment and hours worked per week affect more women than men. Requirements of that nature, set by employers in order to qualify for service benefits, such as pension and medical benefits, should be recognised as indirect discrimination as they affect more women than men. They should be capable of justification only where they correspond to a real need on the part of the undertaking, for example, a genuine economic need to entice full time rather than part time employees.¹⁵

Reliance on a male standard has also proved problematic in respect of pay equity. The British Equal Pay Act 1970 deviates from a strict male norm to the extent that it

14 Dickens 128 states that half of all part time workers in the United Kingdom are disqualified on the ground of hours worked, and a quarter of all full time employees on the ground of service length.

15 See *Bilka-Kaufhaus GmbH v Weber von Hartz* 170/84 (1986) ECR 1607/ (1986) IRLR 317 (European Ct).

requires equal pay for equal work as well as for work of equal value. But it is restrictive in that it requires a comparison between a man and a woman in the same employment. It is thus unable to address the problems of women in employment where there are no men or where male comparators may be scarce. Furthermore, job evaluation exercises which evaluate various components of jobs, such as effort, skill and responsibility, tend to award less points for typically female skills (which are seen as a reflection of domestic responsibilities) than for skills usually developed in the context of paid work (which are seen as typically male).¹⁶

The approach adopted in respect of laws which focus on equality of opportunity and require compliance with a male norm, in accordance with the liberal approach to equality, is essentially an assimilationist one. Rather than incorporating sexual differentiation without attaching a penalty to it, the aim is to eradicate all sex role differentiation. A society is envisaged in which sex is no more significant than eye colour. That vision has been termed the "assimilationist ideal".¹⁷

Liberal orientated anti-discrimination laws have been criticised for their failure to accommodate inherent sexual differences. The utility of the approach, based on assimilation as opposed to acceptance of sexual differences, is limited to situations where male and female employees are similarly situated: it does little to overcome barriers in areas such as occupational segregation, accommodation of pregnancy and addressing sexual harassment. The problem has been explained in the following manner (in the context of American law):

16 Dickens 128 explains that the experience in the United States, for example, has been that "rather than revalue women's work, comparable worth exercises have tended to reward women only for what is already considered valuable in men's work".

17 Wasserstrom 606 explains that: "On the attitudinal and conceptual level, the assimilationist ideal would require the eradication of all sex-role differentiation. It would never teach about the inevitable or essential attributes of masculinity or femininity; it would never encourage or discourage the ideas of sisterhood or brotherhood; it would be unintelligible to talk about the virtues as well as the disabilities of being a woman or a man. Were sex like eye color, these things would make no sense."

"The essentially assimilationist approach fundamental to this legal equality doctrine -- be like us and we will treat you like we treat each other -- was adopted in sex cases wholesale from the cases on racial discrimination. The judicial interpretation of sex equality, like its predicates the Fourteenth Amendment and Title VII, has been built on the racial analogy. So not only must women be like men, sexism must be like racism, or nothing can be done. Where the analogy seems to work, that is, where the sexes are reasonably fungible and the inequalities can be seen to function similarly -- as in some elite employment situations, for example -- equality law can work for sex. Where the sexes are different, and sexism does not readily appear to work like racism -- as with sexual abuse and reproductive control, for example -- discrimination as a legal theory does not even come up."¹⁸

C The Significance of Legal Reform

Anti-discrimination employment legislation in the United States and the United Kingdom has been criticised for its failure to eradicate discrimination in the work place. The most fundamental criticism of those systems is based on the assumptions which underlie the law, namely the meaning of the concept of equality, the adoption of a male standard of comparison, and the narrow perception of discrimination¹⁹ (although, as explained below, the British system in particular has been criticised for its ineffective mechanisms for mobilisation).

As stated, the meaning generally assigned to equality in anti-discrimination laws is that of equality of opportunity rather than equality of outcome. Irrelevant characteristics, such as an employee's sex, are to be discounted: competition is to occur on the ground of neutral attributes pertaining to merit. The effectiveness of law based on that notion is said to be inherently limited because the effect of structural inequality is ignored. It assumes that fair procedures will ensure fair outcomes. The fact that supposedly neutral attributes regarding merit may be socially determined

18 MacKinnon 1288. Prechal and Burrows 1 also emphasise the fact that different types of discrimination, such as sex and nationality discrimination, are not analogous.

19 For a discussion of the effectiveness of the law on sex equality in the broader sense, see MacKinnon 1281- 1328. See also Conaghan 377, 389- 390; Smart 109, 114, 122; Polan 301- 302.

or may be determined on the basis of a male standard is overlooked. Furthermore, a male standard has been adopted as the norm with which employees are expected to comply in order to qualify for equal treatment. The approach is a comparative one: the norm which has been accepted, and against which the treatment of female employees is measured, is the male one. The focus of the examination is whether there has been less favourable treatment, rather than unfavourable treatment. Structural discrimination, which as resulted in differing social norms and working patterns for women, is overlooked. Finally, the perception of discrimination has been criticised. The reason is that, while discrimination is a far reaching structural phenomenon, the law tends to focus narrowly on aggrieved individuals rather than on groups of employees. A significant reason is that the concept of indirect discrimination -- that is, facially neutral conduct which detrimentally affects more women than men -- has not been developed adequately. The focus in this regard is on interpretation of the concept by the courts in a manner which accords due weight to institutional discrimination, on the one hand, and provisions which facilitate mobilisation of the legislature, on the other.

A feminist jurisprudence is needed to address this fundamental critique of anti-discrimination legislation. But in the context of the virtual statutory vacuum which presently exists in South Africa, it is felt that legislation dealing with discrimination in employment is a significant starting point for addressing inequality in the work place, provided that it is formulated adequately in respect of its substantive provisions and its procedures and mechanisms for enforcement. While legislation of that nature alone cannot eliminate discrimination against women in the work place entirely, its role is none the less significant.

In South Africa two key areas need to be addressed in an effort to bring about equality in the work place. They are education/ training and equal employment

laws.²⁰

First, adequate non-discriminatory education and training is essential to address the root causes of occupational segregation and inequality. The significance thereof has been explained in the following manner:

"Policy to promote equal opportunities cannot be effective unless it tackles problems at the root. For this reason, action in the area of education and training is fundamental, particularly with regard to... adaptation to economic and social change."²¹

Both the British Sex Discrimination Act and Title IX of the Civil Rights Act prohibit discrimination in education. Positive steps proposed by the Commission of the European Communities to bring about *de facto* equality in education include the reinforcement of co-education practices, the introduction of measures to ensure a balanced distribution of posts held by men and women at all levels of education regarding subject matter and level of post, and the elimination of sex related stereotypes from educational material.²² These proposals are as relevant in the South African context as in Europe. One might add that particular attention is needed to enhance the position of Black women, who may have suffered both racial and gender based discrimination.

20 Pillay 34 states: "In conclusion it is pertinent to ask what can be done and should be done to elevate women to their rightful place as equal participants with men in the economy. While a detailed analysis of the necessary measures are beyond the scope of this paper, it is obvious that amongst those that need to be adopted are

- (i) the more effective implementation of equal opportunities legislation;
- (ii) equal access to educational opportunities; and
- (iii) an improvement in maternity protection to enable women workers to reconcile the dual function of maternity and economic activity."

21 *Equal Opportunities for Women: Medium Term Community Programme 1986 - 1990* 7 paragraph 12.

22 *Equal Opportunities for Women: Medium Term Community Programme 1986 - 1990* 10 paragraph 20(a).

Secondly (and of particular significance for the purposes of this study), legislation providing for equality in employment must be introduced. Issues which are not regulated legally are generally regarded as unimportant. Provisions contained in constitutions, laws, regulations and court decisions constitute a significant statement of national will.²³ They serve an educational purpose²⁴ and may be reflected in collectively agreed structures.

It is interesting to note that although law usually follows the pattern of social and economic development, anti-discrimination laws have often shaped, rather than reflected, social norms. In the United States, for example, the inclusion of a prohibition against sex discrimination in Title VII of the Civil Rights Act was due to a capricious attempt to derail the statute, rather than a concern for women's rights. Litigation which followed reflected developing social mores and gave substance to the broad prohibition. The majority of cases which established general legal principles regarding direct and indirect discrimination dealt with allegations of race discrimination. The key area affecting the vast majority of women workers, namely pregnancy, required further legal intervention to remedy the inequitable approach adopted by courts interpreting Title VII. A similar trend is encountered in Europe where the norms of equality contained in Article 119 of the Treaty of Rome and supplementary Directives, the case law of the European Court of Justice and national legislation of member states have often been an example to, and not a reflection of, the labour market.²⁵ It is thus apparent that while law alone cannot

23 See Olsen 207; Charlesworth 71; Part 5 of the *Report of the Commission of Inquiry into Labour Legislation* (the Wichaha Commission).

24 Dickens 126 notes that the "conceptualization of equal opportunity in the legislation helps shape its educational message."

25 Landau 67. The author cites statistics which reveal that 13% of women working in the European Community (4 million out of a total of 30 million) have had personal experience of discrimination based on sex, regarding conditions of pay, access to employment, promotion and dismissal. A survey conducted in the United Kingdom found that sex discrimination continued to occur despite anti-discrimination legislation.

bring about equality in the work place, it does play a significant role.

As indicated in the preceding chapter, South African law does contain provisions which may be utilised to challenge discrimination. The most significant of these is the unfair labour practice concept contained in the LRA. But the protection afforded by that statute is far from adequate. A significant limitation is the fact that several categories of employees are excluded from the ambit of the Act. For example, it does not apply to farmworkers, domestic servants in private households, employees of the public service, or teachers at state financed educational institutions. There is no statute upon which those employees can rely to challenge unfair practices by an employer. As stated previously, abstention of the law from a particular area tends to create the impression that the area is regarded as an insignificant one. The exclusion of domestic servants from virtually all legislation which provides protection in the employment context is particularly detrimental as the vast majority of domestic servants are (Black) women.

The protection afforded by the Labour Relations Act is further curtailed by virtue of the fact that it applies only to employers and employees as defined, apparently excluding applicants for employment. In Europe and the United States the majority of cases challenging employer action on the basis of discrimination have dealt with hiring practices. An employer who is able to discriminate when selecting employees for employment can thereafter comply with anti-discrimination principles with relative ease. For example, an employer who is required to comply with comprehensive legislative provisions dealing with pregnancy, can avoid the issue simply by refusing to employ women. Thus a failure to extend the ambit of anti-discrimination legislation to applicants for employment does not merely curtail the protection available to women, but may actually serve to increase discrimination against them.

Furthermore, the unfair labour practice definition provides no guidance as to the meaning which may be assigned to the concept of discrimination. Extensive litigation would probably be necessary to develop even the most basic principles of discrimination law. The trend of such decisions is unpredictable and the application of general principles which have evolved in the context of the court's unfair labour practice definition (such as the classification of a dispute concerning a job evaluation study as a dispute of interest because it will result in the payment of more money to an applicant) may hinder the development of these principles. The Act also contains an array of procedural requirements which must be met in order to obtain relief in the Industrial Court. These technical requirements have been relied on by respondents to prevent access to the court.

Another potential area of legal development may exist in the context of an employee's common law right to exercise a chosen calling, as recognised in *Hawker v Life Offices Association of SA*.²⁶ But uncertainty regarding the existence and possible extent of that right or a similar right based on delictual principles, as well as difficulties associated with litigation before the ordinary courts, make it improbable that significant developments will occur in the near future.

Besides legal structures, collective bargaining structures have the potential to play a significant role.²⁷ Within the context of existing statutory structures, industrial council and conciliation board agreements may cover a wide range of topics, and may not discriminate on the ground of an employee's sex. But, in the absence of a clear anti-discrimination policy spurred on by the legislature, the potential of collective bargaining to address discrimination in the work place has not been realised. Naturally, a legislative statement is not all that is needed in the context of collective

26 (1987) 8 ILJ 231 (C).

27 See chapter 6 paragraph D above for a discussion of collective bargaining structures.

bargaining: effective collective bargaining on this issue also requires strong support for women's issues from representative employee organisations. But the significance of a legislative framework cannot be overlooked.

Finally, it is possible that the virtual absence of the legislature from the arena of employment discrimination (and other areas such as education, training and the provision of services) in South Africa is a significant reason for the fact that so few cases dealing with discrimination against female employees have been referred to the Industrial Court for determination, despite the fact that the court has had jurisdiction in that regard for over a decade. The absence of a legislative statement of national will creates the impression that the issue is an insignificant one. Fears on the part of individual applicants which exist in countries which have anti-discrimination laws, become more formidable when no such legislation exists. These include, for example, fears of victimisation and deterioration in employment relationships, which could lead to eventual termination of employment and subsequent difficulties in seeking new employment.²⁸ The significance of anti-discrimination laws has been explained simply in the following terms:

"There is another way of looking at the achievement of the equality legislation [in the United Kingdom]. It is significant that the despondent winners whose personal experience was so disappointing nevertheless viewed their experiences positively. These women would prefer that the legislation continued to exist and be used. Their major reasons related to their expectations of justice and of vindication, to the value they placed on public statements about equality, and to solidarity with other women also the victims of discrimination. When we view the legislation in these terms rather a different picture emerges.

The statement contained in anti-discrimination legislation is of symbolic significance to women, notwithstanding its qualifications and limitations. Discriminatory laws, policies, actions and practices can be challenged. Even where it is established that these are lawful a process of explanation and justification is required. This calls for a practical reason for the action or practice, and the reason can in turn be challenged. In other words, practical reason involves dialogue. The dialectical process gives women an opening in which to express their viewpoint, how they see things. The legislation also helps to create a language, a vocabulary in which to express an alternative viewpoint from that which is taken for granted."²⁹

A legislative structure is thus proposed which regulates the working environment as effectively as is possible. It is probable that a future constitution will provide for equality irrespective of sex. That would provide a significant statement of national will. But by its very nature a document such as a constitution cannot regulate discrimination in employment in an adequate fashion: it is a broad statement of policy which requires interpretation. Legislation designed specifically to challenge discrimination in employment would provide a more effective structure.

In concrete terms, a system is proposed which draws upon the experience of the United States and the United Kingdom, incorporating elements of both systems. The theoretical approach underlying those systems is the liberal one. However elements which reflect the a more radical approach to the notion of equality have been incorporated, for example, in areas such as equal pay, pregnancy and sexual harassment. The fact that the effectiveness of the laws in those countries has been criticised has not been overlooked. However, it is felt that by incorporating and modifying substantive and procedural elements of both systems, an effective starting point for legal regulation in South Africa can be formulated.

It is suggested that the legislature should provide a broad framework for addressing discrimination in the work place. A court interpreting the legislative provisions would then have the flexibility to consider principles which have evolved in other jurisdictions and to apply them to the facts of a particular case.

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O'Donovan and Szyszczak 229. See also Ellis *European Community 1*: "The law and the apparatus by which it is administered, of course, play a vital part in sustaining the notion of equality between the sexes; the law cannot do the whole job, since people's attitudes and cultural differences will always overlay it, but it is highly instrumental in shaping behaviour and expectations." Dickens 116 notes: "Positive impacts on woman's employment may come about through the direct use of the law. Actual use of the law may result in improvements for particular women or groups of women. At the same time the direct use of the law may foster voluntary initiatives elsewhere, through educational or threat effects."

D A Legislative Structure

It is envisaged that the structure discussed below should form a base for the development of legislative provisions in South Africa. It is suggested that the structure proposed should replace, and not merely complement, the Industrial Court's unfair labour practice jurisdiction. The reason is that the field of law dealing with equality in employment for women is a specialised one. It should be dealt with in the context of provisions and procedures contained in a statute designed for that purpose. If dealt with in the course of the court's unfair labour practice jurisdiction, general principles which have evolved in the context of that jurisdiction and which are inappropriate in the context of discrimination, may be applied, for example, the exclusion of applicants for employment or promotion from the court's jurisdiction, or the classification of a job evaluation dispute as one of interest.

The coverage and scope of legislative provisions must be broad in order to be effective. In both the United States and the United Kingdom, private sector and the majority of public sector employees are covered at every stage of the employment process from hiring through to dismissal. Discrimination by employers, labour organisations and employment agencies is prohibited.³⁰

Both countries have two statutes, one dealing with discrimination in general and one dealing specifically with equal pay. The reason in both instances is based on historical development rather than effective implementation. Both the British Equal Pay Act 1970 and the American statute of 1963 were originally passed to provide for minimum national wages. It is felt that two statutes are unnecessary; procedures relating to enforcement are either complicated or duplicated. One statute dealing

30 See sections 6, 11- 15 of the Sex Discrimination Act 1975; section 701 of Title VII.

with all aspects of sex discrimination in employment is envisaged. Other grounds of discrimination, such as race discrimination, are not analogous to sex discrimination and should be dealt with in a separate statute in order to avoid undue confusion of issues by the legislature as well as a court interpreting the provisions.

The breadth of comparison should be as wide as possible. As explained before, an ideal situation would be one where the legislature deals with the position of women in broad terms rather than one where discrimination, which is determined by means of a comparison, is proscribed. But, even in the context of specific anti-discrimination legislation, a relatively wide base of comparison would increase the effectiveness. For example, in the context of equal pay, equal remuneration for equal work results in a far narrower application than equal remuneration for work of equal value; comparison with a male employee in the same employment leads to a more restrictive application than comparison with any male in an entire operation; requiring contemporaneity is more restrictive than permitting comparison with a predecessor. Where practicable, comparison with a hypothetical male should be permitted.

It is felt that small employers should not be granted a blanket exemption from statutory provisions. The purpose of exempting employers who employ less than a certain number of employees from the provisions of instruments providing for minimum working conditions, such as industrial council agreements providing for minimum standards in respect of remuneration, is to stimulate job creation by easing the financial burden on employers who cannot afford to pay the wages or provide the pension benefits specified. A broad exemption of that nature is not necessary in the context of anti-discrimination legislation which is designed primarily to fulfill a social purpose. One area in which a measure of flexibility may be necessary is in respect of maternity provisions which impose an unduly onerous burden on small

employers. Employers who are able to show that they will be prejudiced unduly should be able to apply for exemption from specified provisions.

An analysis of substantive and procedural provisions which should be included follows below.

1 Substantive Provisions

Both direct and indirect discrimination are prohibited by the American and British legislatures, although neither uses those terms.³¹ The concepts have been defined in terms of the liberal approach to equality. In the United States, for example, it is unlawful "to discriminate against any individual... because of such individual's... sex", or "to deprive any individual of employment opportunities... because of such individual's... sex".³² The provision has been interpreted as prohibiting both disparate treatment (that is, direct discrimination) and disparate impact (or indirect discrimination).³³ Direct discrimination occurs when an employer treats an employee differently because she is a woman -- discrimination must have been the intentional or the probable consequence of the employer's actions.³⁴ Indirect discrimination involves conduct which affects more women than men, irrespective of the employers's intention. In the United Kingdom, an employer discriminates directly if it treats a woman "less favourably than he treats or would treat a man" because of her sex.³⁵ Indirect discrimination occurs where an apparently neutral requirement or condition is applied, the effect of which is "that the proportion of women who can

31 Section 703(a) of Title VII and *International Brotherhood of Teamsters v United States* 431 US 324 (1977); Sections 1(1), 6(1) and 6(2) of the Sex Discrimination Act 1975.

32 Section 703(a) of Title VII.

33 *International Brotherhood of Teamsters v United States* 431 US 324 (1977).

34 Cox 6-5 - 6-6.

35 Section 1(1) of the Sex Discrimination Act 1975.

comply with it is considerably smaller than the proportion of men who can comply with it".³⁶ In both countries, direct discrimination is permitted where it is necessary for the operation of the business -- where it is a genuine occupational qualification.³⁷ Indirect discrimination is not unlawful if the allegedly discriminatory practice can be justified. American courts require a practice to be a business necessity,³⁸ while the British legislature refers to a condition which is "justifiable irrespective of the sex of the person to whom it is applied."³⁹ The interpretation of "justifiable" by British courts ranged from "necessary", which was determined objectively, to something less, namely, "what was acceptable to right thinking people as sound and tolerable reasons".⁴⁰ The latter standard was more subjective and took the motivation and good faith of the employer into consideration. The subsequent approach of the European Court of Justice saw a return to a more objective standard, namely, that an employer's policy should correspond to a real need on the part of the undertaking, should be appropriate with a view to achieving the objectives pursued, and should be necessary to that end.⁴¹

The liberal notion, encompassed in provisions such as these, has been criticised on the basis of the underlying assumptions which are reflected therein, notably the adoption of masculinity as the norm or standard against which equality is measured.⁴² That is a fundamental criticism directed at the adoption of anti-

36 Section 1(1)(b).

37 Section 703(c)(1) of Title VII; section 7 of the Sex Discrimination Act 1975.

38 *Griggs v Duke Power Company* 401 US 424 (1971); *Abernale Paper Company v Moody* 422 US 405 (1975); *Doshard v Rawlinson* 433 US 321 (1977).

39 Section 1(1)(b) of the Sex Discrimination Act 1975.

40 *Dickens* 119- 120; *Singh v Rowntree Macintosh Ltd* (1979) IRLR 199 (EAT); *Fanesar v The Nestle Company Ltd* (1980) IRLR 60 (EAT); *Ojutiku v Manpower Services Commission* (1981) IRLR 156 (EAT).

41 *Bilka-Kaufhaus GmbH v Weber von Hartz* Case 170/84 (1986) ECR 1607/ (1986) IRLR 317 (European Ct); *Rainey v Greater Glasgow Health Board* (1987) IRLR 26 (HL).

42 See *Dickens* 124- 134.

discrimination legislation (as opposed to a feminist jurisprudence). However, having accepted that the adoption of anti-discrimination legislation is the initial step which should be taken, it is suggested that a broad prohibition of both direct and indirect discrimination is an appropriate point of departure within such legislation. Coupled with the procedural provisions outlined below, it would provide a platform from which to challenge discriminatory practices in the work place. Indirect discrimination, with its emphasis on effects as opposed to intentions, is particularly important because of the potential which it provides to challenge structural discrimination (provided, again, that it is supported by adequate procedural features, such as a class action and the power to provide adequate remedies). However, the effect of provisions such as those outlined above would be reduced significantly if defences were construed broadly. A concept such as "genuine occupational qualification", which is usually regarded as a defence to directly discriminatory conduct, must be restricted to application in situations where physical attributes are essential to proper performance of work, or those involving positions of intimacy. A broad interpretation would permit reliance on stereotyped role division. Similarly, the potential to address the effects of social and economic discrimination on the basis of indirect discrimination would be reduced significantly if standards of justification for practices of that nature were construed leniently. An indirectly discriminatory practice should be capable of justification only if it is shown to be necessary, and not where its application is merely convenient, to the employer's business needs. Small advantages to an employer should not justify a discriminatory practice. The practice should also be an appropriate method of satisfying the employer's needs. The impact of the practice on the victim must be emphasised -- unless the adverse effect on the economic position of the employer is significant.

In addition to addressing discrimination in broad terms, the legislature should

actively encourage, rather than merely permit, affirmative action. That would assist in overcoming the effect of structural discrimination which segregates the labour market, rather than merely halting present discrimination. The British legislation is limited in this regard. It does not require affirmative action, but permits single sex training for current and prospective employees, and encouragement of prospective employees, in order to provide opportunities in respect of positions in which they have been under represented.⁴³ The European Equal Treatment Directive, however, permits member states to adopt "measures to promote equal opportunity for men and women, in particular by removing existing inequalities which effect women's opportunities".⁴⁴ The scope of measures envisaged is clearly wider than that permitted under the Sex Discrimination Act. The scope of the American legislation, too, is somewhat broader than the British. One of the remedies which a federal court is specifically permitted, although not required, to order for a contravention of the legislative provisions is "such affirmative action as may be appropriate".⁴⁵ Affirmative action may also be compelled by means of government orders, designed to ensure that those who do business with the American government implement affirmative action programmes. An example is to be found in Federal Executive Order 11246, which requires private contractors who do business with the federal government to take affirmative action to ensure gender balance in their work forces. Finally, employers may undertake voluntary affirmative action programmes, provided that the purpose of the programme which is adopted mirrors the purpose of the Act, and does not unnecessarily disregard the interests of unprotected employees.⁴⁶

43 Sections 47 and 48 of the Sex Discrimination Act 1975.

44 Article 2(4) of the Equal Treatment Directive.

45 Section 706(g) and (j) of Title VII.

46 *United Steelworkers of America v Weber* 443 US 193 (1979).

It is suggested that the South African legislature should require, and not merely permit, the implementation of affirmative action programmes.⁴⁷ It has been said that:

The fair distribution of rewards approach calls for direct intervention in workplace practices to achieve a fair distribution of outcomes (usually in terms of the proportional representation of disadvantaged groups mirroring their representation in the labour force or society). It adopts a group perspective, taking the absence of a fair distribution of rewards as evidence of unfair discrimination. This approach leads to quotas, to policies like preferential hiring and to promotion of disadvantaged groups...⁴⁸

The legislature should thus impose a statutory duty to develop affirmative action. It should provide a basic legal framework within which specific policies could be developed by employers. Employers should be required to evaluate existing practices, and to set objectives with regard to issues such as vocational training and occupational distribution, as well as timetables for meeting those goals. Consultation with representative employee organisations should occur on these issues. Compliance with timetables and goals set should be monitored by the state, for example, through a specialised body such as an Equal Employment Commission. A cautionary word must, however, be sounded. The extent of affirmative action undertaken should not be such that efficiency is affected detrimentally, or that women are stigmatised as inferior employees whose success depends on quotas.

In addition to a general prohibition of discrimination in respect of issues such as access to jobs, training, promotion and dismissal, certain aspects of women's employment must be addressed specifically by the legislature. These are remuneration, pregnancy/ maternity and sexual harassment. These are issues in respect of

47 See also the discussion in chapter 6 paragraph C7.

48 Dickens 126. Docksey 14- 15 notes that "voluntary positive action cannot really be successful in a voluntary environment, and... positive action has been most effective in countries such as Sweden and the USA which enjoy a basic legal framework."

which a blanket, liberally orientated, prohibition of discrimination is inadequate. They affect women specifically to such an extent that comparison with a male employee is particularly inappropriate.

The average rate of women's pay is well below that of men. This can be attributed to several factors. First, there may be remuneration differences within occupations: in the United Kingdom, for example, the average pay of female nurses is 90,3% of that of male nurses. Secondly, women generally do different work to men, and work typically performed by women is under valued. Thirdly, women are crowded into low paid jobs.⁴⁹ These are issues which need to be addressed in the long term through broader social and educational policies. In the context of employment, however, they may be addressed in terms of anti-discrimination legislation, and specifically through that dealing with equal pay. Crowding into certain jobs may be challenged on the basis of general anti-discrimination provisions, for example, where an employer refuses to hire women for certain positions or to promote women. Where remuneration differences occur within occupations, they can be challenged in terms of legislation providing for equal pay for work which is the same or substantially similar. However, the under valuation of women's work requires legislation providing for equal pay for work of equal value.

Legislation providing for equal pay for work of equal value was introduced in the United Kingdom in order to comply with European standards.⁵⁰ The utility thereof has been criticised on the ground that the legal structure is one which is complicated

49 Townshend-Smith 151 explains in the British context that: "there were two reasons why the [Equal Pay] Act could not significantly reduce the pay differential. The first is the crowding of women into low paid jobs: this can only be attacked through the SDA. The second is the undervaluing of women's jobs; the equal value amendment deals with this issue but its impact has as yet been very limited" (own emphasis).

50 *Commission v The United Kingdom* Case 61/81 (1982) ECR 2601/ (1982) IRLR 333 (European Ct).

and difficult to use. The complexity of a claim of that nature is an obstacle which is virtually impossible to remove and has hindered the development of the comparative worth (equal value) doctrine in the United States.⁵¹ It has been said of the British system dealing with equal value:

"The legal structure is a severe deterrent to effective action. It is complex, time-consuming and unpredictable.... Lawyers are a mixed blessing, though, for they frequently fail to understand evaluation and payment systems. In this area Tribunals cannot dispense speedy, cheap, relatively informal justice.... Whatever form the law takes it is never likely to be anything but a last resort. That is no argument for not improving the procedure; rather it cautions against believing that the real problems claimants face are procedural. Equal value is conceptually radical; courts and tribunals are never likely to accept the full force of that radicalism."⁵²

It is none the less felt that legislation dealing with equal pay must contain a provision requiring equal pay for work of equal value.⁵³ Like general anti-discrimination legislation, it would raise consciousness and could act as an incentive to the negotiation of more equitable pay structures.⁵⁴ Even as a legal measure, its value would be enhanced if it could be enforced by means of a class action, (as is suggested below in the context of procedural legislative provisions) as opposed to enforcement by individual employees, as is the case in the United Kingdom.

51 See *County of Washington v Gunther* 452 US 161 (1981); Berger 430- 431.

52 Townshend-Smith 165- 166.

53 See also the discussion of equal pay in chapter 6 paragraph C6.

54 It has been suggested that: "Law can make little impact compared with collective agreements, because the outworking of the impact of equal value needs constant vigilance and renegotiation, and because any change has to overcome the relative "stickiness" of wage-rates over time. Yet law may be a necessary spur to such agreements" (Townshend-Smith 166). Dickens 110 illustrates the broader effect of the legislation with the following case study: "There have been successful attempts by unions to use or threaten legal action to improve women's pay, and low pay more broadly. An equal value claim by a checkout operative at Sainsbury's, who compared her job to a warehouseman, was withdrawn after a regrading exercise resulted in substantial pay increases for checkout staff. This provided a catalyst for similar pay reviews in other large retailers such as Marks and Spencer and Tesco. Other major regrading exercises and revisions of pay structures have been undertaken with conscious attention to equal value issues."

A similar equal pay structure to the one adopted in the United Kingdom, in accordance with European standards,⁵⁵ is thus proposed, to attempt to overcome the barriers to equality which are posed by occupational segregation resulting from structural discrimination beyond the work place. Legislation must provide for equal pay for men and women who do work which is the same, work which has been rated as equivalent by an employer under a voluntary job evaluation scheme, and work which is of equal value within a particular organisation. The concept of an organisation must be defined broadly. It may be restricted to one undertaking, but should not permit artificial divisions which permit an employer to avoid compliance with legislative provisions. Contemporaneous employment of a woman with a male comparator should not be required -- comparison with a male predecessor should be permitted. Pay or remuneration must also be defined broadly to include any payment in money or in kind which is made or owing to any person by virtue of her employment, including pension and medical benefits and any housing or travel allowance granted. Direction as to the method of evaluating work may be taken from the British approach.⁵⁶ There the industrial tribunal to which the case is referred considers whether there are reasonable grounds for the claim, as a preliminary step. Cases which have no chance of success are sifted out in that manner. If there are reasonable grounds for the claim, a report is commissioned from a panel of experts. The woman is entitled to equal pay if the tribunal, having considered the report, finds that the value of her work is equal to (or greater than) that of her comparator. Where the voluntary job evaluation study carried out by an employer is found to be discriminatory, an equal value claim may be instituted.

A "genuine material factor" defence, such as the British defence, may be provided for where the pay discrepancy is genuinely due to a material factor which is not the

55 Section 1(2)(a)- (c) of the Equal Pay Act 1970; *Commission v The United Kingdom Case 61/81* (1982) ECR 2601/ (1982) IRLR 333 (European Ct).

56 See section 2A(1) of the Equal Pay Act 1970.

difference of sex.⁵⁷ The American legislature contains a similar defence, namely, where a difference in pay is based on any factor other than an employee's sex. It also refers to specific instances where a pay differential may be justified: where it is based on seniority, merit or productivity (measured in terms of an objective system).⁵⁸ As is the case with any defence to discrimination, a defence of that nature must be interpreted restrictively. The reason for the difference in pay, furnished by an employer, should not be a pretext for unlawful discrimination. Different treatment of part time and full time employees, for example, should not automatically be capable of justification under a defence of that nature. The reason is that the majority of part time employees are women, who are unable to work full time due to domestic responsibilities.⁵⁹ A pay differential based on market forces, such as skill shortages, for example, should be permitted only where it corresponds to a real need on the part of the undertaking, and is appropriate and necessary in order to achieve that objective.⁶⁰

Legislative provisions which acknowledge pregnancy as a biological condition which is unique to women are necessary.⁶¹ Unfavourable treatment of a woman because she is pregnant, or for any reason associated with her pregnancy, must be prohibited. Unfavourable treatment, and not less favourable treatment than a similarly incapacitated man would have received, must be proscribed by the legislature. The "less favourable" approach, adopted in the United Kingdom under the Sex Discrimination Act and on a federal level in the United States, incorrectly equates

57 See section 1(3) of the Equal Pay Act 1970.

58 Section 206 of the Equal Pay Act 1963.

59 See *Jenkins v Kingsgate (Clothing Productions) Ltd* Case 96/80 (1981) ECR 911/ (1981) IRLR 228 (European Ct).

60 *Bilka-Kaufhaus GmbH v Weber von Hartz* Case 170/84 (1986) ECR 1607/ (1986) IRLR 317 (European Ct).

61 See also the discussion in chapter 6 paragraph C4 above.

pregnancy with illness. There is no possible male comparator for a pregnant employee.

A defence may be provided where an employer is able to show that the action complained of was for a reason unrelated to the employee's pregnancy. As is the case with any defence, one of this nature should be interpreted narrowly, as a broad interpretation would undermine the purpose of the legislature. In a redundancy situation, for example, an employer should not be permitted justify the dismissal of a pregnant employee solely on the ground that it is economically viable to do so due to her inability to work around the time of confinement.

In addition to proscribing unfavourable treatment in respect of pregnancy in general terms, the legislature must make specific provision for job security. It is suggested that dismissal of an employee while she is pregnant and for a specified period thereafter should be presumed to be because of her pregnancy, unless the employer can show that dismissal was for a reason not related to her pregnancy. An approach of that nature would be similar to the one adopted in the United Kingdom under the Employment Protection (Consolidation) Act.⁶²

The legislature must also provide for time off for ante natal and post natal care, and for adequate maternity leave to protect the health of a mother and her child. The employee must be assured of returning to the same job or to one which is substantially similar, unless the employer is unable to accommodate her. An employer should not be entitled to refuse a woman permission to return merely because it is inconvenient to do so. A similar approach has been adopted under the British Employment Protection (Consolidation) Act.⁶³ Financial benefits which enable a

62 Section 60 of the Employment Protection (Consolidation) Act 1978.

63 See sections 45 and 47 of the Employment Protection (Consolidation) Act 1978.

woman to take advantage of the statutory maternity leave must be provided. The financial burden should be shared by employers and the state, via a fund such as the unemployment insurance fund.

It is equitable to expect an employee to meet statutory service and notice requirements in order to qualify for the statutory maternity benefits. But those requirements should not be unduly onerous as is the case in the United Kingdom, where a large number of women are excluded from the net of protection.⁶⁴ Notice requirements should be as uncomplicated as is possible, while serving the purpose for which they were designed, namely, to inform an employer that an employee intends to return to work in order to enable it to make the arrangements necessary to accommodate her. The purpose of service requirements, on the other hand, is to require an employee to show some commitment to her job in order to qualify for maternity benefits. But qualification for a benefit subject to a period of continuous service with a single employer assumes that women are able to conform to a typically male working pattern and effectively excludes a large proportion. A service requirement which permits interrupted service with different employers would be a truer reflection of a female working pattern. While it would not require extended commitment to employment with a particular employer, it would reflect commitment to the job market and the maintenance of skills. Similarly, a qualification related to the minimum number of hours worked per week may effectively exclude many part time employees who are predominantly female. The latter qualification would serve little purpose in respect of maternity benefits, in any case, as the amount to which an employee may be entitled should correspond to the amount of money which she

64 As Dickens 128 explains: "Somewhat ironically, many women are denied access to statutory maternity rights because of the need to conform to the male model of employment in order to fall within those employment protection provisions which call for two years' continuous service and a minimum number of hours a week. Half of all part-time workers fall outside these provisions (mainly on the basis of hours worked) as do a quarter of full-time employees (on service length). Women are more likely than men to fall through the net as their employment patterns tend to deviate from the (male) full-time continuous employment mode."

normally earns. Furthermore, such constraints are not necessary in respect of protection against unfavourable treatment relating to recruitment and career advancement.

An issue which is related to that of pregnancy concerns the protection of the health of the expectant employee and the fetus which she carries. It is felt that setting of adequate health and safety standards lies beyond the scope of anti-discrimination legislation. It is one which should be dealt with on the basis of expert knowledge in the context of a statute regulating health and safety in the work place in general. Legislation of that nature should require employers to comply with strict standards in order to ensure the health of all employees in the context of physical hazards, such as heat stress, noise and vibration, and potentially toxic chemical substances. An employer should not be allowed to prejudice female employees, for example, by excluding them from a potentially hazardous work place, thereby reinforcing negative stereotypes while failing to protect all employees adequately. In the United States, conduct of that nature has been held to constitute direct sex discrimination.⁶⁵ A similar approach appears to be evident in the United Kingdom.⁶⁶

Finally, it is suggested that the legislature should proscribe sexual harassment. Sexual harassment has been defined as:

**repeated and unreciprocated actions, comments and looks of a sexual nature and which treat the recipient as a sexual object only. It prejudices the recipient's job security or promotion prospects and/ or creates a stressful working environment.*⁶⁷*

65 *International Union, UAW v Johnson Controls Incorporated* 111 SC1 1196 (1991).

66 *Johnston v The Chief Constable of the Royal Ulster Constabulary Case 222/84 (1986) ECR 1651/ (1986) IRLR 263* (European Ct), read with article 2(3) of the European Equal Treatment Directive.

67 *Wise and Stanley 38*. The definition is that of the composite trade union movement in the United Kingdom.

In terms of the definition, sexual harassment is a form of conduct which impacts on the working environment. Two forms of harassment are recognised, namely, one which leads to loss of a tangible job benefit and one which results in a stressful employment environment. A more radical description of harassment is the following:

"the unwanted imposition of sexual requirements in the context of a relationship of unequal power, where power from one sphere is used to lever benefits or impose deprivation in another. And here the power from one sphere is that derived from a man's position as an owner or manager or supervisor, and another is the sexual sphere."⁶⁸

The latter definition sees sexual harassment at work as a reflection of the relationship of power which exists within and beyond the work place. As such, laws relating to employment and sex discrimination at work are essentially ineffectual in addressing the broader social problem facing women.⁶⁹ But, while laws dealing with employment discrimination in general, and sexual harassment in the work place in particular, cannot resolve the problem in the light of broader social issues, they do at least highlight its existence.⁷⁰

It is suggested that legislature, in accordance with the approach adopted in the United States and the United Kingdom, should proscribe any form of conduct which leads to loss of a tangible job benefit, including a failure to hire or promote an

68 Wise and Stanley 52.

69 Wise and Stanley 52 note that: "...women's experiences of sexual harassment are much wider than could possibly be included within even the broader and more extensive American legislation and practice.... [S]ome experiences of sexual harassment "contra-indicate" legal action, and yet others require assessments and interpretations that the courts are ill-suited to make. This is because much, perhaps even most, sexual harassment turns on the experiencing women's interpretation of "the advance" and both parties' interpretation of "the response", as well as the actual employment consequences."

70 See also the discussion in chapter 6 paragraph C5 above.

employee, transfer or dismissal of an employee, as well as conduct which creates a stressful environment, although no tangible loss has occurred.⁷¹ Determination of the existence of a stressful environment should be considered from the point of view of a reasonable employee, as is the case in the United Kingdom.⁷² An employer should be liable for all acts of harassment by any person whom it employs in a position of authority, where the conduct leads to loss of a benefit ("quid pro quo harassment"). In cases involving the creation of a stressful working environment, so-called hostile environment cases, an employer should be liable for the conduct of persons employed in positions of authority, irrespective of whether or not the conduct occurred within the course of their employment, unless it is able to show that it was unaware of the conduct complained of and that it had taken all reasonable steps to prevent conduct of that nature. An employer's liability should not be necessarily limited to situations where the harasser was acting within the scope of his employment. A limitation of that nature incorrectly assumes that unacceptable conduct outside of the work place does not permeate the working environment.

2 Procedural Provisions

In order to be effective, substantive legal provisions must be capable of effective mobilisation. It is felt that the Industrial Court remains the appropriate forum for enforcement as it is used to dealing with the concept of equity. But certain changes to the existing structure are suggested. These include simplification of procedures, a separate division of the court to deal with discrimination cases in order to ensure expertise, training of members in the specialised field of employment discrimination, and greater attention to the selection of members.⁷³

71 See *Meritor Savings Bank FSB v Vinson* 477 US 57 (1986); *Strathclyde Regional Council v Porcelli* (1986) IRLR 134 (SCS).

72 *Wilman v Milncc Engineering Ltd* (1988) IRLR 144 (EAT).

73 Lacey 418 cautions against "male domination of the legal forum in terms of its personnel", while Dickens 122 notes that: "The predominance of white men on industrial tribunals has

A analysis of enforcement procedures in operation in the United States, the United Kingdom and South Africa was undertaken in the preceding chapters.⁷⁴ It is felt that the American system is superior to the British one in most respects. The following passage states the position succinctly:

"A number of observers have noted the inadequacy of British courts in dealing with problems requiring consideration of issues other than those raised in individual discrimination cases.... McCrudden notes that the US courts have adapted their procedures in a number of ways not found in the UK, or found only to a limited extent: reliance on expert witnesses; permitting wide discovery of evidence; widespread use and encouragement of class action suits; relaxation of standing requirements; permitting argument by those interested in the outcome of a case but with no legal standing; encouragement of arguments which explain the social facts (the so-called brandeis brief); acceptance of the expertise of specialist government agencies; and, lastly a willingness to examine the legislative history of an Act which they are interpreting. In the UK the applicant has to produce evidence, yet the lack of a class action limits the scope of inquiry; there is only a narrow range of discovery and pre-trial interrogatories; employers are not required to keep workforce statistics which may aid the tribunal; the tribunals are not expert at handling statistical material, and the British judicial process, with no power of independent investigation is inadequate at discovering and assessing social facts."⁷⁵

The following key factors can be extracted from the American and British systems:

- 1 Enforcement of anti-discrimination procedures by individual employees is not an effective method of ensuring general compliance by employers. In the United Kingdom, where that is the general method of enforcement, the suc-

been recognised as a problem but attempts to address it have met with limited success; women constitute only 22 per cent of lay members. The policy of having a woman on tribunals hearing cases of equal pay is not always followed in practice, although tribunals with women members decide in favour of applicants more often than do all male tribunals. In its evidence to the Royal Commission on Legal Services the EOC noted 'male tribunal members or chairmen may have preconceived notions, albeit unconscious, of women's work and women's role in society'. Some preconceived notions, or stereotypes have been challenged in decisions.... In other cases, however, the judges' own stereotypes have been to the fore."

74 See chapter 4 paragraphs B2, B6 and C1b; chapter 5 paragraphs B2, B6 and C2; chapter 6 paragraphs B1b and B1c.

75 Dickens 121- 122.

cess rate of the legislation has been affected negatively. Individual litigants, whether successful or not, face repercussions in the work place in the form of victimisation and deteriorating relationships. Furthermore, successful applications have not necessarily brought about an improvement in employer practices in the broader sense.⁷⁶

- 2 Extensive procedural requirements complicate the matter. It is suggested that requirements such as time periods should be limited in so far as is possible. But attempts at conciliation prior to instituting legal action should be encouraged: the legislature should allow a period of time for that to occur and should require the parties to meet in order to attempt conciliation. Dialogue and the exchange of ideas would be encouraged. Conciliatory efforts may prove particularly effective when undertaken on behalf of employees by a specialised body established to deal with discrimination in the work place. Agreements reached on that basis may well lead to an improvement in the conditions of other employees, particularly when subsequent collective bargaining on the issue by an employee organisation occurs.
- 3 The existence of an independent specialised agency with administrative powers and powers relating to enforcement of legislative provisions is essential. In Europe the greatest incidence of attempts to enforce equality rights has occurred in countries which first set up specialised agencies, namely, the United Kingdom and Ireland.⁷⁷ A body with powers similar to those of the

⁷⁶ See Chambers and Horton 4-5. Lacey 417 notes that the emphasis on individual cases in the United Kingdom "poses some particularly acute problems from a feminist viewpoint. In the first place it entails a diversion of attention away from the idea of sexism as a structure or institution -- an idea which is crucial to a feminist vision.... More subtly, it is also inherent in the approach based on individual cases that the claimant has to prove something *special or abnormal*, whereas much institutional discrimination is or is seen as *normal, usual behaviour*. This may well inhibit tribunals from making findings of discrimination, particularly where they feel there was nothing "wrong" with the behaviour and hesitate to stigmatise it by finding for the plaintiff".

⁷⁷ Docksey 9. Agencies now also exist in Belgium, Denmark, Italy, Luxembourg, Netherlands

American Equal Employment Opportunities Commission is envisaged.⁷⁸ It is felt that the powers of the British Equal Employment Commission are limited in respect of enforcement, which can occur in limited instances, namely, where an employer has placed a discriminatory advertisement and in respect of indirectly discriminatory practices.⁷⁹ A commission of that nature should be required to investigate areas of employment where it has reason to believe that discrimination is occurring, for example, following a complaint by an individual or an organisation, and should be able to enforce compliance with legislative provisions where that is found to be the case. The institution of legal steps on behalf of employees who have been discriminated against should lie in the hands of the commission, as is the case in the United States. Only where it has relinquished that function, for example, because a preliminary investigation does not reveal the existence of discrimination as alleged, should individual employees be allowed to challenge the practice.

A commission should also be required to attempt to conciliate alleged contraventions of the legislation. Assigning a conciliatory function to a commission would reinforce the potentially significant role of conciliation, as described in paragraph 2 above.

The commission should also be responsible for training persons involved in implementing and enforcing equality legislation, such as employers, employees and their organisations, lawyers, presiding officers of a specialised division of the Industrial Court and judges.

and Portugal. Similar bodies exist in Germany, Greece, France and Spain.

78 See section 706 of Title VII.

79 See sections 37, 38, 53, 58 and 67 of the Sex discrimination Act 1975.

Finally, it should be required to play an educational role. It should issue official guidelines on significant issues, such as sexual harassment and affirmative action. Those guidelines could deal in a more detailed fashion with areas which are covered in general terms by the legislature. The guidelines could be amended on a regular basis to reflect international tendencies and to address particular problems which arise locally. They would not have the effect of legislation, but should be accorded significant weight by a court interpreting the legislative provisions. It should also disseminate information by means of regular bulletins/ newsletters which provide information on issues such as implementation and interpretation of the legislation and good/bad employment practices.

- 4 A class action for enforcing compliance with anti-discrimination provisions must be provided.⁸⁰ Although isolated incidents of discrimination may be identified, it is really a reflection of an approach towards employees generally. A class action is best able to challenge the structural, group nature of discrimination. A class action by a specialised agency is also necessary to challenge indirectly discriminatory practices where it may not be possible to identify individual employees affected. A further advantage of the class action lies in the possible combination of relatively small individual claims in order to increase the potential liability of employers who contravene the legislation. That may act as an incentive to adopt an equal employment policy. Where the institution of legal steps lies primarily in the hands of an Equal Employment Commission (as was suggested in paragraph 3 above), the significance of the class action is reinforced. The spectre of legal action by a commission on behalf of an entire class of aggrieved employees should act as a strong deterrent to discrimination by an employer.

In South Africa a trade union has standing in common law to institute legal action in its own right or in a representative capacity where its members have been treated unlawfully. It also has standing to act on behalf of its members in respect of alleged unfair labour practices. It is felt that, while the possibility of an action by a trade union does assist employees by virtue of the its potential to provide relief of a collective nature, it is none the less inadequate. A class type action by a specialised body such as an Equal Employment Commission has the potential to be far more effective. The reason is that the very function of a body of that nature would be to eliminate discrimination: it would have the resources and expertise to do so. Where it does not institute a action (because it believes that it is not viable to do so or, even, due to financial constraints) the right to do so should pass to an individual employee, who may then be supported by her trade union.

- 5 In both the United States and the United Kingdom the employee bears the ultimate onus of proving discrimination on a balance of probabilities. A similar approach has been adopted by the Industrial Court in South Africa in the context of unfair dismissal cases. It is felt that this general approach may be maintained in the context of discrimination cases.⁸¹ However, it should be borne in mind that an employer usually has the information at its disposal which required to show that discrimination has occurred. Thus, where an employee provides a set of facts which make out a prima facie case, such as possession of a minimum essential set of qualifications, the evidentiary burden should shift to the employer to rebut the presumption of discrimination, and prove that there was no unlawful discrimination, by providing an explanation for its conduct. Furthermore, a system of questioning an

81 See also the discussion in chapter 6 paragraph B1d above.

employer, similar to that operational in the United Kingdom, is proposed. There an employee may question her employer on any relevant matter by means of a reply form which may be sent to the employer before proceedings have been initiated or during such proceedings. Although an employer is not compelled to reply, a tribunal may draw a negative inference from a failure to reply, as well as from an evasive one.⁸² It is suggested that an employer should be obliged to keep records of a statistical nature, for example, regarding work force composition and pay structures, and to provide information sought by an applicant. A negative inference should be drawn from an evasive reply to questions posed by an applicant. Furthermore the Industrial Court should not hesitate to use its existing powers to investigate facts, and to subpoena and interrogate witnesses.⁸³

- 6 Where discrimination is found to exist, remedies must be capable of being tailored to suit the circumstances of the particular case. It has been said that "it is impossible to establish real equality of opportunity without an appropriate system of sanctions".⁸⁴ A remedy serves two purposes: it must compensate an employee adequately and must have a deterrent effect on an employer.

The remedies available in the United Kingdom under the Sex Discrimination Act 1975 are inadequate. Three remedies are available there, namely, a declaration of right, an award of compensation (which includes compensation for injury to feelings, but does not include compensation for future loss of earnings) and a recommendation for action. The recommendation is not an

82 See section 74 of the Sex Discrimination Act 1975.

83 Section 17(14), (17) and (20) of the Labour Relations Act 28 of 1956.

84 Docksey 12.

order and cannot be enforced. There is no provision for reinstatement.⁸⁵ Remedies under the Equal Pay Act 1970 are more effective: each term in a woman's contract which is less favourable than a corresponding term in that of her male comparator is modified in accordance with his.⁸⁶ A tribunal may also order the payment of arrears of remuneration or damages.⁸⁷ In the United States, a court may order any equitable relief which it deems appropriate.⁸⁸ That approach is in line with the current approach which the Industrial Court in South Africa is required to adopt where an unfair labour practice is found to exist and, it is suggested, is appropriate with regard to discrimination cases. It enables the court to tailor a remedy to the suit circumstances of a particular case. Depending on the nature of the discriminatory conduct, the employer may be ordered to hire or reinstate an employee, to transfer or promote her, or to compensate her for past or future loss of earnings or injury to feelings. It may also be ordered to amend a practice which discriminates indirectly, or to implement a programme of affirmative action. It is felt that the existing powers of the Industrial Court in this regard allow the flexibility which is necessary to provide a remedy based on the facts of the matter.

85 See sections 65 and 66 of the Sex Discrimination Act 1975.

86 See section 1(1) of the Equal Pay Act 1970 and *Hayward v Cammell Laird Shipbuilders Ltd* (1988) *IRLR* 257 (HL).

87 Section 2(5) of the Equal Pay Act 1970.

88 Section 706(g) of Title VII.

CHAPTER EIGHT

CONCLUSION

"One of the fundamental human rights is the right to earn a living, free of discrimination on any ground other than ones relating directly to a person's ability to perform."¹

The following conclusions may be drawn from the foregoing discussion.

Inequality between men and women and the subordination of women, which extends into the work place, stems from biological differences and cultural norms. These two factors are often so closely intertwined that they become difficult to distinguish. Their effect has been explained in the following manner:

[J]udges confound biological differences with socially determined differences, or in confirming biological differences they justify detrimental differential treatment. Professor Catherine MacKinnon captures the essence of the problem when she writes:

The relationship between woman's anatomy and her social fate is the pivot on which turns all attempts, and opposition to attempts, to define or change her situation. At every turn, nature appears hand in glove with culture, so that the special definition of woman's place within man's world appears to conform exactly to her differences from him. But the same reality can be seen as the fist of social dominance hidden in the soft glove of reasonableness - the ideology of biological fiat.²

The effectiveness of legal reform in the quest for equality has been questioned. One reason is that existing legislation in countries such as the United States and the United Kingdom is formulated in a manner which hinders its direct impact. There are weaknesses in the substantive provisions and in the procedures and institutions for enforcement. A more fundamental criticism relates to assumptions underlying such legislation, namely, the meaning assigned to the concept of equality, the adop-

1 Editors *Columbia Human Rights Law Review* 261.

2 Sheppard 211.

tion of a male standard as the appropriate norm against which behaviour is evaluated, and the narrow interpretation of discrimination due to a failure to recognise its structural nature. It has been said that women are "caught between a work life that does not allow for any integration of family responsibilities and a home and community life that still demands women's primary allegiance".³ But it is submitted that legal reform can and should play a significant role in establishing an atmosphere of equality. The significance of legislative reform was recognised by the Wiehahn Commission, which observed that legal provisions constituted a clear statement of national will. Anti-discrimination legislation is a significant starting point for addressing inequality in the work place.

To date the formulation of principles relating to employment discrimination by the Industrial Court has occurred largely in the context of race discrimination. Blatant discrimination, such as unequal pay for equal work based on the race of the employee performing the work, has been held to be unfair. In respect of broad principles which may be applied where discrimination is alleged the court has tended to adopt a narrow approach. An example is the classification of a challenge to an employer's job evaluation study as a dispute of interest, on the ground that it amounts to no more than a demand for more money. In the context of sexual harassment, on the other hand, the court appears to have adopted a broad view of the nature of the conduct which constitutes harassment by including both deprivation of a tangible job benefit and creation of a hostile work environment in the concept. It has indicated that an employer may be held liable in both instances. But it should be borne in mind that the court's remarks in respect of harassment were made while considering the alleged unfairness of the dismissal of a harasser by an employer. It has not yet been confronted with an allegation of sexual harassment by an employee against her employer.

It is apparent that the Industrial Court has taken the first tentative steps toward the formulation of anti-discrimination principles in the work place. But it is a long way from establishing a coherent equal employment policy. It is submitted that the task is not one which should be left entirely in the hands of the court. The legislature should intervene in order to lay down universally accepted general norms which may be interpreted by a specialised division of the court in the light of specific factual circumstances. The current broad discretion allows decisions to be based almost entirely on the presiding officers' views of women, and the majority of presiding officers are men. In addition, South African society is a patriarchal one. This is reflected in laws which discriminate against women in areas such as marriage and taxation. Black women in particular have been accorded a subservient role under customary law. Against that background it is possible, if not probable, that the formulation of an equal employment policy by the Industrial Court will be slow and arduous. The nature of the problem is reflected in the following comment on the use of the equal protection clause, contained in the Fourteenth Amendment of the United States constitution, to challenge sex classifications:

"Under the equal protection and due process clauses, laws that treated women and men differently were held unconstitutional only if different treatment seemed unreasonable or arbitrary. At that time, of course, women and men were thought to be profoundly different creatures. Laws treating women and men differently seemed perfectly reasonable, and therefore did not violate the Fourteenth Amendment.... It was not until the 1970's that the court used the Fourteenth Amendment to strike down differential treatment of women and men. But this novel approach was not the result of some doctrinal leap; it was not even the result of doctrinal evolution. The Court's new approach simply reflected changing social mores: Most classifications based on sex now seemed unreasonable. In sum, what distinguishes the sexist Fourteenth Amendment decisions of the 1870's from the feminist Fourteenth Amendment decisions of the 1970's and 1980's is simply judges views of women."⁴

In formulating an equal opportunities policy it is essential that the legislature

4 Morais 1169- 1170.

incorporate and, where necessary, adapt internationally acceptable principles. In the foregoing chapters international norms, as well as various national systems have been analysed to determine the type of conduct which is generally regarded as discriminatory. Internationally, in instruments of the International Labour Organisation, as well as in Europe and the United States, two broad categories of discrimination are prohibited, namely, direct and indirect discrimination. Direct discrimination is easily recognised. It occurs when an employer treats a woman less favourably than it would treat a similarly situated man. Indirect discrimination is less obvious. An apparently neutral policy is adopted, but it has an adverse effect on women. Indirect discrimination typically occurs in the context of hiring employees. An employer applies a facially neutral criterion, such as a minimum height requirement, which effectively excludes a large number of women but very few men. It may apply a criterion, such as a minimum qualification, which is not necessary for proper performance of the job and which has the effect of excluding a large number of women. Both direct and indirect discrimination must be prohibited.

Employers in Britain and the United States are provided with two defences to allegations of unlawful discrimination. They are permitted to discriminate directly where the sex of an employee is a genuine occupational qualification. That is the case where biological requirements, or social or cultural values (such as privacy and decency) demand that the job be performed by an employee of a particular sex. It is submitted that a defence of that nature must be interpreted narrowly. Employers should not be permitted to rely on the defence where reliance would reinforce stereotypical views about jobs which are considered to be appropriate for either men or woman. Employers are permitted to justify indirectly discriminatory practices where reliance on the practice challenged has been classified as a business necessity. Courts in the United States and the United Kingdom have tended to interpret the defence narrowly. Employers who wish to justify the use of indirectly

discriminatory practices have generally been required to show that they are essential to the operation of the business, and not merely convenient. A strict application of that approach would rule out reliance on customer preference as a defence to discrimination -- the fact that customers would prefer a particular position to be held by a man would not allow an employer to exclude women from training for, or appointment to, that position. A similar argument would prevail in respect of the stated preference of employees in respect of a position such as supervisor. Similarly, employers would not be permitted to rely on market forces when setting wage scales. Defences to discrimination reduce the protection afforded to employees and must be applied with the utmost circumspection.

The legislature must also provide for affirmative action by employers in order to diversify occupational opportunities for women. Affirmative action is a measure which is designed to eliminate the effects of institutional discrimination. The emphasis is on equipping women with the necessary skills to perform work from which they traditionally have been excluded. Employers should be required to set objectives in consultation with employees. A subsequent plan setting out goals and timetables which reflect those objectives should be monitored by the state.

In addition to general anti-discrimination legislation, there are three areas which must be addressed specifically by the legislature. These are remuneration, pregnancy and sexual harassment. First, it is essential that the legislature require equal pay for male and female employees for work which is substantially equal, as well as for work which is of equal value to an employer. The wage discrepancy between male and female employees is due largely to occupational segregation rather than to unequal pay for identical work. To date, positions have been evaluated and compensation levels set on the basis of the sex of the person doing the job, rather than the value of the work performed. Highly paid "men's" jobs have been denied to

women due to stereotyped perceptions affecting education and training, as well as the conflict between work and family responsibilities. Unless equal value claims are permitted it will be virtually impossible to alleviate the effects of past discrimination and discrimination outside the work place. The value of work can be determined by means of a job evaluation study conducted by an independent expert. A court should not be required to determine the value of work as it is improbable that it would have the expertise to do so. But a procedure for the evaluation of jobs by independent experts must be provided. Remuneration must be interpreted as including any benefit to which an employee becomes entitled by virtue of the position held, including medical aid, pension and housing benefits, to name a few.

Secondly, the legislature must provide for job security for pregnant employees and proscribe any unfavourable treatment on the basis of pregnancy. It must also provide for adequate maternity benefits around the time of confinement, including time off for ante natal and post natal care and paid maternity leave. The father of a child should be entitled to a short period of paternity leave at the time of the birth of his child. But child care after early infancy should not be seen as the sole responsibility of the mother. The sharing of family and occupational responsibilities is essential for the attainment of equality in employment. Provision should be made for parental leave and for child care facilities. The Commission of the European Communities, for example, has proposed that provision be made for parental leave for either parent in order to care for very young children. It has also suggested that leave for family reasons should be available to any employee of either sex for significant reasons, such as the illness of a child.⁵ Parental leave is an issue which may be dealt with effectively through collective bargaining rather than legislation, as the needs of an employer as well as its employees can be accommodated. Legislation

5 The Parental Leave Directive was proposed in 1983 but has not yet been accepted. However, since its proposal, leave for that purpose has become available in all member states except for the United Kingdom, the Netherlands and Ireland (Docksey 20).

should provide for the protection of pregnant employees and unborn fetuses. But employers should not be able to rely on those provisions to exclude women from the work place. All employees should be properly informed of hazards in the work place and employers should be required to make the work place as safe as possible for both male and female employees.

Thirdly, sexual harassment must be prohibited, both where it involves loss of a tangible benefit, and where it leads to a stressful work environment (a so-called hostile work environment).

Equal employment legislation must be easily enforceable. Enforcement procedures should be accessible, speedy and inexpensive. It is suggested that enforcement should occur through a tribunal which deals only with equal employment issues, such as a specialised division of the Industrial Court. That would ensure that adjudicating officers have the expertise required to deal with potentially complicated issues such as indirect discrimination and equal value. An administrative agency must be established to monitor the effects of the legislation and to inform employers and employees of their obligations and rights. The agency should be in a position to draw up a code of conduct for employers, in respect of specific issues which are not adequately covered in general legislation, as the commissions in the United States and United Kingdom have done. Such an agency should also have the power to enforce anti-discrimination legislation through the appropriate forum as is the case in the United States and, to a lesser extent, in the United Kingdom. It may be noted that in Europe, the attempts to enforce equality legislation has occurred most frequently in member states where specialised agencies have been set up, namely, Ireland and the United Kingdom.⁶ Furthermore, provision should be made for the institution of class actions. These have been described as the "single most

6 Docksey 9.

effective tool in eliminating employment discrimination⁷ in the United States. There it has been found that, while the threat of an individual claim may offer little incentive to an employer to avoid discrimination, the threat of a class action is very effective in compelling employers to eliminate discrimination. The unitary resolution of claims also reduces the costs of litigation. A related issue is the significance to be attached to statistical evidence. In the United States, particularly in the context of the class action, statistical evidence plays a significant role. A substantial statistical disparity is regarded as prima facie proof of discrimination. In the United Kingdom, on the other hand, the use of statistics is less significant because less favourable treatment of a particular individual must be shown in order to make out a case of discrimination. It is suggested that an approach which is akin to the American one should be adopted. Discriminatory conduct, by its very nature, tends to affect categories of people. The fact that an employer practice impacts negatively on a significant number of women should be regarded as prima facie proof of discrimination in respect of which an employer is required to introduce evidence to the contrary.

Finally, it is necessary to mention that the implementation of an equal employment policy will involve costs for employers and the state. Anti-discrimination laws in fact play a dual role -- a social one, to ensure social progress and improve employees' working and living conditions, and an economic one to ensure that employers which implement equal employment policies are not placed at a disadvantage vis-a-vis those which do not. Opponents of anti-discrimination laws have argued that the cost of equality to employers and the state should not be too great. They have also argued that employers should be permitted to rely on market forces to justify indirect discrimination -- in effect, suggesting that discriminatory practices which are functional to the market (such as the employment of part time workers at low

wages) should be permitted.⁸ However, as proponents of equality point out, an equal employment policy does not only ensure social and economic progress for employees, but also has economic merits as far as employers are concerned:

"Classical market economists take the view that discrimination is inefficient in that it involves the introduction of non-economic factors in making a judgment as to the hiring and dismissal of workers. Employers, in making their business decisions, should be required to refrain from the temptation of resorting to factors, such as... sex prejudice, which are unrelated to labor efficiency. Capitalist efficiency, therefore, favors the introduction of an effectively implemented anti-discrimination law."⁹

8 Fredman 130- 132 discusses the constraints on equality within a market order.

9 Bercusson 133- 134.

SELECTED ABBREVIATIONS

ACAS:	Advisory Conciliation and Arbitration Service
BCEA:	Basic Conditions of Employment Act 3 of 1983
BFOQ:	Bona Fide Occupational Qualification
CA:	Court of Appeal
EAT:	Employment Appeal Tribunal
ECJ:	European Economic Community
EEC:	European Economic Community
EEOC:	Equal Employment Opportunities Commission
EOC:	Equal Opportunities Commission
EPA:	Equal Pay Act 1963 (United States)
EPCA:	Employment Protection Consolidation Act 1978
EqPA:	Equal Pay Act 1970 (United Kingdom)
FLSA:	Fair Labour Standards Act 1938
GOQ:	Genuine Occupational Qualification
HL:	House of Lords
ILJ:	Industrial Law Journal (South Africa)
ILO:	International Labour Organisation
IRLR:	Industrial Relations Law Reports
IT:	Industrial Tribunal

LRA:	Labour Relations Act 28 of 1956
MOSA:	Machinery and Occupational Safety Act 6 of 1963
NICA:	Northern Ireland Court of Appeal
SCS:	Scottish Court of Sessions
UIA:	Unemployment Insurance Act 30 of 1966
UK:	United Kingdom
UN:	United Nations
USA:	United States Of America

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Declaration on the Elimination of Discrimination Against Women

International Covenant on Civil and Political Rights

International Covenant on Economic, Social and Cultural Rights

Universal Declaration of Human Rights

United Nations Charter

B United Nations Education Scientific and Cultural Organisation

Convention Against Discrimination in Education

C International Labour Organisation

Discrimination (Employment and Occupation) Convention No 111 of 1958

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E Europe

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F Africa

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C South Africa

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