

**The Reconciliation of Work and Care – A Comparative Analysis  
of South African Labour Laws Aimed at Providing Working Parents  
with Time off to Care**

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## ABSTRACT

The purpose of this thesis is to examine the adequacy of South African labour laws which regulate the rights of employees to take time off from work to attend to care-giving responsibilities. It engages in a comparative analysis between South African labour laws, international and regional labour standards, and the laws of the United Kingdom which govern the reconciliation of work and care. Work–care reconciliation can be achieved through the reorganisation of work to account for family interests and responsibilities. Labour laws must be used to restructure working times through the incorporation of family-friendly policies, with particular emphasis on statutory leave provisions. As such, the reconciliation of work and care requires the statutory recognition of time off from work for employees to attend to their family responsibilities.

This thesis relies on labour standards set out by international and regional organisations as indications of minimum standards which should exist within a comprehensive legislative package aimed at the reconciliation of work and care. These minimum standards have been identified as maternity leave, adoption leave, paternity leave, parental leave, emergency care leave, and flexible working arrangements. Maternity leave should be comprised of a period of leave over the pregnancy, childbirth, and postnatal care of the child; benefits in the form of cash for the period of maternity leave; health protection at work during pregnancy and the period of breastfeeding; employment protection which provides security of employment and the right to return to work after maternity leave, as well as protection against discrimination based on maternity; and periods of breastfeeding breaks available to employees at the workplace.

South African labour laws provide employees with rights to maternity leave and family responsibility leave. Section 25 of the *Basic Conditions of Employment Act 75* of 1997 provides pregnant employees with four consecutive months of maternity leave. Section 27 provides employees with family responsibility leave, available for the duration of three days to both men and women for the general purpose of caring for a family member. By examining the scope, duration, qualifications, and affordability of maternity leave and family responsibility leave, this

thesis will seek to ascertain whether these leave entitlements have limitations in their capacities to accommodate employees with care-giving responsibilities.

The laws of the United Kingdom are relied on as a comparative foreign legal system which has made numerous policy initiatives and legal reforms within the area of the reconciliation of work and care. Fuelled by a political agenda, the commitment of the government of the United Kingdom towards family-friendly legislative rights has led to the adoption of an inclusive and comprehensive statutory package aimed at the reconciliation of work and care. These statutory provisions are set out and examined with the objective of providing insight to the measures which are necessary to ensure the adequacy of South African labour legislation aimed at the reconciliation of work and care.

The comparative analyses of international and regional labour standards, together with the laws of the United Kingdom, lead to a series of recommendations in the form of amendments to current labour legislation and the introduction of new legislative provisions. This thesis concludes with proposals aimed at ensuring that employees with care-giving responsibilities are provided with options of leave entitlements which accommodate their individual needs according to affordability and family structure. As such, it calls for legislative reform in the labour laws of South Africa to provide employees with a comprehensive legislative package aimed at the reconciliation of work and care.

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## TABLE OF ABBREVIATIONS

|        |  |
|--------|--|
| Acas   | Advisory, Conciliation and Arbitration Service   |
| ACDP   | African Christian Democratic Party   |
| ACRWC  | <i>African Charter on the Rights and Welfare of the Child</i>  |
| AU     | African Union  |
| BCEA   | <i>Basic Conditions of Employment Act 75 of 1997</i>   |
| CEACR  | Committee of Experts on the Application of Conventions and Recommendations                           |
| CEDAW  | <i>Convention on the Elimination of All Forms of Discrimination against Women</i>                    |
| CESCR  | Committee on Economic, Social and Cultural Rights  |
| CFA    | <i>Children and Families Act, 2014 (UK)</i>  |
| EA     | <i>Equality Act, 2010 (UK)</i>   |
| EAT    | Employment Appeals Tribunal (UK)   |
| ECJ    | European Court of Justice  |
| EEA    | <i>Employment Equity Act 55 of 1998</i>  |
| ERA    | <i>Employment Rights Act 1999 (UK)</i>   |
| EU     | European Union   |
| ICESCR | <i>International Covenant on Economic, Social and Cultural Rights</i>                                |
| ILC    | International Labour Conference  |
| ILO    | International Labour Organisation  |
| LAC    | Labour Appeal Court  |
| LLAB   | Labour Laws Amendment Bill   |
| LRA    | <i>Labour Relations Act 66 of 1995</i>   |
| MPLR   | <i>Maternity and Parental Leave etc. (Terms and Conditions of Employment) Regulations, 1999 (UK)</i> |

|        |  |
|--------|--|
| MPRWRS | <i>Maternity and Paternity Rights and Women Returners Survey 2009/10 (UK)</i>                      |
| NCOP   | National Council of Provinces  |
| OAU    | Organisation of African Unity  |
| OECD   | Organisation for Economic Co-operation and Development   |
| PALR   | <i>Paternity and Adoption Leave (Amendment) Regulations 2002 (UK)</i>                              |
| SADC   | Southern African Development Community   |
| SDA    | <i>Sex Discrimination Act, 1975 (UK)</i>   |
| ShPLR  | <i>Statutory Shared Parental Leave (Terms and Conditions of Employment) Regulations, 2014 (UK)</i> |
| SMPR   | <i>Statutory Maternity Pay (General) Regulations 1986 (UK)</i>                                     |
| SSCBA  | <i>Social Security Contributions and Benefits Act 1986 (UK)</i>                                    |
| ToA    | <i>Treaty of Amsterdam 1997</i>  |
| UDHR   | <i>Universal Declaration of Human Rights</i>   |
| UIA    | <i>Unemployment Insurance Act 63 of 2001</i>   |
| UIAA   | <i>Unemployment Insurance Amendment Act 10 of 2016</i>   |
| UICA   | <i>Unemployment Insurance Contributions Act 4 of 2002</i>  |
| UIF    | Unemployment Insurance Fund  |
| UK     | United Kingdom   |
| UN     | United Nations   |
| UNCRC  | <i>United Nations Convention on the Rights of the Child</i>  |
| WFA    | <i>Work and Families Act 2006 (UK)</i>   |
| WLB4   | <i>Fourth Work-Life Balance Employee Survey, 2012 (UK)</i>   |

# CHAPTER ONE

## INTRODUCTION

### 1.1 Introduction

This thesis is a comparative analysis of South African labour laws governing the reconciliation of work and care against international and regional labour standards and the laws of the United Kingdom (UK).<sup>1</sup> The focus of the investigation is to examine the adequacy of South African labour legislation which provides employees with employment rights and protections to take time off from work to attend to care-giving responsibilities. It is based on the premise that the increase in care-giving responsibilities (or family responsibilities) of employees across South Africa has led to the need for legislative reform in the reconciliation of work and care.<sup>2</sup>

The reconciliation of work and care is dependent on three essential elements: time, money, and services.<sup>3</sup> For employed caregivers, time involves both time to work and time to care; money may be essential to buy care and to pay for caregivers; and finally, services need to be available to care for children.<sup>4</sup> These three elements provide the employed caregiver with genuine choices in their endeavours to engage in paid work and unpaid work according to their financial and family needs.<sup>5</sup> This thesis is limited to a comparative analysis of the legislative provisions of time off for working parents to provide care to young children through employment rights and protections.<sup>6</sup> The legal framework for time off to provide care encompasses entitlements to leave

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<sup>1</sup> Literature within this area of law refers to 'work-family integration', 'work-family reconciliation', 'work-life balance', and 'work-care balance.' However, for this thesis the term 'work-care reconciliation' has been chosen to reflect the intention to address the conflict which exists between work and care. These terms are mutually acceptable and likewise, denote the conflict between work and care.

<sup>2</sup> CD Field, JJ Bagraim & A Rycroft 'Parental leave rights: Have fathers been forgotten and does it matter?' (2012) 36(2) *SALR* 30; L Dancaster & T Cohen 'Leave for working fathers in the SADC region' (2015) 36 *ILJ* 2474.

<sup>3</sup> L Dancaster & M Baird 'Workers with care responsibilities: Is work-family integration adequately addressed in South African labour law?' (2008) 29 *ILJ* 22, 41; L Dancaster & T Cohen 'Workers with family responsibilities: a comparative analysis to advocate for the legal right to request flexible working arrangements in South Africa' (2010) 34(1) *SALJ* 31, 33; L Dancaster 'State measures towards work-care integration in South Africa' in Z Mokomane *Work-Family Interface in Sub-Saharan Africa: Challenges and Responses* (2014) 177, 178.

<sup>4</sup> Dancaster & Baird (note 3 above) 41; Dancaster & Cohen (note 3 above) 33; Dancaster (note 3 above) 178; J Lewis 'Employment and care: The policy problem, gender equality and the issue of choice' (2006) 8(2) *Journal of Comparative Policy Analysis* 103, 111.

<sup>5</sup> *Ibid.*

<sup>6</sup> Dancaster (note 3 above) 178; J Lewis & M Campbell 'UK work/family balance policies and gender equality, 1997–2005' (2007) 14(1) *Social Politics: International Studies in Gender, State and Society* 4, 5; M Leon 'Parental,

from work for the purpose of caregiving to newborn or young children, and entitlements to flexible working which allow for flexible care to dependents with long-term care needs.<sup>7</sup>

This chapter will first introduce the concept of work–care conflict as it relates to employees within the South African legal system. It places in context the links between work–care conflict, gender inequalities in the workplace, and the increased labour participation of women in South Africa. By establishing the work–care conflict, the need to regulate work–care conflict through labour laws becomes clear. A literature review is carried out to establish the rationale for the study conducted in this thesis. The literature review highlights the gaps in the existing legislative framework governing the reconciliation of work and care in South Africa. This chapter sets out the objectives, central premises, methodology and structure of this thesis.

## 1.2 Defining the work–care conflict in South Africa

The labour laws of South Africa are based on the traditional assumption that a family consists of a male breadwinner and a female caregiver and homemaker.<sup>8</sup> Within the framework of this traditional assumption, the role of caregiver and the role of a worker remain separate and cannot be reconciled.<sup>9</sup> The conflict between work and care is based on the gendered assumption shared by social and cultural constructs that women must be the primary caregivers in their households.<sup>10</sup> The gendered assumption originates from women’s biological reproductive

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maternity and paternity leave: European legal constructions of unpaid care giving’ (2007) 58(3) *Northern Ireland Legal Quarterly* 353, 355; L Haas ‘Parental leave and gender equality: Lessons from the European Union’ (2003) 20(1) *Review of Policy Research* 89; H Selford ‘The UK referendum on membership of the EU: Whither social welfare and family law’ (2016) 38(2) *Journal of Social Welfare and Family Law* 115, 116 <http://dx.doi.org/10.1080/09649069.2016.1200172>, accessed on 10 July 2016.

<sup>7</sup> Dancaster & Baird (note 3 above) 29; Dancaster & Cohen (note 3 above) 33; Dancaster (note 3 above) 178.

<sup>8</sup> Field, Bagraim & Rycroft (note 2 above) 30; R Crompton *Employment and the Family: The Reconfiguration of Work and Family Life in Contemporary Societies* (2006) 2; B Clarke & B Goldblatt ‘Gender and family law’ in E Bonthuys & C Albertyn (eds) *Gender, Law & Justice* (2007) 195, 202; J Conaghan ‘Work, family and the discipline of labour law’ in J Conaghan & K Rittich (eds) *Labour Law, Work and Family* (2007) 19, 26; E Huysamen ‘Women and maternity: Is there truly equality in the workplace between men and women, and between women themselves?’ in K Malherbe & J Sloth-Nielsen (eds) *Labour Law into the Future: Essays in Honour of D’Arcy du Toit* (2012) 46, 46.

<sup>9</sup> Conaghan (note 8 above) 26; T Cohen ‘The efficacy of international standards in countering gender inequalities in the workplace’ (2012) 33 *ILJ* 19, 27.

<sup>10</sup> Rapoport et al *Beyond Work-family Balance: Advancing Gender Equity and Workplace Performance* (2002) 25–29; KL Adams ‘The *Family Responsibilities Convention* reconsidered: The work-family intersection in international law thirty years on’ (2013–2014) 22 *Cardozo Journal of International & Comparative Law* 201, 208; Clarke & Goldblatt (note 8 above) 202; Conaghan (note 8 above) 30.

functions to bear children.<sup>11</sup> A gendered assumption exists where social significance is attached to sexual difference, resulting in social and political institutions and identities founded on those sexual differences.<sup>12</sup> One of the consequences of the gendered assumption is that women must conform to the socially and culturally constructed role of the unpaid caregiver.<sup>13</sup>

Social priorities place greater emphasis on paid work of employees over the unpaid work of family carers.<sup>14</sup> This affects women who attempt to balance their responsibilities as paid employees and as unpaid caregivers and homemakers.<sup>15</sup> Such gendered assumptions have led to ‘systemic barriers’ which have carried through to the workplace. These ‘systemic barriers’ obstruct the rights of women to attain full-time employment by placing the care-giving role of women in opposition to the role of the ‘ideal worker’.<sup>16</sup> The ideal worker is perceived as a person who functions in the primary role of a full-time employee and has little or no responsibilities as a family-carer for the purposes of childbearing or childrearing. Since the ideal worker is assumed to be male, these gendered assumptions exclude workers with care-giving responsibilities from performing as ideal workers.<sup>17</sup> Social ideals reflect further that an employer is more likely to consider a man, rather than a woman, to be the type of employee who can work longer hours without interruption.<sup>18</sup> Thus, the majority of women are excluded from actually fulfilling the role of the ideal worker.<sup>19</sup>

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<sup>11</sup> Cohen (note 9 above) 23; J Kentridge ‘Measure for measure: Weighing up the costs of a feminist standard of equality at work’ (1994) *Acta Juridica* 85, 85.

<sup>12</sup> J Fudge ‘A new gender contract? Work/life balance and working-time flexibility’ in J Conaghan & K Rittich (eds) *Labour Law, Work and Family* (2007) 261, 264–265; Field, Bagraim & Rycroft (note 2 above) 30.

<sup>13</sup> Adams (note 10 above) 211; C Albertyn ‘Substantive equality and transformation in South Africa’ (2007) 23 *SAJHR* 253, 261.

<sup>14</sup> L Dancaster & T Cohen ‘Family responsibility discrimination litigation – a non-starter?’ (2009) 2 *Stell LR* 221, 228; Cohen (note 9 above) 23–24.

<sup>15</sup> Cohen (note 9 above) 24–30.

<sup>16</sup> *Ibid*; Clarke & Goldblatt (note 8 above) 203.

<sup>17</sup> Cohen (note 9 above) 30.

<sup>18</sup> *Ibid*.

<sup>19</sup> Adams (note 10 above) 211; Dancaster & Cohen (note 3 above) 31; E Bonthuys ‘Gender and Work’ in E Bonthuys & C Albertyn (eds) *Gender, Law & Justice* (2007) 245, 249–250; O Dupper ‘Maternity protection in South Africa: An international and comparative analysis (Part one)’ (2001) 3 *Stell LR* 421; JC Williams *Unbending gender: Why family and work conflict and what to do about it* (2000) 1.



A woman must be employed with the possibility that at some point she will claim maternity leave.<sup>20</sup> Therefore, women are not afforded full recognition as ‘ideal’ employees due to the gendered assumption that women are the principal caregiver in a household. Although women are not considered as ‘ideal workers’, the labour participation of women has been increasing steadily over a number of years.<sup>21</sup> For instance, the labour force participation of women has increased from 38 per cent in 1995 to 51.4 per cent in 2016.<sup>22</sup> The increased labour participation of women has impacted the conflict between work and care in South Africa. South Africa has a large percentage of women-headed households. This is particularly true in rural areas, where the women live apart from their husbands and care for the children.<sup>23</sup> These households are often vulnerable and lack financial resources. This means that more women from rural homes must seek income-producing employment, leaving behind their children in the care of extended family.<sup>24</sup> Therefore, women often fulfil dual roles as worker and carer.

The conflict between work and care is further compounded by the diverse family structures which exist in South Africa.<sup>25</sup> The most common type of family in South Africa is the nuclear family, which consists of a mother and a father with their biological or adopted children only.<sup>26</sup> However, there is an increase in diversity in the formation of modern families. Modern families may include couples in same-sex relationships and marriages, couples in cohabitation, or single-parent families.<sup>27</sup> Single parent households may require the single mother or single father to

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<sup>20</sup> Ibid.

<sup>21</sup> Bonthuys (note 19 above) 245; Adams (note 10 above) 208; Huysamen (note 8 above) 46. R Smit ‘The changing role of the husband/father in the dual-earner family in South Africa’ (2002) 33(3) *Journal of Comparative Family Studies* 401, 402.

<sup>22</sup> Department of Social Development Republic of South Africa *White Paper on Families in South Africa* October 2012 (White Paper on Families) 9, 16; Field, Bagraim & Rycroft (note 2 above) 39; Dancaster & Cohen (note 3 above) 32; Huysamen (note 8 above) 47; Smit (note 21 above) 401; O Dupper et al ‘The case for increased reform in South African family and maternity benefits’ (2001) 4 *Journal of Law, Democracy & Development* 27, 38; *Quarterly Labour Force Survey – P2011 – 2nd Quarter 2016* Appendix 1, Table 2 (Quarterly Labour Force Survey 2016). Publication date: 28 July 2016 <http://www.statssa.gov.za>, accessed on 14 November 2016.

<sup>23</sup> Clarke & Goldblatt (note 8 above) 198; Bonthuys (note 19 above) 247.

<sup>24</sup> Clarke & Goldblatt (note 8 above) 197–198.

<sup>25</sup> The White Paper on Families (note 22 above) 9, 16.

<sup>26</sup> Ibid.

<sup>27</sup> Ibid; Huysamen (note 8 above) 47.

work full time in pursuit of financial stability for their dependants.<sup>28</sup> The dependants in a modern family may range from children to extended family, and ill or elderly family members.<sup>29</sup>

In light of the diverse family structures, the standard worker cannot be presumed to be a full-time, male worker. The mother of the family no longer has the primary role as caregiver but is also employed for the purposes of contributing to the financial needs of her dependants.<sup>30</sup> This dual role of a woman creates the challenge of ensuring that neither her family nor her job is neglected at the expense of the other.<sup>31</sup> Furthermore, modern family structures may require that the father of the family no longer be the sole breadwinner and may require him to share in the parental responsibilities attached to caregiving.<sup>32</sup> However, the actuality of the dual roles of men and women as workers and caregivers has not removed the assumption that a woman is the principal caregiver.<sup>33</sup>

Gendered assumptions lead to a conflict in the household and the workplace roles of both women and men. As working parents endeavour to fulfil the dual roles of employee and caregiver, an inevitable conflict arises between responsibilities as caregiver and income-earner.<sup>34</sup> While gendered assumptions assign women to the role of principal carer, they have also resulted in the poor social recognition of fathers as caregivers. More value is placed on their role of breadwinners than on the role as fathers.<sup>35</sup> Men cannot achieve full recognition of their roles as fathers owing to the gendered assumption that their principal role is as the breadwinner of the family.

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<sup>28</sup> Field, Bagraim & Rycroft (note 2 above) 30; Clarke & Goldblatt (note 8 above) 202; Smit (note 21 above) 401–402; Dupper, Malherbe, Shipman & Bolani (note 22 above) 27.

<sup>29</sup> The White Paper on Families (note 22 above) 16–22.

<sup>30</sup> Clarke & Goldblatt (note 8 above) 202.

<sup>31</sup> Dancaster & Cohen (note 3 above) 31.

<sup>32</sup> Field, Bagraim & Rycroft (note 2 above) 30; Huysamen (note 8 above) 48; Rapoport et al (note 10 above) 6.

<sup>33</sup> Field, Bagraim & Rycroft (note 2 above) 30; Dancaster & Cohen (note 3 above) 32.

<sup>34</sup> Adams (note 10 above) 208; Conaghan (note 8 above) 27; Crompton (note 8 above) 78–79; Field, Bagraim & Rycroft (note 2 above) 30; Dancaster & Cohen (note 3 above) 32; JH Greenhaus & NJ Beutell 'Sources of conflict between work and family roles' (1985) 10(1) *The Academy of Management Review* 76, 77.

<sup>35</sup> ILO (2014) *Maternity and Paternity at Work: Law and Practice across the World*, International Labour Organisation, Geneva 52 <http://www.ilo.org/maternityprotection>, accessed on 20 January 2015.

In October 2012, the South African Department of Social Development released the *White Paper on Families* (the White Paper), with the objective of promoting family life and strengthening families in South Africa.<sup>36</sup> The White Paper defines work–family conflict as ‘a form of inter-role conflict’ in which the pressures from work and family domains are mutually incompatible.<sup>37</sup> Accordingly, work and family are mutually incompatible because while paid work is necessary for the economic support of a family, the needs of the family are the emotional incentive for paid work.<sup>38</sup> For instance, emotional incentive is attached to the care of a child. In order to care for a child, the employee must be absent from work and remain at home to provide care for the child. Alternatively, in order to work, the employee must find a substitute caregiver to care for the child.<sup>39</sup> Therefore, work and care are mutually dependent on each other and neither can operate effectively within conflict.<sup>40</sup>

The reconciliation of work and care accordingly requires acknowledgment of the mutually incompatible domains. As such, the reconciliation of work and care calls for the reconciliation of conflicting social obligations of work and family demands. It can be achieved through the reorganisation of work to account for family interests and responsibilities.<sup>41</sup> The statutory regulation of work and care through labour laws is aimed at providing the rights and protections of time off to care, thereby reconciling these roles. These labour law rights and protections have the potential to address the gendered preference of motherhood over fatherhood, and transform gender inequalities in both the workplace and in the household.<sup>42</sup>

### 1.3 The legal regulation of the work–care conflict

Legislative reforms in the post-apartheid era of South Africa were aimed at the transformation of apartheid institutions and most policies adopted at the time neglected to incorporate expressly the

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<sup>36</sup> The White Paper on Families (note 22 above) 8; A Behari ‘Daddy’s home: The promotion of paternity leave and family responsibilities in the South African workplace’ (2016) 37(2) *Obiter* 346, 360.

<sup>37</sup> The White Paper on Families (note 22 above) 4; Greenhaus & Beutell (note 34 above) 77.

<sup>38</sup> Adams (note 10 above) 206.

<sup>39</sup> *Ibid* 204.

<sup>40</sup> *Ibid*; J Conaghan & K Rittich (eds) *Labour law, Work and Family* (2007) 8.

<sup>41</sup> Williams (note 19 above) 4; EC Landau & Y Beigbeder *From ILO Standards to EU Law: The Case of Equality between Men and Women at Work* (2008) 167.

<sup>42</sup> *Ibid*; Huysamen (note 8 above) 48; C McGlynn ‘Work, family and parenthood: The European Union agenda’ in J Conaghan & K Rittich (eds) *Labour Law, Work and Family* (2007) 217, 228.

socio-economic factor of families into laws. As such, traditional labour laws, based on the traditional assumption that the man of the household is the breadwinner and will be employed full time to support his family financially, while his wife cares for the home and the children, failed to account for the dynamics of the roles of men and women in South African families.<sup>43</sup> The conflict between work and care requires current labour law regulations and policies to be re-examined to ensure that they adequately provide for the dual roles of working women and the family responsibilities of working men respectively.<sup>44</sup>

Laws and policies aimed at the reconciliation of work and care necessitate the statutory recognition of time off from work for employees to attend to their family responsibilities.<sup>45</sup> Labour laws must be used to restructure working time through the incorporation of family-friendly policies, with particular emphasis on statutory leave provisions.<sup>46</sup> For instance, the leave entitlements of traditional labour law provide annual leave for rest and recreation, and paid sick leave.<sup>47</sup> With the increase in the number of women entering the labour force, legal provisions had to account for those women who fell pregnant while employees.<sup>48</sup> Maternity leave was first legislated in South Africa through the *Basic Conditions of Employment Act 3 of 1983* (now repealed), in the interest of affording equal opportunities between men and women in the workplace.<sup>49</sup> Considering the increased labour participation of women and the challenges which arise from the shift in traditional roles of men and women, there is a need to understand better the work–care conflicts and to reassess measures which reconcile them.<sup>50</sup>

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<sup>43</sup> Bonthuys (note 19 above) 251; Clarke & Goldblatt (note 8 above) 197; Conaghan (note 8 above) 26; the White Paper on Families (note 22 above) 7.

<sup>44</sup> Field, Bagraim & Rycroft (note 2 above) 30; L Richter 'The Importance of Fathering for Children' in L Richter & R Morrell (eds) *Baba: Men and Fatherhood in South Africa* (2006) 53, 57.

<sup>45</sup> Dancaster & Cohen (note 3 above) 33.

<sup>46</sup> ILO Maternity & Paternity at Work (note 35 above) 52.

<sup>47</sup> Dancaster & Baird (note 3 above) 28.

<sup>48</sup> *Ibid.*

<sup>49</sup> Section 17(b) of the Basic Conditions of Employment Act 3 of 1983 prohibited employees from working one month before and two months after confinement. Grogan *Workplace Law* (2014) 65; F Kagnas & C Murray 'Law and women's rights in South Africa: An overview' (1994) *Acta Juridica* 1, 29–30; CR Matthias 'Neglected terrain: Maternity legislation and the protection of the dual role of worker and parent in South Africa' (1994) 15 *ILJ* 20.

<sup>50</sup> H Brand & J Barrerio-Lucas 'Return-to-work experiences of female employees following maternity leave' (2014) 38(1) *South African Journal of Labour Relations* 69, 70.

Within the labour market, social security provides income substitution to persons who have to leave their employment temporarily or permanently, or to workers who have been excluded from the protection of labour laws because of their category of employment.<sup>51</sup> As such, social security and labour laws mutually complement one another.<sup>52</sup> Section 27(1)(c) of the Constitution states that everyone has the right to access social security, even if they are unable to support themselves and their dependants.<sup>53</sup> Social security ensures the promotion of social and economic development by providing minimum standards of living in society.<sup>54</sup> It provides measures of protection to members of society to ensure that they do not face social and economic distress through insufficient income which may result from sickness, maternity, employment injury, or old age, among other social and economic consequences.<sup>55</sup> The protection takes the form of types of monetary benefits.

Social security plays a vital role in addressing gender inequalities in the workplace by protecting women's roles as child bearers, their family responsibilities, and their domestic roles in their households.<sup>56</sup> Work and family are recognised as significant social concepts.<sup>57</sup> Therefore, work and family must be protected by social security.

The role of labour legislation and social security in the reconciliation of work and care would require an analysis of laws which regulate maternity protection and work–care matters. Primary labour law statutes which promote work–care reconciliation in South Africa are the *Constitution of the Republic of South Africa* 1996 (the Constitution); the *Basic Conditions of Employment Act* 75 of 1997 (BCEA), and the *Codes of Good Practice*; the *Labour Relations Act* 66 of 1995 (LRA); and the *Employment Equity Act* 55 of 1998 (EEA). Maternity as a form of social security

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<sup>51</sup> MP Olivier 'The Concept of Social Security' in MP Olivier et al (eds) *Introduction to Social Security* (2004) 13, 31.

<sup>52</sup> LG Mpedi 'The evolving relationship between labour law and social security' (2012) *Acta Juridica: Reinventing Labour Law: Reflecting on the First 15 years of the Labour Relations Act and Future Challenges* 270, 271.

<sup>53</sup> Section 27(1)(c) of the Constitution of the Republic of South Africa Act 108 of 1996 (Constitution); MP Olivier & ER Kalula 'Scope of Coverage' in MP Olivier et al (eds) *Introduction to Social Security* (2004) 123, 124.

<sup>54</sup> E Strydom 'Introduction to Social Security Law' in EML Strydom et al (eds) *Essential Social Security Law* (2006) 1, 24; M Nyenti & LG Mpedi 'The Impact of the SADC Social Protection Instruments on the Setting up of a Minimum Social Protection Floor in Southern African Countries' (2012) 15(1) *PER/PELJ* 243, 245–246.

<sup>55</sup> Strydom (note 54 above) 4–6; Mpedi (note 52 above) 270–271.

<sup>56</sup> L Addati 'Extending maternity protection to all women: Trends, challenges and opportunities' (2015) 68(1) *International Social Security Review* 89–91.

<sup>57</sup> Adams (note 10 above) 206.

is protected by the *Unemployment Insurance Act* 63 of 2001 (UIA), as amended by the *Unemployment Insurance Amendment Act* 10 of 2016 (UIAA). Therefore, the UIA will be relied on in an analysis of the provision of maternity benefits. In carrying out an analysis of the national legal framework of laws regulating work–care reconciliation in South Africa, the relevant legislation must be examined together with related case law.

## 1.4 Literature review

There has been a growing interest in the academic discourse of the laws governing the reconciliation of work and care in South Africa.<sup>58</sup> This literature review will be limited to a survey of academic publications central to the research of this thesis and which assess the regulation of work and care through labour laws in South Africa. Academic scholarship has recognised the need to adopt workplace policies which address the conflict between work and care in South Africa.<sup>59</sup> Research within the area of work–care reconciliation began with the objectives of assessing the extent and adequacy of women’s employment rights to maternity.<sup>60</sup> The biological capacity of women to give birth has been acknowledged as a significant source of workplace discrimination.<sup>61</sup>

As the discussions developed into understanding the burdens placed on working mothers in the reconciliation of their workplace and family demands, the discourse extended to investigations on the inclusion of leave for fathers of newborn babies.<sup>62</sup> The provision of three days of family

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<sup>58</sup> O Dupper ‘Maternity protection in South Africa: An international and comparative analysis (Part two)’ (2002) *Stell LR* 83; Dancaster ‘Work-life balance and the legal right to request flexible working arrangements’ (2006) 2(9) *South African Journal of Economic & Management Sciences* NS 175; CR Matthias ‘Achieving effective maternity rights in a post-apartheid South Africa: Is the new constitution adequate?’ (1995) 28(2) *The Comparative and International Journal of Southern Africa* 247, 248; Ml van Jaarsveld ‘Parental leave: For the sake of employees and their children: A comparative study’ (2002) 14 *SA Merc LJ* 399; R Smit ‘Family-related Policies in Southern African countries: Are working parents reaping any benefits?’ (2011) 42(1) *Journal of Comparative Family Studies* 15; Dancaster (note 3 above) 177; Matthias (note 49 above) 20; Dupper (note 19 above) 421; Huysamen (note 8 above) 46; Field, Bagraim & Rycroft (note 2 above) 30; Dupper, Malherbe, Shipman & Bolani (note 22 above) 38; Dancaster & Baird (note 3 above) 22; Dancaster & Cohen (note 14 above) 221; Dancaster & Cohen (note 3 above) 31.

<sup>59</sup> Dancaster & Cohen (note 3 above) 32; Brand & Barrerio-Lucas (note 50 above) 70; Dancaster (note 3 above) 177.

<sup>60</sup> Dupper (note 19 above) 421; Dupper (note 58 above) 83; Dupper, Malherbe, Shipman & Bolani (note 22 above) 27.

<sup>61</sup> *Ibid.*

<sup>62</sup> Field, Bagraim & Rycroft (note 2 above) 30; Dupper, Malherbe, Shipman & Bolani (note 22 above) 38; Dancaster & Baird (note 3 above) 35; Dancaster & Cohen (note 3 above) 33; Dancaster & Cohen (note 2 above) 2474.

responsibility leave available to fathers of newborn babies has been found to be grossly inadequate.<sup>63</sup> The inclusion of a separate and individual leave entitlement for fathers has been recommended as a means of sharing the care-giving demands with women.<sup>64</sup> Further academic interest in the legislative pursuit has seen the research move towards an abundance of comparative analyses.<sup>65</sup> The aims have been to expose the inadequacies of South Africa's legislative provisions relating to time off from work to care, and to make recommendations based on international minimum standards and foreign national legal systems.

As the research points out, there are three essential elements relevant to the reconciliation of work and care: time (time to work and time for care); money (cash to buy care and cash for carers); and services (for children, the sick and the elderly).<sup>66</sup> According to Dancaster and Baird (2008), these elements are crucial to the accommodation of choice for carers. These elements provide the working carer with options of combining their work and care responsibilities.<sup>67</sup> The literature which assesses the regulation of work and family through labour laws in South Africa is directed at time off from work to provide care.<sup>68</sup>

The literature highlights types of leave essential to the provision of time off to care, which they submit as adequate leave provisions.<sup>69</sup> These are:

- maternity leave, to provide mothers with time off for the birth of a child;
- adoption leave; to provide adoptive parents with time off for the placement of the adoptive child;
- paternity leave, to provide fathers with time off for the birth of a child;
- parental leave, to provide parents with time off during the early developmental stages of a child's life; and

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<sup>63</sup> Dancaster & Baird (note 3 above) 35, 37; Dancaster & Cohen (note 3 above) 33; Dancaster & Cohen (note 2 above) 2474; Dancaster (note 3 above) 184.

<sup>64</sup> Field, Bagraim & Rycroft (note 2 above) 30; Dupper, Malherbe, Shipman & Bolani (note 22 above) 38; Dancaster & Baird (note 3 above) 24; Dancaster & Cohen (note 14 above) 221; Dancaster & Cohen (note 3 above) 32; Dancaster (note 3 above) 184.

<sup>65</sup> Ibid.

<sup>66</sup> Dancaster & Cohen (note 3 above) 41; Dancaster & Cohen (note 3 above) 33; Dancaster (note 3 above) 178.

<sup>67</sup> Dancaster & Cohen (note 3 above) 31.

<sup>68</sup> Ibid 33; Dancaster & Baird (note 3 above) 29; Dancaster (note 3 above) 178.

<sup>69</sup> Ibid; Huysamen (note 8 above) 46–75.

- emergency leave, to be used under instances of sudden illness of a child or to arrange substitute care in the event that the arranged caregiver becomes unavailable.<sup>70</sup>

They further encourage the adoption of the right to request flexible working arrangements, which may be made feasible through technological advancements, globalisation, and non-traditional forms of work organisation.<sup>71</sup>

There is a consensus in the literature that the South African legislative rights providing time off from work to provide care are inadequate.<sup>72</sup> South African labour law provides limited leave for time off to care. Recommendations from the literature focus on the adoption of paternity leave or parental leave, which may encourage shared parenting between the mother and the father of a child.<sup>73</sup> Recommendations have also been made for the introduction of adoption leave and benefits, which are excluded from the leave entitlements in South Africa.<sup>74</sup> The right to request flexible working arrangements is recommended in response to the South African care crisis, and particularly on account of the care demanded by HIV/Aids crisis.<sup>75</sup>

The literature addresses maternity leave by assessing the current provisions set out in the BCEA, and determining whether they provide adequate protection to pregnant employees, or employees who have given birth.<sup>76</sup> Dupper (2001, 2002) examines the laws of South Africa which provide and support maternity protection against those prescribed by international labour standards. In a two-part discussion, he considers whether or not South African maternity protection meets international labour standards.<sup>77</sup> In doing so, Dupper highlights many shortcomings in the South African maternity protection system. These shortcomings are analysed, and the concluding remarks involve recommendations for the improvement of maternity protection in South

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<sup>70</sup> Dancaster & Baird (note 3 above) 29; Dancaster & Cohen (note 3 above) 33; Dancaster (note 58 above) 182.

<sup>71</sup> Such as part-time work and job-sharing. Dancaster & Cohen (note 3 above) 34; Dancaster (note 58 above) 176.

<sup>72</sup> Dancaster & Baird (note 3 above) 41; Dancaster & Cohen (note 14 above) 239; Dancaster & Cohen (note 3 above) 34; Smit (note 58 above) 32; Field, Bagraim & Rycroft (note 2 above) 33; Dancaster (note 3 above) 192.

<sup>73</sup> Dancaster & Baird (note 3 above) 30; Dancaster & Cohen (note 3 above) 33; Field, Bagraim & Rycroft (note 2 above) 33; Dancaster (note 3 above) 185.

<sup>74</sup> Huysamen (note 8 above) 46–75.

<sup>75</sup> Dancaster & Cohen (note 3 above) 41.

<sup>76</sup> Dupper (note 19 above) 421; Dupper (note 58 above) 83; R Boswell & B Boswell 'Motherhood deterred: Access to maternity benefits in South Africa' (2009) 23(82) *Agenda* 76; Huysamen (note 8 above) 46–75.

<sup>77</sup> Dupper (note 19 above) 421; Dupper (note 58 above) 83.



Africa.<sup>78</sup> His research situates the significance of maternity protection in the global increase of women's participation in the labour force. The article also highlights the fact that many women entering the workforce are in their childbearing years, thus increasing the demand for maternity protection.<sup>79</sup> Dupper (2001) states that important elements of maternity protection include maternity leave; cash benefits; health and protection of mother and child; night work; restriction on overtime; time off for medical examinations; breastfeeding breaks and nursing facilities; regard to dangerous, arduous or unhealthy work; non-discrimination; employment security; leave and benefits for fathers; parental leave; and adoption leave.<sup>80</sup>

On the aspect of maternity leave, Dupper (2001) examines the Maternity Protection Conventions and Recommendations of the ILO.<sup>81</sup> While the *Maternity Protection Convention No. 183 of 2000* increases the duration of maternity leave to 14 weeks from the previously stipulated 12 weeks, the *Maternity Protection Recommendation No. 191 of 2000* suggests an 18-week period of maternity leave. It is noted that the European Council's Pregnant Workers Directive provides for 14 weeks of maternity leave. The article touches upon the different allocations of postnatal and antenatal compulsory leave; however it fails to complete an in-depth study of compulsory leave periods.<sup>82</sup> In the analysis of South African maternity leave, it is indicated that the four consecutive months of maternity leave provided for in the BCEA is four weeks more than that prescribed by the ILO's *Maternity Protection Convention No. 103 of 1952*.<sup>83</sup> Attention is brought to the fact that developing countries usually provide shorter periods of leave.<sup>84</sup>

In light of this factor, Dupper (2001) finds that the period of maternity leave set out in national legislation is adequate.<sup>85</sup> Similarly, Dupper et al (2001) state that the four months of maternity leave provided to pregnant employees in the BCEA is adequate.<sup>86</sup> Longer maternity leave should be avoided where there is a large gap between the minimum amount of leave and the period

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<sup>78</sup> Dupper (note 19 above) 422.

<sup>79</sup> Ibid 421–422.

<sup>80</sup> Ibid 421; Dupper (note 58 above) 83.

<sup>81</sup> Maternity Protection Convention, 1919; Maternity Protection Convention No. 103 of 1952; Maternity Protection Convention No. 183 of 2000 and Maternity Protection Recommendation No. 191 of 2000.

<sup>82</sup> Dupper (note 19 above) 423.

<sup>83</sup> Ibid.

<sup>84</sup> Ibid 423–424.

<sup>85</sup> Ibid 425.

<sup>86</sup> Dupper et al (note 22 above) 33.

during which cash benefits are provided.<sup>87</sup> In such an instance, women would have to return to work prematurely because their unemployment benefits may be inadequate in meeting their financial needs. In addition, long-term leave may impact adversely on businesses, specifically in small businesses comprised of a large staff of women wage earners.<sup>88</sup>

Huysamen (2012) explores equality between genders in the workplace with a focus on maternity and adoption benefits.<sup>89</sup> The provisions of the BCEA are praised by Huysamen as a legal advancement towards social security for pregnant women in employment law.<sup>90</sup> However, she finds inadequacy with the provision of the lack of guaranteed payment over the maternity leave period.<sup>91</sup> Certain employees may be unable to take the full duration of four months' maternity leave awarded to them if they are not paid for this period.<sup>92</sup> If the employee does not receive benefits during her maternity leave then she may claim these in terms of the UIA. Huysamen finds that although the UIA does financially safeguard the employee to some extent, the benefits provided are limited. This is due to the restriction on the amount of benefits payable (a maximum of 66% of income) and the period for which the benefits are payable (17.32 weeks per confinement for maternity leave).<sup>93</sup> Similarly, Dancaster and Baird (2008) have carried out a comparative analysis of South Africa's maternity leave provisions to find that South Africa falls short of providing adequate maternity leave, in terms of duration and cash benefits over the leave period.<sup>94</sup> Dancaster and Cohen (2010) have stated that statutory maternity leave in South Africa is inadequate in terms of both duration and cash benefits, and requires reassessment against international maternity standards.<sup>95</sup>

Dupper et al (2001) recommend that South African policies should provide pregnant employees with different sources of cash benefits, such as half by social security and half by employers or

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<sup>87</sup> Dupper (note 19 above) 425.

<sup>88</sup> Dupper et al (note 22 above) 33.

<sup>89</sup> Huysamen (note 8 above) 46–75.

<sup>90</sup> Ibid 60.

<sup>91</sup> Ibid.

<sup>92</sup> Ibid.

<sup>93</sup> Ibid 65.

<sup>94</sup> Dancaster & Baird (note 3 above) 34.

<sup>95</sup> Dancaster & Cohen (note 3 above) 34.

all by employers.<sup>96</sup> This involves implementing a comprehensive social security system which specifically addresses maternity protection to replace the maternity benefits provided by the Unemployment Insurance Fund (UIF).<sup>97</sup> This concept is developed further by Dupper, Olivier and Govindjee (2010).<sup>98</sup> The article discusses the exclusion of certain employees from the UIA, and sets out a recommendation for the extension of the coverage of the UIA to employees who resign or suspend their employment.<sup>99</sup>

The recommendation is based on the suggestion that an exception should be allowed for ‘employees who resign or suspend their employment for any compelling family reason’.<sup>100</sup> The exception would lead to the addition of a ‘carer’s benefit’, which will extend the right to benefits for the care of children or of a terminally ill family member to employees who have resigned or have suspended their employment.<sup>101</sup> The ‘carer’s benefit’ would be claimable on the basis of ‘compelling family reasons’. As such, social security legislation will be extended to provide a separate scheme for care-givers benefits, including maternity and adoption benefits.<sup>102</sup> Such a scheme is aimed at bridging the gap between the unpaid effort of care-giving and the paid effort of employment. The recommendation will require the introduction of new definitions such as ‘compelling family reasons’, which would be defined to include care for both natural and adopted children and that of a terminally ill family member; and ‘family member’, which would include a list of family members, including a common-law partner.<sup>103</sup>

The regulation of such benefit would necessitate that the contributor’s benefits cannot be restored once they have been claimed, and proof will be required from the contributor to show that a child or an ill family member requires care or support, or is at risk of dying within a short period of time.<sup>104</sup> A separate scheme for care-giving benefits would allow legislative intervention supporting work–family integration to the extent that employees are not only offered

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<sup>96</sup> Dupper et al (note 22 above) 33.

<sup>97</sup> Ibid.

<sup>98</sup> O Dupper, M Olivier & A Govindjee ‘Extending coverage of the unemployment insurance-system in South Africa’ (2010) 21 *Stell LR* 438, 446.

<sup>99</sup> Ibid 446.

<sup>100</sup> Ibid 447.

<sup>101</sup> Ibid.

<sup>102</sup> Ibid 448; Boswell & Boswell (note 76 above) 84.

<sup>103</sup> Dupper, Olivier & Govindjee (note 98 above) 447.

<sup>104</sup> Ibid 447–448.

benefits for the care of a child, but by providing compassionate care benefits for the needs of other ill family members who require care. This would provide great assistance to employees with family members who are infected with HIV/Aids and require care assistance.<sup>105</sup>

While Dupper and Olivier and Govindajee (2010) have argued for legislation providing a separate ‘carer’s benefit’, Boswell and Boswell (2009) call for the ‘de-linking’ of maternity benefits from the UIA so that a separate fund for self-employed and unemployed mothers could be created to assist working women who are not in formal employment.<sup>106</sup> Clearly, Boswell and Boswell could be envisioning a social security scheme aimed at providing working women in both the formal and the informal sector with an insurance fund to finance their maternity benefits.

Dancaster (2014) draws from existing research to expose the shortcomings of the South African agenda and sets out recommendations for the adoption of legislative measures to address the work–care conflict.<sup>107</sup> On the issue of maternity cash benefits, Dancaster (2014) makes a number of recommendations for the extension of the coverage of maternity benefits to excluded employees, which may assist in the possibility of increasing the amounts of payable maternity cash benefits.<sup>108</sup> It is stated that consideration must be made to adopting a system of voluntary participation, whereby the amount of the benefits afforded by the fund could be increased by the employer and/or employee, or even by state contributions to the fund.<sup>109</sup>

The coverage of maternity cash benefits could be extended through the provision of social assistance packages, made available to employees who are excluded from the fund.<sup>110</sup> Dancaster (2014) also recommends the possible alternative of separating maternity benefits from unemployment insurance schemes, and introducing the entitlement to maternity pay through legislative provisions.<sup>111</sup> These recommendations deserve to be researched and considered in

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<sup>105</sup> Dancaster & Baird (note 3 above) 25.

<sup>106</sup> Boswell & Boswell (note 76 above) 84.

<sup>107</sup> Dancaster (note 3 above) 177–193.

<sup>108</sup> *Ibid* 184.

<sup>109</sup> *Ibid* 185.

<sup>110</sup> *Ibid*.

<sup>111</sup> *Ibid*.

light of international and regional obligations and minimum standards; as well as through comparative analysis with a foreign national legal framework for the reconciliation of work and care.

Huysamen (2012) argues that equality demands that maternity leave and benefits should be afforded to adopting mothers, within the specified requirements.<sup>112</sup> Dancaster (2014) also calls for the inclusion of adoption leave in the BCEA.<sup>113</sup> Whereas Dancaster has situated the recommendation in the omission of adoption leave from the comprehensive legislative package addressing work–care integration in South Africa, Huysamen (2012) sets out to examine whether the exclusion of the offer of adoption leave to an adopting mother constitutes discrimination, since a biological mother is entitled to maternity leave for the birth of her child.<sup>114</sup>

Huysamen finds that it would not be difficult to prove that the differentiation between biological mother and adoptive mother does in fact amount to unfair discrimination, in that it impairs the human dignity of an adopting mother, or is evidence that an adopting mother has been adversely treated in a comparably serious manner.<sup>115</sup> It is indicated that a court would have to consider that maternity leave and benefits are afforded to a biological mother primarily for the reason of bonding with a child and integrating a child into a new family environment. Therefore, excluding adopting mothers from the same experience as biological mothers would be unfair and would constitute discrimination.<sup>116</sup>

In addition, Huysamen states that the duration of adoption leave should be determined according to the age of the adopted child.<sup>117</sup> This provision is similar to section 27 of the UIA, which provides adoption benefits to the adopting parents of a child below the age of two years.<sup>118</sup> However, Dancaster (2014) recommends that the duration of the adoption leave should vary

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<sup>112</sup> Huysamen (note 8 above) 60.

<sup>113</sup> Dancaster (note 3 above) 180.

<sup>114</sup> Huysamen (note 8 above) 67–72.

<sup>115</sup> *Ibid* 70–71.

<sup>116</sup> *Ibid* 71.

<sup>117</sup> *Ibid*.

<sup>118</sup> *Ibid* 74.

according to the age of the adoptive child.<sup>119</sup> The omission of adoption leave from the legislative work–care package of South Africa is a massive gap in the legal rights of employees. The anomaly requires greater academic attention in the interests of ensuring a commitment towards the advocacy of adoption leave in South African labour law.

Huysamen (2012) recognises that there is a need for equality between men and women in the workplace. This means that labour laws should not only make provisions for maternity leave and benefits, but provision should also be made for the child-care responsibilities of working fathers. However, caution must be had against strengthening stereotypical views that women, as a weaker sex, require greater legal protection than men, or that women should have greater maternity protection because women, to the exclusion of working men, should have the responsibility to raise children.<sup>120</sup>

There has been a trend within this area of literature to recommend the introduction of the right to paternity leave in South Africa.<sup>121</sup> This has been relied on as the first step towards the reconciliation of work and care based on comparative research indicating that a number of countries have amended their labour legislation to provide paternity leave or parental leave.<sup>122</sup> The introduction of paternity leave is regarded as essential considering the inadequacy of the three days of family responsibility leave provided for in the BCEA, which is the only leave entitlement upon which fathers may rely during the postnatal stage of the birth of a newborn baby.<sup>123</sup> Attention is also drawn to the limitation that family responsibility leave may be taken only if the employee has been employed for at least four months, and works for at least four days a week.<sup>124</sup>

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<sup>119</sup> Dancaster (note 3 above) 182.

<sup>120</sup> Huysamen (note 8 above) 48.

<sup>121</sup> Field, Bagraim & Rycroft (note 2 above) 30; Dupper et al (note 22 above) 38; Dancaster & Baird (note 3 above) 42; Dancaster & Cohen (note 3 above) 34; Smit (note 58 above) 24; Dancaster (note 3 above) 186.

<sup>122</sup> Dancaster & Baird (note 3 above) 35; Field, Bagraim & Rycroft (note 2 above) 30.

<sup>123</sup> Field, Bagraim & Rycroft (note 2 above) 31; Dancaster (note 3 above) 186.

<sup>124</sup> Dancaster & Cohen (note 2 above) 2488.

Field et al (2012) investigate whether the exclusion of fathers from the provisions of maternity leave constitutes unfair discrimination.<sup>125</sup> The right to equality would demand that either parent is entitled to claim rights equivalent to maternity rights.<sup>126</sup> With reference to case law, the research implicates that there would be difficulty in challenging the gender-specific nature of maternity rights if there is a rational relationship between the differentiation between mothers and fathers and a legitimate government purpose. Even if the differentiation were shown to be related to a legitimate government purpose, it would have to be justified. The reasons for the gender-specific nature of maternity rights serving a legitimate government purpose are that maternity leave allows rest for pregnant women and provides a bonding period between mother and baby; maternity benefits give the mother financial security; and maternity rights provide the pregnant employee with job security.<sup>127</sup>

The argument explains that the strongest reason for the inclusion of fathers through the extension of maternity rights is the provisions of the UIA which permit either adoptive parent to apply for adoption benefits.<sup>128</sup> The provisions are gender-free. Therefore, if the adoptive father can claim adoption benefits, he should be entitled to claim four months' leave to care for the child. The UIA would require the father to apply for leave to care for the child as a precondition of receiving the benefits under the UIA.<sup>129</sup> In taking the argument further, the protective provisions against dismissal found in the LRA must then apply to adoptive fathers who have exercised their adoption benefits in the same way a mother would.<sup>130</sup>

The research continues to investigate whether a legitimate government purpose exists for distinguishing between an adoptive father and a biological father with regard to child-care rights.<sup>131</sup> It appears that adoption provisions are gender-free because the adoptive mother does not give birth to the adopted child. Thus, both parents have equal roles in caring for the child.

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<sup>125</sup> Field, Bagraim & Rycroft (note 2 above) 31.

<sup>126</sup> *Ibid* 31–33.

<sup>127</sup> *Ibid* 33.

<sup>128</sup> *Ibid* 32.

<sup>129</sup> *Ibid*.

<sup>130</sup> *Ibid*.

<sup>131</sup> *Ibid* 34.

Therefore, it is unlikely that maternity rights would be found to be discriminatory.<sup>132</sup> The legitimate government purpose for favouring the mother of the child is to protect mothers against gender inequality.<sup>133</sup> However, Field et al (2012) note that the exclusion of fathers from child-care rights creates a division between genders and strengthens stereotypes that women should carry the responsibilities of primary care-giver.<sup>134</sup>

This elaborate test to establish a reason for the introduction of paternity leave on the basis that its exclusion amounts to unfair discrimination is submitted as unnecessary. As will be reflected in this thesis, South Africa is bound by various international and regional instruments which require the adoption of minimum standards of employment protection. These minimum standards require the inclusion of rights that recognise the role of fathers in their contribution to family responsibilities within the scheme of employment rights and protections.<sup>135</sup> Common international and regional organisations which are examined by existing literature in this regard are the International Labour Organisation (ILO), the Southern African Development Community (SADC), and the European Union (EU).<sup>136</sup> This thesis will draw a comparative analysis from these international bodies, as well as the African Union (AU), to complete the analysis of regional obligations placed on South Africa within this area of law.

With much of the literature relying on international standards to set a benchmark for the adoption of paternity leave, there is a consensus that South African legislation has failed to keep up with the global recognition of paternity leave, or an individual leave entitlement that may be extended to fathers through parental leave rights.<sup>137</sup> Dancaster (2014) recommends that the entitlement to use family responsibility leave as paternity leave should be removed from the provision and a separate right to paternity leave should be included in the BCEA.<sup>138</sup> While Field et al (2012)

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<sup>132</sup> Ibid 35.

<sup>133</sup> Ibid.

<sup>134</sup> Ibid.

<sup>135</sup> Dancaster & Baird (note 3 above) 25, 35; Dancaster & Cohen (note 3 above) 33; Smit (note 58 above) 24; Dancaster & Cohen (note 2 above) 2477.

<sup>136</sup> Ibid, Dupper (note 19 above) 421; Dupper (note 58 above) 83; Huysamen (note 8 above) 46; Field, Bagraim & Rycroft (note 2 above) 30; Dupper et al (note 22 above) 38.

<sup>137</sup> Dupper (note 58 above) 89; Dancaster & Baird (note 3 above) 25, 35, Field, Bagraim & Rycroft (note 2 above) 35; Dancaster & Cohen (note 3 above) 34; Smit (note 58 above) 24; Dancaster & Cohen (note 2 above) 2493; Dancaster (note 3 above) 186.

<sup>138</sup> Dancaster (note 3 above) 186.



make mention of employment protection and benefits attached to the right to paternity leave, Dancaster (2014) makes a recommendation for the right to paternity leave to be accompanied by cash benefits.<sup>139</sup>

Dancaster and Baird (2008) draw attention to the urgency for the introduction of parental leave in South Africa as many women are resigning from work, or voluntarily leaving employment, to take care of their young children.<sup>140</sup> Much of the research on the introduction of parental leave is based on the impact of parental leave during the early stages of childhood development.<sup>141</sup> The literature indicates that South Africa cannot meet its international obligations without adopting a separate right to parental leave.<sup>142</sup> Huysamen (2012) sets out two options for implementing parental leave.<sup>143</sup> First, parental leave may be granted as a single entitlement to both parents. The parents will be allowed to decide which of them would use the parental leave. Secondly, each parent will be granted a separate and individual entitlement to parental leave. This entitlement cannot be transferred to the other parent.<sup>144</sup>

Dupper (2002) and Smit (2011) argue for the introduction of an individual entitlement to parental leave which is non-transferable between the mother and the father.<sup>145</sup> This would ensure that fathers take up parental leave, and do not leave the entitlement for the mother of the family to use as time off to care.<sup>146</sup> Smit (2011) argues that regardless of the structure of parental leave, the mere presentation of the option to take parental leave gives parents choices that in turn enhance their social rights.<sup>147</sup> Dancaster (2014) notes that a recommendation for paid parental leave could rely on the extension of social security legislation to provide for a ‘carer’s benefit’, suggested by Dupper et al (2010).<sup>148</sup> However, this calls for further debate into the duration and

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<sup>139</sup> Field, Bagraim & Rycroft (note 2 above) 39; Dancaster (note 3 above) 186.

<sup>140</sup> Dancaster & Baird (note 3 above) 37–38; Dancaster (note 3 above) 188.

<sup>141</sup> Dancaster & Baird (note 3 above) 38; Dancaster (note 3 above) 188.

<sup>142</sup> Dupper (note 58 above) 92; Dancaster & Baird (note 3 above) 38; Smit (note 58 above) 24; Dancaster (note 3 above) 187.

<sup>143</sup> Huysamen (note 8 above) 73.

<sup>144</sup> Ibid.

<sup>145</sup> Dupper (note 58 above) 92; Smit (note 58 above) 25.

<sup>146</sup> Smit (note 58 above) 25; Dancaster (note 3 above) 187.

<sup>147</sup> Smit (note 58 above) 25.

<sup>148</sup> Dupper, Olivier & Govindjee (note 98 above) 447.

cash benefits attached to parental leave.<sup>149</sup> This thesis will add to existing literature in making recommendations for parental leave based on international and regional minimum standards, and drawing from the development of parental leave in the foreign legal system of the UK.

Leave for care emergencies is examined by Dancaster and Baird (2008) and Dancaster (2014).<sup>150</sup> The need for leave for care emergencies is placed in the context of the South African care crisis, which includes the need to ensure that care is available in instances of unexpected disruptions in arranged care; unexpected incidents at school; the unreliability of public transportation; and the care demands of the HIV/Aids epidemic.<sup>151</sup>

According to the literature, leave for emergency care is incorporated into the provision of family responsibility leave set out in the BCEA.<sup>152</sup> In comparing this provision to that found in the UK, it is clear that the South African provision is very limited.<sup>153</sup> The principal reason for this argument is that family responsibility leave offers the employee three days of leave for a range of incidents, these being: the birth of a child, the sickness of a child, and the death of a family member.<sup>154</sup> Recommendations have been made for the widening of the scope of family responsibility leave, to include unexpected care disruptions, and the extension of the duration of the leave.<sup>155</sup> The research on leave for care emergencies is limited in comparison to the research completed on maternity leave and the need for paternity leave. However, in light of the existing care crisis in South Africa, there is a significant demand for leave to attend to care emergencies.<sup>156</sup> For this reason, additional research on leave for care emergencies is imperative.

Much of the research on the topic of flexible working arrangements has been conducted by Cohen and Dancaster (2009) and Dancaster and Cohen (2009, 2010).<sup>157</sup> Their articles argue for

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<sup>149</sup> Dancaster (note 3 above) 188.

<sup>150</sup> Ibid; Dancaster & Baird (note 3 above) 37–38.

<sup>151</sup> Dancaster & Baird (note 3 above) 29, 30; Dancaster (note 3 above) 188–189.

<sup>152</sup> Ibid.

<sup>153</sup> Dancaster & Baird (note 3 above) 30.

<sup>154</sup> Ibid 29–33; Dancaster (note 3 above) 188.

<sup>155</sup> Dancaster & Baird (note 3 above) 31–32; Dancaster (note 3 above) 189.

<sup>156</sup> Dancaster & Baird (note 3 above) 29–33; Dancaster (note 3 above) 188.

<sup>157</sup> Dancaster & Cohen (note 14 above) 221; Dancaster & Cohen (note 3 above) 31; T Cohen & L Dancaster 'Flexible working arrangements for employees with family responsibilities – the failings of the Employment Equity Act' in O Dupper & C Garbers (eds) *Equality in the Workplace: Reflections from South Africa and Beyond* (2009) 207.

the introduction of the legal right to request flexible working arrangements in South Africa.<sup>158</sup> It is stated that apart from the adoption of a comprehensive legislative package to address the reconciliation of work and care, there is a principal need to adopt a right to request flexible working arrangements.<sup>159</sup> Employees who require flexible working arrangements in South Africa have to rely on the goodwill of their employers to permit such arrangements.<sup>160</sup> Relying on employer goodwill to provide flexible working arrangements will result in a slow and disorganised change in workplace culture.<sup>161</sup> The resultant effect is that employees may be prevented from working to their potential and may leave employment altogether.<sup>162</sup>

Dancaster and Baird (2008) identify the existing legal avenue for the right to request flexible working arrangements as being through the anti-discrimination laws of the EEA.<sup>163</sup> This contention arises from the Australian Work and Families test case (*Family Provisions Case* (2005) 143 IR 245), which determined whether anti-discrimination laws could be used to assert the right to request flexible working arrangements, rather than relying on the adoption of a separate legal right. However, the use of anti-discrimination law in reaching such an end was found to be inherently limited.<sup>164</sup>

Cohen and Dancaster (2009) and Dancaster and Cohen (2009, 2010) consider the legislation's failure to advance the right to flexible working arrangements in light of the prohibition on family responsibility discrimination in the EEA.<sup>165</sup> In pursuing flexible working arrangements through the EEA, an employee will have to pursue a route of litigation against the employer, and then prove discrimination on the ground of family responsibility.<sup>166</sup> According to the research, anti-discrimination provisions in the EEA are ineffective in addressing the work–care conflict.<sup>167</sup>

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<sup>158</sup> Cohen & Dancaster (note 157 above) 207; Dancaster & Cohen (note 3 above) 31.

<sup>159</sup> Dancaster & Cohen (note 3 above) 34; Dancaster (note 3 above) 179.

<sup>160</sup> Dancaster & Cohen (note 3 above) 42.

<sup>161</sup> *Ibid* 42.

<sup>162</sup> *Ibid*.

<sup>163</sup> Dancaster & Baird (note 3 above) 40.

<sup>164</sup> *Ibid*.

<sup>165</sup> Dancaster & Cohen (note 14 above) 222; Cohen & Dancaster (note 157 above) 208.

<sup>166</sup> Dancaster & Cohen (note 14 above) 229–231; Cohen & Dancaster (note 157 above) 216–218; Dancaster & Cohen (note 3 above) 34.

<sup>167</sup> Dancaster & Cohen (note 14 above) 227; Cohen & Dancaster (note 157 above) 213; Dancaster & Cohen (note 3 above) 34.

Litigation is onerous and expensive for the employee. In bringing and proving a claim of discrimination, the employee will have to risk his employment relationship with the employer.<sup>168</sup> Furthermore, the employee is likely to be met with counter arguments from the employer which justify inflexible workplace practices, such as operational requirements and inherent job requirements.<sup>169</sup> Cohen and Dancaster (2009) and Dancaster and Cohen (2009, 2010) conclude that the ground of family responsibility as a ground of discrimination in the EEA is underutilised.<sup>170</sup> This indicates the inefficacy of the provision.<sup>171</sup> The articles conclude that government intervention is necessary for the introduction of the right to request flexible working arrangements.<sup>172</sup>

Dancaster and Cohen (2010) add to their previous research. The article critically examines the right to request flexible working arrangements of countries within the European Union and countries outside the European Union.<sup>173</sup> Most countries in the EU have adopted legislative rights to flexible working arrangements by virtue of the requirements set out in the EU *Directive on Part-Time Work (97/81/EC)*. Countries outside the EU which have adopted rights to request flexible working arrangements are New Zealand and, more recently, Australia and the United States.<sup>174</sup> The research confirms that the adoption of the right to request flexible working arrangements in these countries is a result of prominent political steps, whereas state intervention in South Africa is lacking in the area of work–care reconciliation.<sup>175</sup>

There has been an international trend towards the adoption of flexible working legislation.<sup>176</sup> Policy motivations for the adoption of flexible working arrangements are investigated in attempts

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<sup>168</sup> Dancaster & Cohen (note 14 above) 230; Cohen & Dancaster (note 157 above) 213.

<sup>169</sup> Dancaster & Cohen (note 14 above) 230; Cohen & Dancaster (note 157 above) 217; Dancaster & Cohen (note 3 above) 34.

<sup>170</sup> Dancaster & Cohen (note 14 above) 238; Cohen & Dancaster (note 157 above) 225; Dancaster & Cohen (note 3 above) 34.

<sup>171</sup> *Ibid.*

<sup>172</sup> Dancaster & Cohen (note 14 above) 238–239; Cohen & Dancaster (note 157 above) 226–227; Dancaster & Cohen (note 3 above) 40–41.

<sup>173</sup> Dancaster & Cohen (note 3 above) 35.

<sup>174</sup> *Ibid.* 40.

<sup>175</sup> *Ibid.*; Dancaster & Cohen (note 14 above) 236; Dancaster (note 3 above) 191.

<sup>176</sup> Dancaster & Cohen (note 3 above) 42; Dancaster (note 3 above) 191.

to consider the introduction of flexible working in South Africa.<sup>177</sup> It is indicated that the UK, Australia and New Zealand have adopted the right to request flexible working arrangements as a reflection of the government's commitment towards the support of working families.<sup>178</sup>

Dancaster (2014) sets out additional arguments for the adoption of the right to request flexible working arrangements.<sup>179</sup> Firstly, the reduction of working hours through flexible working arrangements may allow employees to attend to care responsibilities arising from the care of dependants living with HIV/Aids.<sup>180</sup> Although the reduced hours may result in reduced income, this is the better alternative to the temporary withdrawal from employment without the guarantee of returning to employment.<sup>181</sup> Secondly, UK employer-employee surveys indicate that the right has had a positive effect on employees and has not opened the floodgates of requests to employers.<sup>182</sup> Third, research has shown that employers are not voluntarily offering employees the right to request flexible working arrangements.<sup>183</sup> All literature on this aspect of work-care reconciliation concludes that there is a need for state intervention in the introduction of flexible working arrangements in South Africa.<sup>184</sup>

While much of the literature aimed at inadequacies of South Africa's legislative provisions of time off from work to care advocates for the adoption of leave provisions, significant aspects of the provisions of time off from work to provide care are overlooked. It is submitted that leave entitlements cannot be encouraged without considering aspects of job security. For instance, maternity leave must be accompanied by cash benefits, but also by adequate employment protection in the right to return to the same or a similar position as that held prior to the leave period; protections of health for pregnant and breastfeeding employees; and breastfeeding rights upon returning to the workplace.

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<sup>177</sup> Dancaster (note 3 above) 191.

<sup>178</sup> *Ibid*; Dancaster & Cohen (note 3 above) 40.

<sup>179</sup> Dancaster (note 3 above) 191.

<sup>180</sup> *Ibid*.

<sup>181</sup> *Ibid*.

<sup>182</sup> *Ibid*.

<sup>183</sup> *Ibid*.

<sup>184</sup> Dancaster & Cohen (note 14 above) 238–239; Cohen & Dancaster (note 157 above) 226–227; Dancaster & Cohen (note 3 above) 42; Dancaster (note 3 above) 191.

Dupper (2002), in his international and comparative analysis of maternity protection in South Africa, examines each of these elements in the interests of making recommendations for more adequate maternity protections.<sup>185</sup> The article notes that although the LRA provides the right to return to the same or a comparable job after a pregnancy-related absence, the provision does not specify the duration for which the employment position shall be held open for the employee to return.<sup>186</sup> Dupper (2002) also advocates for a right to paid leave for antenatal and postnatal appointments to be made available to pregnant employees.<sup>187</sup>

Huysamen (2012) sets out the legislative provisions of South African labour laws which provide maternity and family responsibility employment protections.<sup>188</sup> She draws attention to various elements of employment protection which have not been implemented. These include the provision of nursing facilities at the workplace; and the transfer of maternity leave to the father of the child in the event that the mother passes away, becomes sick, or is hospitalised.<sup>189</sup> She advocates for a legal framework of work–care laws which are made to be in line with the ILO’s Decent Work Agenda.<sup>190</sup>

There is a common appreciation in the literature for the inclusion of family responsibilities as a ground for discrimination in the EEA.<sup>191</sup> However, it is noted that this provision is underutilised and ineffective in providing adequate protection to employees with family responsibilities.<sup>192</sup> Despite the use of international obligations to provide comparators and recommendations for leave provisions, the literature does not rely on international obligations to determine whether South Africa has adopted employment protections for employees with care responsibilities which are in line with international minimum standards. There is a consensus among the authors that the international obligations of South Africa to account for work–care reconciliation through labour laws are a significant factor which necessitates legislative intervention in the promotion of

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<sup>185</sup> Dupper (note 58 above) 83–88.

<sup>186</sup> *Ibid* 94.

<sup>187</sup> *Ibid* 95.

<sup>188</sup> Huysamen (note 8 above) 57–59.

<sup>189</sup> *Ibid* 57.

<sup>190</sup> *Ibid* 75.

<sup>191</sup> Dancaster & Cohen (note 14 above) 238; Cohen & Dancaster (note 157 above) 225; Huysamen (note 8 above) 59.

<sup>192</sup> Dancaster & Cohen (note 14 above) 238; Cohen & Dancaster (note 157 above) 225; Dancaster & Cohen (note 3 above) 34.

work–care reconciliation in South Africa.<sup>193</sup> The effect of international obligations on the policy considerations and adoption of legislative provisions have also been relied on.<sup>194</sup>

Overall, the literature calls for state intervention in the adoption of legislation to promote the reconciliation of work and care.<sup>195</sup> There is an additional appeal in the literature for research and debate in the area of work–care reconciliation in South Africa.<sup>196</sup> Mokomane and Chilwane (2014) have conducted a literature review of work–family research in sub-Saharan Africa.<sup>197</sup> According to their literature review, there has been an increasing academic interest in work–care reconciliation. However, research in developing countries lags behind the studies done in western countries.<sup>198</sup> While most research within the topic has been derived from South African studies, major research gaps exist in the investigation and understanding of the impact attached to work–family-policies in sub-Saharan Africa.<sup>199</sup> The study calls for research into aspects of work–family reconciliation which include the current mechanisms available to employees in sub-Saharan countries; gaps which exist in addressing the needs of employees; and existing labour legislation and employment policies.<sup>200</sup> It is established that work–family research conducted on sub-Saharan countries is an agenda worth pursuing in order to demonstrate a commitment to the field, and thereafter, inform social policy-making.<sup>201</sup> Such research and debate will be conducted through this thesis.

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<sup>193</sup> Matthias (note 49 above) 20; Matthias (note 58 above) 248; Dupper (note 19 above) 421; Dupper et al (note 22 above) 28; Dupper (note 58 above) 83; Dancaster & Baird (note 3 above) 24; Dancaster & Cohen (note 14 above) 236; Boswell & Boswell (note 76 above) 78; Huysamen (note 8 above) 48; Cohen (note 9 above) 19; Field, Bagraim & Rycroft (note 2 above) 37; Smit (note 58 above) 15; Dancaster (note 3 above) 179–191; Dancaster & Cohen (note 2 above) 2474.

<sup>194</sup> Ibid.

<sup>195</sup> Dupper (note 58 above) 93–96; Dancaster & Baird (note 3 above) 24; Dancaster & Cohen (note 14 above) 239; Huysamen (note 8 above) 74–75; Cohen (note 9 above) 33; Field, Bagraim & Rycroft (note 2 above) 39; Smit (note 58 above) 32; Cohen & Dancaster (note 157 above) 226; Dancaster (note 3 above) 192; Dancaster & Cohen (note 2 above) 2494.

<sup>196</sup> Boswell & Boswell (note 76 above) 84; Dancaster & Baird (note 3 above) 42; Dancaster & Cohen (note 14 above) 239; Dancaster & Cohen (note 3 above) 43; Field, Bagraim & Rycroft (note 2 above) 39; Cohen & Dancaster (note 157 above) 226; Dancaster (note 3 above) 185–188; Brand & Barrerio-Lucas (note 50 above) 70; Dancaster & Cohen (note 2 above) 2494.

<sup>197</sup> Z Mokomane & D Chilwane ‘A Review of Work-Family Research in Sub-Saharan Africa’ in Z Mokomane *Work-Family Interface in Sub-Saharan Africa: Challenges and Responses* (2014) 195.

<sup>198</sup> Ibid.

<sup>199</sup> Ibid 197, 203.

<sup>200</sup> Ibid.

<sup>201</sup> Ibid 204.

## 1.5 Objectives of this study

This thesis aims to contribute to the current discourse on the reconciliation of work and care in South Africa. It attempts to do so by conducting a comparative analysis. The comparative analysis will encompass international and regional labour standards, together with a comparison between the relevant laws of South Africa and the UK. The discussion following the comparative analysis will then attempt to examine South African labour laws which regulate the reconciliation of work and care. A range of statutory options which could be adopted for the reconciliation of work and care in South Africa will then be identified. As such, this thesis will make recommendations for more adequate statutory mechanisms that should be adopted to better reconcile the work and care-giving responsibilities of South African employees.

### 1.5.1 Comparative analysis

A comparison will be drawn from international and regional labour standards which arise from primary international and regional obligations of South Africa and the UK. Each country has international obligations as a member state of the United Nations (UN). These international obligations will be explored in Chapter Two of this thesis. In carrying out a comparative analysis of regional labour standards, it is advantageous to compare two domestic legal systems, each falling within a separate regional organisation. South Africa is a member state of the AU and the SADC. South Africa undertakes to adopt measures which give effect to the objectives of the SADC, while the AU informs political and socio-economic integration across Africa.<sup>202</sup> The UK was a member state of the EU, until its exit from the organisation in 2016.<sup>203</sup> The adoption of legislative rights to maternity leave and employment protection; health and safety of pregnant and breastfeeding employees; parental leave and flexible working hours have been a direct result of the UK's membership in the EU.<sup>204</sup> Therefore, this thesis will compare relevant labour standards of the SADC and AU against those of the EU, to indicate the impact of these regional

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<sup>202</sup> A Saurome 'The role of SADC institutions in implementing SADC treaty provisions dealing with regional integration' (2012) 15(2) *PER/PELJ* 454, 457; MP Olivier & ER Kalula 'Regional Social Security' in MP Olivier, N Smit, ER Kalula *Social Security: A Legal Analysis* (2003) 656–678; Smit (note 58 above) 15; Nyenti & Mpedi (note 54 above) 249; Dancaster & Cohen (note 2 above) 2474; African Union *AU in a Nutshell* <https://www.au.int/web/en/au-nutshell>, accessed on 26 June 2016.

<sup>203</sup> Dancaster & Baird (note 3 above) 23.

<sup>204</sup> Selford (note 6 above) 116; O Golyner 'Family-friendly reform of employment law in the UK: An overstretched flexibility' (2015) 37(3) *Journal of Social Welfare and Family Law* 378, 379.



labour standards on each domestic legal system.<sup>205</sup> These regional obligations will be explored in Chapter Three of this thesis. International and regional labour standards will be used as a comparator against each respective national legal system, setting out the minimum labour standards which should be in place for the effective regulation of employee work and care conflicts.<sup>206</sup>

Comparative law assists in exposing the inefficiencies of South African legislation by highlighting gaps and identifying recommendations. Apart from availability of research on the UK laws relevant to this thesis, the UK has been selected as the comparative country for the following reasons. The legal systems of both South Africa and the UK share English law as a common-law basis. Against this commonality in their legal backgrounds, the UK has far more extensive laws which support work–care reconciliation than those of South Africa.

The UK has been committed to the adoption of a comprehensive legislative package aimed at the reconciliation of work and care since 1997.<sup>207</sup> The agenda of the UK government to reconcile work and care is fairly recent compared to other countries in the EU. The commitment of the UK government towards family-friendly reforms has seen an adoption of various leave options and a widened scope of entitlements to time off for the purposes of caregiving.<sup>208</sup> Employees in the UK are provided with the flexibility and choice to cater to their care-giving responsibilities.<sup>209</sup>

In South Africa, there has been recent mention of governmental intervention in work–care reconciliation. However, there has been no undertaking on the part of the government to commit itself to the reconciliation of work and care through law and policy.<sup>210</sup> This thesis will attempt to indicate the measures which can be taken to reconcile work and care through a government

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<sup>205</sup> Dancaster & Cohen (note 3 above) 35.

<sup>206</sup> Dancaster & Baird (note 3 above) 23.

<sup>207</sup> Conaghan (note 8 above) 27; Golyner (note 204 above) 378; E Caracciolo di Torella 'New labour, new dads – the impact of family friendly legislation on fathers' (2007) 36 *Industrial Law Journal* 318; J Lewis et al 'Patterns of development in work/family reconciliation policies for parents in France, Germany, the Netherlands, and the UK in the 2000s' (2008) 15(3) *Social Politics: International Studies in Gender, State and Society* 261, 270; G Mitchell 'Encouraging fathers to care: The Children and Families Act 2014 and shared parental leave' (2015) 44(1) *Industrial Law Journal* 123; G James *The Legal Regulation of Pregnancy and Parenting in the Labour Market* (2009) 39.

<sup>208</sup> Caracciolo di Torella (note 207 above) 318.

<sup>209</sup> Ibid; Lewis & Campbell (note 6 above) 21.

<sup>210</sup> Dancaster & Cohen (note 14 above) 239; Dancaster (note 3 above) 177.

commitment by comparing the legislative initiatives of the UK as a benchmark against the current laws of South Africa.<sup>211</sup>

The family-friendly reform of the UK was aimed at promoting employment and economic growth.<sup>212</sup> Many of the drivers for legislative reform in the reconciliation of work and care in the UK overlap with those identified in South Africa. For instance, there has been a steady increase in the labour participation of women in the UK since the 1950s.<sup>213</sup> Women now represent 46 per cent of the total labour force in the UK.<sup>214</sup> As explained above, South Africa has also experienced an increase in the labour force participation of women.

Diverse family models are also prevalent in the UK.<sup>215</sup> There has been an increase in the number of single-parent households, as well as cohabitations and heterosexual partnerships.<sup>216</sup> The occurrence of such modern family models is increasing also in South Africa. Other identifiable factors which are common to both jurisdictions are the predisposition of women to be found in part-time or atypical employment;<sup>217</sup> the need to encourage the active participation of caregiving by fathers;<sup>218</sup> and the need to address gender inequalities in the workplace arising from the gendered division of work and care.<sup>219</sup>

### 1.5.2 Primary aims of this thesis

The primary aims of this thesis are to:

- (i) identify and explain the elements which are essential to a comprehensive legislative package regulating work and care;
- (ii) consider the impact of international and regional labour standards in addressing the regulation of work and care;

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<sup>211</sup> Dancaster & Baird (note 3 above) 30.

<sup>212</sup> Golyner (note 204 above) 383; Lewis & Campbell (note 6 above) 9.

<sup>213</sup> James (note 207 above) 3; Lewis (note 4 above) 105; N Busby & G James *Families, Care-giving and Paid Work: Challenging Labour Law in the 21st Century* (2011) 15.

<sup>214</sup> The World Bank 'Labor Force, Female (% of Total Labor Force)' *The World Bank Databank* (2016) <http://data.worldbank.org/indicator/SL.TLF.TOTL.FE.ZS>, accessed on 14 November 2016.

<sup>215</sup> James (note 207 above) 3; Lewis (note 4 above) 105.

<sup>216</sup> James (note 207 above) 4; Lewis (note 4 above) 105.

<sup>217</sup> Lewis & Campbell (note 6 above) 9.

<sup>218</sup> Caracciolo di Torella (note 207 above) 319.

<sup>219</sup> Lewis & Campbell (note 6 above) 10.

- (iii) investigate legislative measures which regulate work and care in the different national contexts of South Africa and the UK;
- (iv) critically examine the adequacy of current labour laws which aim to reconcile work and care in South Africa; and
- (v) outline recommendations for the adoption of a comprehensive legislative package of employment rights and protections, aimed at providing South African employees with adequate choices for time off from work to attend to their care-giving responsibilities.

## **1.6 The need for research into more effective legislative intervention for the promotion of work–care reconciliation in South Africa**

Principal factors which necessitate the adoption of a comprehensive legislative package for the promotion of work–care reconciliation in South Africa are:

- the achievement of gender equality and the accommodation of pregnancy in the workplace;
- the high unemployment rate in South Africa;
- the consequences of the HIV/Aids epidemic on families;
- the promotion of fatherhood in South Africa; and
- the international and regional obligations of South Africa to adopt minimum labour standards aimed at the reconciliation of work and care.<sup>220</sup>

The impact of these factors on the reconciliation of work and care are described below.

### **1.6.1 The achievement of gender equality and the accommodation of pregnancy in the workplace**

Women account for over 58 per cent (8.8 million) of the economically inactive population in South Africa.<sup>221</sup> These women are found either to be homemakers or to have faced

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<sup>220</sup> Dancaster & Cohen (note 3 above) 32; Dancaster & Baird (note 3 above) 27; Field, Bagraim & Rycroft (note 2 above) 30; Cohen (note 9 above) 21; Huysamen (note 8 above) 47; Dupper, Olivier & Govindjee (note 98 above) 447; O Dupper 'Maternity' in MP Olivier et al (eds) *Introduction to Social Security* (2004) 399, 400; CI Tshoose 'The impact of HIV/AIDS regarding informal social security: Issues and perspectives from a South African context' (2010) 13(3) *PER/PELJ* 408.

<sup>221</sup> *Quarterly Labour Force Survey – P2011 – 4th Quarter 2015*, xvi (Quarterly Labour Force Survey 2015). Publication date and time: 25 February 2016 @ 13:00 [http://www.statssa.gov.za/?page\\_id=1854&PPN=P0211a](http://www.statssa.gov.za/?page_id=1854&PPN=P0211a) accessed on 19 April 2015.

discouragement from entering the workforce.<sup>222</sup> The majority of informal workers in South Africa are made up of women.<sup>223</sup> Women are often given the most precarious and poorly paid work within the informal sector.<sup>224</sup> Black African women are particularly under-protected within the South African labour market.<sup>225</sup> They have been under-educated and lack the skills that are necessary to work in the formal sector. This is due to the historical economic disadvantages faced by black women in South Africa.<sup>226</sup> Women have been ‘occupationally segregated’ into poorly paying jobs.<sup>227</sup> ‘Occupational segregation’ operates, firstly, to limit the distribution of women’s work across the labour sector.<sup>228</sup> Women are more often employed in ‘women’s work’, which involves duties of caregiving, such as the nursing profession.<sup>229</sup> Secondly, it operates to prevent women from attaining higher wages in comparison to men, and senior positions. Women are also less likely to be appointed, retained or promoted over a male employee.<sup>230</sup> This forms one of the ‘systemic barriers’ which prevents women from attaining full-time employment. As a result, many South African women are employed in atypical forms of employment.<sup>231</sup>

Atypical employment comprises of casual or temporary, contract or seasonal work, and work that requires the employees to be home based, self-employed or employees on-call. Atypical employment offers women the opportunity to work part-time or as contract workers so as to minimise the time pressures on their lives.<sup>232</sup> However, the consequences of atypical employment positions are low wages, lack of employment security, and a lack of benefits such as medical aid, pension, and maternity leave. Statistics have shown that women atypical workers are often the main breadwinners and heads of their households. Atypical work frustrates the movement towards gender equality. While it does provide women with jobs, it places them in

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<sup>222</sup> Ibid.

<sup>223</sup> Bonthuys (note 19 above) 254.

<sup>224</sup> Cohen (note 9 above) 21.

<sup>225</sup> Quarterly Labour Force Survey 2015 (note 222 above) viii.

<sup>226</sup> C O’Regan ‘Equality at work and the limits of the law: Symmetry and individualism in anti-discrimination legislation’ (1994) *Acta Juridica* 66.

<sup>227</sup> Cohen (note 9 above) 27.

<sup>228</sup> Ibid 24.

<sup>229</sup> This is known as ‘horizontal occupational segregation’.

<sup>230</sup> This is known as ‘vertical occupational segregation.’ Cohen (note 9 above) 24.

<sup>231</sup> Bonthuys (note 19 above) 254.

<sup>232</sup> Ibid.

unstable, unrewarding, and precarious employment.<sup>233</sup> Atypical employment cannot be relied on as a mechanism to accommodate mutually the care-giving and employment responsibilities of women. This is because the more South African women find themselves in atypical employment, the more the systemic barrier of gender inequality is entrenched in the workplace.<sup>234</sup>

Gender inequalities in the workplace may be attributed to the natural sexual differences between men and women. The achievement of equality requires that the law treat people fairly and rationally.<sup>235</sup> Inequalities, which have been historically entrenched through social, political and economic systems and institutions, may be targeted by measures of substantive equality.<sup>236</sup> According to substantive equality, equality is not reached through the eradication of differences, but through the inclusion and accommodation of these differences.<sup>237</sup> When legally applied to socio-economic disadvantages, substantive equality may accomplish transformation.<sup>238</sup> South Africa has established a legal model of substantive equality through its constitutional right to equality.<sup>239</sup> Section 9(1) of the Constitution states that ‘everyone is equal before the law and has the right to equal protection and benefit of the law’.

Substantive equality requires the law to provide separately for the special needs of women.<sup>240</sup> Due to their reproductive functions and the possibility of pregnancy, many employed women face inequalities in various forms during different stages of employment.<sup>241</sup> The biological difference between men and women in their capacity to bear children is one of the systemic barriers existent in the workplace.<sup>242</sup> Substantive equality recognises that in reality women are sexually different from men and this cannot be ignored by the law. In order for equality to be reached, the law must account for the differences to the benefit of women, so that they may be

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<sup>233</sup> Ibid 256.

<sup>234</sup> Cohen (note 9 above) 31; Conaghan (note 8 above) 30.

<sup>235</sup> Kentridge (note 11 above) 84.

<sup>236</sup> Albertyn (note 13 above) 254.

<sup>237</sup> C Albertyn ‘Equality’ in E Bonthuys & C Albertyn (eds) *Gender, Law & Justice* (2007) 91; Albertyn (note 13 above) 259–260, 274.

<sup>238</sup> Albertyn (note 13 above) 255, 261.

<sup>239</sup> Albertyn (note 237 above) 87; Bonthuys (note 19 above) 273.

<sup>240</sup> Kagnas & Murray (note 49 above) 12; S Fredman ‘Engendering social and economic rights’ in B Goldblatt & K McLean (eds) *Women’s Social and Economic Rights: Developments in South Africa* (2011) 12.

<sup>241</sup> Bonthuys (note 19 above) 254; Huysamen (note 8 above) 47–48.

<sup>242</sup> Kentridge (note 11 above) 84.

placed on an equal footing with men.<sup>243</sup> Substantive equality condones special treatment in favour of women's differences from men in terms of their reproductive capabilities and the consequences of this.<sup>244</sup> Therefore, it is a suitable mechanism for targeting the systemic gender inequalities which exist in the workplace.<sup>245</sup>

Substantive equality allows the law to account for the special needs of pregnant employees. Therefore, the law must provide maternity leave to working women.<sup>246</sup> In accordance with substantive equality, South African labour legislation provides maternity protection to pregnant employees, and family responsibility leave to men and women employees, with the aim of addressing the special needs of workers with family responsibilities.<sup>247</sup> Employees are offered maternity leave in the interest of their pregnancies and roles as mothers being accommodated in the workplace.<sup>248</sup> The discrimination faced by pregnant women in the workplace could take the form of pregnancy tests upon recruitment; dismissals resulting from pregnancy or maternity leave; or loss of wages during pregnancy and maternity leave.<sup>249</sup>

Because of the increased labour participation of women, many women entering the workforce are in their childbearing years.<sup>250</sup> This increases the demand for maternity protection and places obligations on employers to provide maternity protection to pregnant employees.<sup>251</sup> Pregnancy and early motherhood places multiple challenges on working women.<sup>252</sup> Maternity protection in the workplace is essential as pregnancy can cause health concerns which may be coupled with the added stress of job security.<sup>253</sup> Pregnant employees may also be financially burdened by

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<sup>243</sup> Kentridge (note 11 above) 89; *Brown v Stockton-on-Tees Borough Council* [1988] IRLR 263; *Botha v A Import Export International CC* (1999) 20 ILJ 2580 (LC) 2584 at par [20]; *Mashava v Cuzen & Woods Attorneys* (2000) 21 ILJ 402 (LC) 405 at par [14].

<sup>244</sup> Kentridge (note 11 above) 89.

<sup>245</sup> Albertyn (note 13 above) 255, 261.

<sup>246</sup> Kentridge (note 11 above) 89.

<sup>247</sup> Section 25 of the Basic Conditions of Employment Act 75 of 1997 (BCEA). In the case of *Co-operative Workers Association & another v Petroleum Oil & Gas Co-operative of SA & others* (2007) 28 ILJ 627 (LC), it was stated that 'special measures are applied to workers with family responsibilities to adjust for the hardships of having such responsibilities. Without affirmation of their special status, there can be no equality amongst the work force'.

<sup>248</sup> *Ibid.*

<sup>249</sup> Landau & Beigbeder (note 41 above) 133; Dupper (note 220 above) 400.

<sup>250</sup> Dupper (note 19 above) 422; Bonthuys (note 19 above) 270.

<sup>251</sup> Dupper (note 19 above) 421–422.

<sup>252</sup> Huysamen (note 8 above) 47.

<sup>253</sup> *Ibid.*

medical bills, and by taking leave from work without a guaranteed income during the antenatal and postnatal periods.<sup>254</sup>

As such, needs of pregnant employees are numerous and lead to multiple employment consequences for both the employee and the employer.<sup>255</sup> Upon recruiting an employee who is within her childbearing years, the employer must take into account the potential of maternity leave and benefits which may eventually become due to the employee.<sup>256</sup> In the event of pregnancy, the employee will require leave from work to prepare for the birth of her baby. The provision of maternity leave may have an impact on the employer through the interruption of commercial activities as a result of the lack of continuity of employment over the maternity period.<sup>257</sup> Once the employee has given birth and is at the stage of postnatal care (such as breastfeeding), she cannot return to work for a lengthy period.<sup>258</sup>

On her return to work from maternity leave, the employer has a duty to ensure that the employee's health is protected and that the working environment is safe.<sup>259</sup> Finally, the employee enters a fixed period of motherhood in which she has to balance her workplace and childcare responsibilities. The employer will have to acknowledge that the employee has an added responsibility to her children throughout her employment.<sup>260</sup> For these reasons employers attempt to avoid obligations of maternity protection by employing fewer women.<sup>261</sup> However, in accordance with substantive equality, the burdens of the employer should not fall on women and exclude them from income-generating employment opportunities.<sup>262</sup>

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<sup>254</sup> N Smit 'Maternity' in MP Olivier et al (eds) *Introduction to Social Security* (2004) 367, 367.

<sup>255</sup> Huysamen (note 8 above) 47–48; *Woolworths (Pty) Ltd v Whitehead* 2000 (12) BCLR 1340 (LAC) at par [145–149].

<sup>256</sup> M O'Sullivan & C Murray 'Brooms sweeping oceans? Women's Rights in South Africa's first decade of democracy' (2005) 1 *Acta Juridica* 1, 25.

<sup>257</sup> *Ibid.*

<sup>258</sup> Huysamen (note 8 above) 47–48; Bonthuys (note 19 above) 273.

<sup>259</sup> Huysamen (note 8 above) 48.

<sup>260</sup> *Ibid.*; Bonthuys (note 19 above) 270.

<sup>261</sup> Boswell & Boswell (note 76 above) 78.

<sup>262</sup> O'Sullivan & Murray (note 256 above) 25.

### 1.6.2 The high unemployment rate in South Africa

The most recent *Quarterly Labour Force Survey* released by Statistics South Africa has revealed an unemployment rate of 26.5 per cent.<sup>263</sup> As indicated by the Survey, more women are unemployed than men.<sup>264</sup> The high unemployment rate in South Africa places financial pressure on families. This creates the necessity for both employable adults of a household (usually the mother and the father) to secure employment.<sup>265</sup> Women are more likely to be found in atypical employment which allows them to work on a part-time basis. Part-time employment provides the dual benefits of income and flexibility to support the employee with care-giving responsibilities.<sup>266</sup> When women cannot reconcile their work and care-giving responsibilities, they are found to resort to voluntary withdrawal from employment by resigning for the purpose of attending to their care-giving responsibilities.<sup>267</sup>

### 1.6.3 The consequences of the HIV/Aids epidemic on families

The HIV/Aids epidemic is a prominent health concern in South Africa. It affects employees in the workplace and the private spheres of their households.<sup>268</sup> With approximately 15 million people living with HIV/Aids in South Africa, the country has the highest prevalence of HIV/Aids compared to other countries in the world.<sup>269</sup> The proportion of deaths resulting from HIV diseases in 2014 was 4.8 per cent.<sup>270</sup> According to the report from Statistics South Africa on ‘*Mortality and Causes of Death in South Africa, 2014: Findings from Death Notification*’, 95.9 per cent of the death notification forms completed in 2014 listed HIV disease as an underlying cause of death.<sup>271</sup>

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<sup>263</sup> *Quarterly Labour Force Survey – P2011 – 4th Quarter 2016* Publication date: 17 February 2017 <http://www.statssa.gov.za/>, accessed on 24 April 2017.

<sup>264</sup> Ibid.

<sup>265</sup> Bonthuys (note 19 above) 246.

<sup>266</sup> Ibid.

<sup>267</sup> Dupper, Olivier & Govindjee (note 98 above) 447; Huysamen (note 8 above) 65; see *Masondo v Crossway* (1998) 19 *ILJ* 180 (LC) at par 181C.

<sup>268</sup> Dancaster & Cohen (note 3 above) 32; Tshoose (note 220 above) 408.

<sup>269</sup> <http://www.aids.org.za/hivaids-in-south-africa/>, accessed on 22 April 2016.

<sup>270</sup> Statistics South Africa ‘*Mortality and Causes of Death in South Africa, 2014: Findings from Death Notification*’ (2015), 48 <http://www.statssa.gov.za/>, accessed: 14 November 2016.

<sup>271</sup> Ibid.



These results have led to social instability, causing a ‘care crisis’, with many HIV/Aids patients receiving home-based care as opposed to hospitalisation.<sup>272</sup> The care carried out by families is therefore a social responsibility that would usually be addressed by the social obligations of the government.<sup>273</sup> The home-based care of HIV/Aids patients places a burden of care on family members to care for those infected with HIV/Aids.<sup>274</sup> Family members who fulfil dual roles as family caregivers and breadwinners need to take time off from work to assist those infected with HIV/Aids within their households. This combination of caregiving at home coupled with the pressures of work may result in the loss of employment or the loss of necessary income through unauthorised absences from work for the reason of caregiving.<sup>275</sup>

The *White Paper on Families* indicates that approximately 91 per cent of HIV/Aids caregivers in South Africa are women. This increases the pressures of the burden of care on women, and adds to the conflict of work and care.<sup>276</sup> The pressures of the conflict between work and care placed on employees with care-giving responsibilities to HIV/Aids family members may be managed through labour law entitlements which aim to reconcile work and care-giving responsibilities.<sup>277</sup>

#### **1.6.4 The promotion of fatherhood in South Africa**

There is a need to recognise and promote fatherhood in South Africa. Although a newborn child is dependent on maternal care for a number of months, the inclusion of a father as a caregiver is essential.<sup>278</sup> The presence of a father at the early stages of postnatal development contributes to the maturity of the child through the bonding between father and child.<sup>279</sup> The promotion of fatherhood may also encourage gender equality by creating equal obligations between women

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<sup>272</sup> <http://www.unaids.org>, accessed: 22 April 2016; Dancaster (note 58 above) 184; Dancaster & Cohen (note 3 above) 31; the White Paper on Families (note 22 above) 25.

<sup>273</sup> Tshoose (note 220 above) 508.

<sup>274</sup> Dancaster & Baird (note 3 above) 27.

<sup>275</sup> Ibid 26.

<sup>276</sup> The White Paper on Families (note 22 above) 25.

<sup>277</sup> GCZ Mhone ‘The Socio-economic context and aspects of social security policy in South Africa’ in MP Olivier et al (eds) *Introduction to Social Security* (2004) 1, 8–9; Tshoose (note 220 above) 408.

<sup>278</sup> Richter (note 44 above) 58.

<sup>279</sup> Ibid.

and men in terms of childcare responsibilities.<sup>280</sup> The father of the family no longer fulfils the role of the sole breadwinner, and shares in the family responsibilities attached to caregiving.<sup>281</sup> The dual role of men is not adequately recognised by the labour laws of South Africa. This is evident from the limited leave entitlements available to working fathers for the birth of a child.<sup>282</sup> Legal efforts to promote fatherhood would consist of efforts to provide a legislated right to paternity leave or parental leave to employees.<sup>283</sup>

### **1.6.5 International and regional labour obligations of South Africa to adopt minimum labour standards aimed at the reconciliation of work and care**

Work–family conflict is an international labour issue which transcends national and cultural boundaries.<sup>284</sup> The issue has become a global concern affecting governments, societies, individuals, and employees within each nation.<sup>285</sup> It impacts on the socio-economic and political factors of each nation.<sup>286</sup> The Constitution states in section 39(1) that when interpreting the Bill of Rights, a court, tribunal or forum must consider international law.<sup>287</sup> The Constitution states further, in section 233, that ‘when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law’. Therefore, in legislating minimum standards of employment, South Africa is obliged to consider international and regional labour standards.<sup>288</sup>

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<sup>280</sup> R Morrell ‘Fathers, fatherhood and masculinity in South Africa’ in L Richter & R Morrell (eds) *Baba: Men and Fatherhood in South Africa* (2006) 13, 18–21; Dancaster & Cohen (note 3 above) 2474; ILO Maternity & Paternity at Work (note 35 above) 61.

<sup>281</sup> Field, Bagraim & Rycroft (note 2 above) 38; ILO Maternity & Paternity at Work (note 35 above) 52, 61.

<sup>282</sup> Dancaster (note 58 above) 175–186; Field, Bagraim & Rycroft (note 2 above) 39.

<sup>283</sup> R Morrell & L Richter ‘Introduction’ in L Richter & R Morrell (eds) *Baba: Men and Fatherhood in South Africa* (2006) 1, 3.

<sup>284</sup> Adams (note 10 above) 204.

<sup>285</sup> Dancaster & Baird (note 3 above) 22–23; Huysamen (note 8 above) 48; Field, Bagraim & Rycroft (note 2 above) 30; C Rickard ‘Getting off the mommy track: An international model law solution to the global maternity discrimination crisis’ (2014) 47 *Vanderbilt Journal of Transitional Law* 1465, 1469.

<sup>286</sup> Dancaster & Baird (note 3 above) 22–23; Smit (note 58 above) 20.

<sup>287</sup> Section 39(1) of the Constitution; L Jansen van Rensburg & MP Olivier ‘International law and supra-national law’ in MP Olivier et al (eds) *Introduction to Social Security* (2004) 619, 620.

<sup>288</sup> Section 233 of the Constitution; s 1(b) of the Labour Relations Act 66 of 1995 (LRA); N Rubin ‘International Labour Law and the Law of the New South Africa’ (1998) 115 *SALJ* 685, 695.

The international obligations arise from the ratification of international and regional instruments.<sup>289</sup> These instruments provide guidelines on the minimum standards that should be adopted, and set a guaranteed benchmark for the continuous improvement of labour standards.<sup>290</sup> The primary international labour obligations applicable to South Africa arise from its position as a member state of the UN, ILO, the SADC, and the AU.<sup>291</sup> These organisations have made the work–life balance and dual-carer model of employees a priority.<sup>292</sup> International minimum standards which provide time off to care prescribe the adoption of leave provisions and flexible working arrangements.<sup>293</sup>

## 1.7 Scope and content

South African employees are limited in their options of time, money and services to reconcile their care-giving responsibilities with the responsibilities of their employment.<sup>294</sup> This thesis is limited to dealing with aspects of time off from work for working parents to attend to the responsibilities attached to care for young children. It will not focus on the time off from work to care for elderly dependants, or sick or HIV/Aids-infected dependants. Time off from work to care for young children is achieved through the entitlement to leave provisions available to working parents.<sup>295</sup>

Various types of leave entitlements and employment protections are necessary to accommodate the numerous care-giving responsibilities which the employee will bear over the periods of

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<sup>289</sup> Cohen (note 9 above) 19; Jansen van Rensburg & Olivier (note 287 above) 621.

<sup>290</sup> A Otting 'International labour standards: A framework for social security' (1993) 132(2) *International Labour Review* 163, 163; W Sengenberger 'Globalization and social progress: The role and impact of international labour standards' A report prepared for the Friedrich-Ebert-Stiftung. Second revised and extended edition (2005) 36 <http://www.newunionism.net>, accessed on 26 January 2015.

<sup>291</sup> Cohen (note 9 above) 19; Dancaster & Cohen (note 3 above) 2474; Jansen van Rensburg & Olivier (note 287 above) 621.

<sup>292</sup> Field, Bagraim & Rycroft (note 2 above) 37.

<sup>293</sup> Dancaster & Cohen (note 14 above) 222.

<sup>294</sup> Dancaster & Baird (note 3 above) 41.

<sup>295</sup> Ibid 29; Dancaster & Cohen (note 3 above) 33; Smit (note 58 above) 17; Dancaster (note 3 above) 178.

caring for young children.<sup>296</sup> According to international standards, the following elements are fundamental to a comprehensive legislative package regulating work and care:<sup>297</sup>

- maternity leave;
- paternity leave;
- parental leave;
- adoption leave;
- cash benefits over the duration of leave;
- employment protection and the elimination of maternity and childcare as a source of discrimination;
- health protection of pregnant, or postnatal, or breastfeeding employees;
- breastfeeding arrangements at the workplace;
- childcare arrangements (including leave for care emergencies); and
- flexible working arrangements.

The scope and content of this thesis will focus on international and regional labour standards, South African law, and the law of the UK relating to these elements of work–care reconciliation. The purpose and scope of each element is set out below as a study in understanding the structure and objectives of this thesis.

### **1.7.1 Maternity leave and protection**

Maternity leave is available exclusively to women because it is directly related to pregnancy.<sup>298</sup> It is aimed at giving pregnant women time off from work for the preparation of their health and wellbeing during the antenatal and postnatal stages of caring for their babies.<sup>299</sup> The objective of maternity leave is the protection of the health of the woman and child after birth and the

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<sup>296</sup> Dancaster (note 58 above) 178.

<sup>297</sup> Chapter Two will examine the international standards which indicate that these elements are necessary for the protection of employees with family responsibilities, and form minimum labour standards which must be adopted in the interests of promoting work–care reconciliation.

ILO Maternity & Paternity at Work (note 35 above) 3–6; Huysamen (note 8 above) 46; Dancaster & Baird (note 3 above) 22; Dancaster & Cohen (note 3 above) 33; Dancaster (note 58 above) 178; Dupper (note 19 above) 421; Dupper (note 58 above) 83.

<sup>298</sup> Landau & Beigbeder (note 41 above) 134.

<sup>299</sup> Haas (note 6 above) 91; Huysamen (note 8 above) 53; Dancaster & Baird (note 3 above) 33; Dupper (note 19 above) 401.

provision of a bonding period which is necessary between the mother and child.<sup>300</sup> As such, maternity leave is integral in decreasing child and maternal mortality and morbidity rates.<sup>301</sup> Maternity leave and benefits reconcile the biological reproductive functions of a woman with paid employment.<sup>302</sup>

Basic maternity protection should include the following elements:

- maternity leave for a period of the pregnancy, the childbirth and the postnatal care of the child;
- benefits in the form of cash for the period of maternity leave and healthcare related to the pregnancy;
- health protection at work during pregnancy and the period of breastfeeding;
- employment protection and non-discrimination providing security of employment and the right to return to work after maternity leave, as well as the protection against discrimination based on maternity; and
- breastfeeding arrangements to provide employees with periods of breastfeeding breaks at the workplace.<sup>303</sup>

In 2014, the ILO report *Maternity and Paternity at Work: Law and Practice across the World* indicated that from an analysis of women employees in private and public sectors, over 830 million women throughout the world do not receive adequate maternity protection.<sup>304</sup> The majority of these women are employees in Asia and Africa. It was indicated that only 18 per cent of African women employees have a right to statutory maternity leave.<sup>305</sup> There are three main reasons for the exclusion of the right to maternity protection of working women. Firstly, national laws and regulations do not provide rights to maternity protection. Second, although there are national laws and regulations in place, the women do not meet the eligibility requirements and

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<sup>300</sup> Haas (note 6 above) 91; Dancaster (note 3 above) 178; Huysamen (note 8 above) 53; Landau & Beigbeder (note 41 above) 133; *Maternity Resource Package: From Aspiration to Reality for All/Module 1: Maternity Protection at Work: What is it?* International Labour Office, Conditions of Work and Employment Programme (TRAVAIL)-Geneva: ILO, 2012, 1 [http://www.ilo.org/global/publications/ilo-bookstore/order-online/books/WCMS\\_193968/lang-en/index.htm](http://www.ilo.org/global/publications/ilo-bookstore/order-online/books/WCMS_193968/lang-en/index.htm), accessed on 30 July 2015.

<sup>301</sup> ILO *Maternity & Paternity at Work* (note 35 above) 2.

<sup>302</sup> Huysamen (note 8 above) 53.

<sup>303</sup> Dancaster (note 3 above) 179.

<sup>304</sup> ILO *Maternity & Paternity at Work* (note 35 above) xiv.

<sup>305</sup> *Ibid* 35.

cannot claim the right to maternity protection. Third, although there are national laws and regulations providing maternity protection, the laws are not implemented effectively.<sup>306</sup> In such instances, women employees are at risk of remaining vulnerable throughout their pregnancies.<sup>307</sup> The specific categories of jobs which are often excluded from national legislation providing maternity protection are domestic workers; casual or temporary workers; workers in agriculture; home workers; self-employed workers; small- to medium-sized enterprises; and women working in family businesses.<sup>308</sup>

There may be certain statutory requirements that must be fulfilled for employees to qualify for maternity leave and cash benefits. A failure to fulfil these requirements may prevent employees from being eligible for statutory benefits and may therefore exclude them.<sup>309</sup> Examples of qualifying requirements include continuous employment for a minimum period of time before the leave period; a notice period within which the application for leave must be made; and limitations on the number of applications for maternity leave within a given time frame.<sup>310</sup> These requirements limit the number of women who are entitled to maternity leave on a global scale.

Factors which contribute to the gaps in maternity have been identified as:

- unclear legislation which creates uncertainty as to the categories of employees which are afforded maternity protection;
- a lack of access to information which may result in failed awareness of existing rights;
- a lack of government implementation and enforcement of statutory provisions;
- a lack of access to social protection or a reluctance to rely on social security systems;
- the exclusion of certain employees for not meeting formal or social requirements; and

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<sup>306</sup> Addati (note 56 above) 86.

<sup>307</sup> *Maternity Resource Package: From Aspiration to Reality for All/Module 2: Maternity Protection at Work: For whom?* International Labour Office, Conditions of Work and Employment Programme (TRAVAIL)-Geneva: ILO, 2012, 4 [http://www.ilo.org/global/publications/ilo-bookstore/order-online/books/WCMS\\_193968/lang--en/index.htm](http://www.ilo.org/global/publications/ilo-bookstore/order-online/books/WCMS_193968/lang--en/index.htm), accessed on 30 July 2015.

<sup>308</sup> Addati (note 56 above) 87.

<sup>309</sup> Ibid 89.

<sup>310</sup> Ibid.

- discrimination which may prevent the effective implementation of statutory provisions.<sup>311</sup>

### 1.7.2 Paternity leave

Paternity leave is offered specifically to fathers.<sup>312</sup> It provides fathers with time off from work to care for and bond with the newborn baby, and to care for the mother of the baby during the postnatal period.<sup>313</sup> Paternity leave should be inclusive of employment protection, ensuring that the father is able to return to his position of employment after the leave period.<sup>314</sup> Paternity leave tends to be a shorter period of leave than parental leave.<sup>315</sup> Paternity leave assists in breaking down gender assumptions in the workplace and in society by recognising the accountability of men towards family responsibilities.<sup>316</sup>

While paternity leave is gender specific and is available only to fathers, most countries do not provide a separate legislative right to paternity leave.<sup>317</sup> The right is generally included in parental leave provisions which provide fathers with an exclusive period of leave. It may alternatively take the form of ‘emergency’, ‘compassionate’ or ‘family’ leave. These may be the only forms of leave offered to fathers for the purposes of care.<sup>318</sup> The provision of statutory paternity leave is becoming more common across the world. This was indicated in the aforementioned 2014 ILO report.<sup>319</sup> While in 1994, 41 out of 141 surveyed countries offered statutory paternity leave, the 2014 study revealed that by the year 2013, 79 countries had adopted statutory paternity leave.<sup>320</sup>

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<sup>311</sup> Ibid 81; *Maternity Resource Package: From Aspiration to Reality for All/Module 2: Maternity Protection at Work: For whom?* International Labour Office, Conditions of Work and Employment Programme (TRAVAIL)-Geneva: ILO, 2012, 7–10.

<sup>312</sup> Dancaster & Cohen (note 3 above) 2475, 2480; Haas (note 6 above) 91; Behari (note 36 above) 347.

<sup>313</sup> Haas (note 6 above) 91; Dancaster & Baird (note 3 above) 34; Behari (note 36 above) 347.

<sup>314</sup> Haas (note 6 above) 91; Dancaster & Cohen (note 3 above) 2475.

<sup>315</sup> ILO *Maternity & Paternity at Work* (note 35 above) 50; Behari (note 36 above) 347.

<sup>316</sup> International Labour Conference (60th Session) Report VIII: Report on the Declaration on the Equality of Opportunity and Treatment for Women Workers (Geneva, 1975) 50 & 57; Field, Bagraim & Rycroft (note 2 above) 35.

<sup>317</sup> Dancaster & Cohen (note 3 above) 2475; Behari (note 36 above) 347.

<sup>318</sup> Dancaster & Cohen (note 3 above) 31; Dancaster & Cohen (note 2 above) 2477; Dancaster & Baird (note 3 above) 34; ILO *Maternity & Paternity at Work* (note 35 above) 50.

<sup>319</sup> ILO *Maternity & Paternity at Work* (note 35 above) 59.

<sup>320</sup> Ibid xiv, 52.

### 1.7.3 Parental leave

Parental leave is a gender-neutral provision which offers fathers as well as mothers the time off to care for and bond with young children.<sup>321</sup> The leave is offered at the expiry of maternity or paternity leave.<sup>322</sup> While the primary objective of parental leave is to promote the wellbeing of the child during the early stages of development, parental leave has the ancillary benefit of advocating the division of parental responsibilities between working mothers and fathers.<sup>323</sup> Common parental leave models involve transferable or non-transferable leave between parents.<sup>324</sup> As transferable leave, parental leave may be granted as a single leave entitlement to be shared by a parent couple. The statutory provision granting parental leave may offer the employees the right to decide which of them would use the parental leave. The parental leave may therefore be separated and taken over shorter periods of time, or at intervals, or the couple may decide to take the full duration of leave all at once.<sup>325</sup> Alternatively, a statutory provision may grant each parent a separate and individual entitlement to parental leave.<sup>326</sup> This entitlement cannot be transferred to the other parent.<sup>327</sup>

### 1.7.4 Adoption leave

Adoption leave gives adoptive parents time off from work to care for their adopted children during their time of placement.<sup>328</sup> It provides the time needed for adopted children to adapt to their new parents and new environment.<sup>329</sup> In some countries, statutory models of adoption leave have been seen to take the form of a leave provision similar to maternity leave or parental leave.<sup>330</sup> The leave is usually granted from the day of placement, being the day the child arrives in the home; this is considered as the legislative day of birth, from which time the postnatal stage

<sup>321</sup> Haas (note 6 above) 91; Dancaster & Cohen (note 3 above) 28; Behari (note 36 above) 347.

<sup>322</sup> Dancaster & Cohen (note 2 above) 2476; Dupper (note 58 above) 90; Dancaster & Baird (note 3 above) 34; Behari (note 36 above) 347.

<sup>323</sup> Field, Bagraim & Rycroft (note 2 above) 37; Dancaster & Cohen (note 2 above) 2476; Behari (note 36 above) 347.

<sup>324</sup> Huysamen (note 8 above) 73; Addati (note 56 above) 81; ILO Maternity & Paternity at Work (note 35 above) 42–43; Behari (note 36 above) 347.

<sup>325</sup> Huysamen (note 8 above) 73; Dancaster & Cohen (note 2 above) 2481; Behari (note 36 above) 347.

<sup>326</sup> Huysamen (note 8 above) 73.

<sup>327</sup> Ibid; Behari (note 36 above) 347.

<sup>328</sup> ILO Maternity & Paternity at Work (note 35 above) 50; Dancaster (note 3 above) 180.

<sup>329</sup> Huysamen (note 8 above) 66; Dupper (note 58 above) 92; Dancaster (note 3 above) 181.

<sup>330</sup> ILO Maternity & Paternity at Work (note 35 above) 69; Huysamen (note 8 above) 66; Dupper (note 58 above) 92; Dancaster (note 3 above) 181.



of maternity leave would begin.<sup>331</sup> For this reason, the period of adoption leave is usually shorter than maternity leave.<sup>332</sup> According to comparative statutory adoption leave models, the duration of adoption leave may also be dependent on the age of the child.<sup>333</sup>

### 1.7.5 Cash benefits over the duration of leave

Income replacement through cash benefits is a significant element of maternity leave.<sup>334</sup> It encourages job continuity and provides financial security and independence during the maternity period.<sup>335</sup> Cash benefits during maternity leave are an economic necessity for the maintenance of a suitable standard of living. Paid maternity leave is ‘universally acknowledged’ and ‘firmly established’ as a core element of the health and economic security for women employees and their children.<sup>336</sup> Cash benefits were introduced by Germany in 1883 through provisions which provided pregnant employees with 50 per cent of their regular pay for a period of six weeks. It was then gradually adopted throughout Europe and by 1945 all industrial countries, with the exception of the United States and Canada, had adopted provisions for paid maternity leave.<sup>337</sup> There may be eligibility requirements attached to cash benefits. These may include a minimum period of employment; a minimum period of contributions to an insurance scheme, or (where the benefits are funded by the employer) a limited number of times in which an employee can claim cash benefits.<sup>338</sup>

Most countries base the amount of cash benefits on previous earning. It is widely accepted that the employer alone should not be responsible for the costs of employee maternity protection.<sup>339</sup> Payment should be made out of public funds or through a social insurance scheme.<sup>340</sup> Despite

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<sup>331</sup> ILO Maternity & Paternity at Work (note 35 above) 69; Huysamen (note 8 above), 66; Dupper (note 58 above) 92.

<sup>332</sup> For example, in South Africa, as set out in Chapter Four of this thesis. ILO Maternity & Paternity at Work (note 35 above) 69.

<sup>333</sup> Dupper (note 58 above) 92.

<sup>334</sup> ILO Maternity & Paternity at Work (note 35 above) 8.

<sup>335</sup> Ibid 9.

<sup>336</sup> Ibid 8.

<sup>337</sup> Dupper (note 19 above) 426.

<sup>338</sup> Addati (note 56 above) 89; ILO Maternity & Paternity at Work (note 35 above) 42–43.

<sup>339</sup> Dupper (note 32 above) 427; Dupper et al (note 22 above) 33; N Kabeer ‘Paid work, women’s employment and inclusive growth.: Transforming the structures of constraint’ *UN Women* (2013) 10.

<sup>340</sup> Dupper (note 19 above) 427; Kabeer (note 339 above) 10.

various means of providing maternity funding, the ILO report reflected that the most common systems used by the 185 surveyed countries are:

- contributory schemes, such as employment-related social insurance;
- the financing cash benefits through employer funds; or
- a mixture of the above systems.<sup>341</sup>

Contributory schemes, such as employment-related social insurance, may be financed through contributions received from employees or government subsidies.<sup>342</sup> The contributions may be compulsory for certain categories of employees, and are based on the level of earnings of the employee.<sup>343</sup> Employer-financing places a burden on employers to aid pregnant employees with maternity benefits out of employer funds.<sup>344</sup> The employer becomes individually liable for the applicable cash benefits.<sup>345</sup> This financial scheme could provoke discrimination against women employees as it discourages the employer from recruiting, promoting, and retaining women.<sup>346</sup> Contributory schemes eliminate the burden on employers for compensating women for maternity leave. In doing so, they eliminate the risk of employers discriminating against pregnant employees on the basis of providing them with maternity benefits out of employer funds.<sup>347</sup>

The ILO report notes that lesser-used systems of funding are non-contributory social assistance schemes where the funds are made available through public finance and administered through the government.<sup>348</sup> In a non-contributory scheme women need not be working or need not have been previously employed in order to benefit; nor is it necessary for them to have been contributing to the scheme.<sup>349</sup> Therefore, non-contributory social assistance schemes can be a sole source of funding of benefits for unemployed women, although the benefits are minimal.<sup>350</sup> For instance, benefits can be paid to women employed in the informal sector who do not contribute to a social security system. The criteria which may apply to a non-contributory

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<sup>341</sup> ILO Maternity & Paternity at Work (note 35 above) 20.

<sup>342</sup> Ibid.

<sup>343</sup> Ibid.

<sup>344</sup> Ibid 20–22; Addati (note 56 above) 78.

<sup>345</sup> ILO Maternity & Paternity at Work (note 35 above) 22.

<sup>346</sup> Ibid; Addati (note 56 above) 78.

<sup>347</sup> ILO Maternity & Paternity at Work (note 35 above) 20, 21; Addati (note 56 above) 78.

<sup>348</sup> ILO Maternity & Paternity at Work (note 35 above) 20, 24.

<sup>349</sup> Ibid 24; Addati (note 56 above) 78.

<sup>350</sup> ILO Maternity & Paternity at Work (note 35 above) 24; Addati (note 56 above) 78.

scheme are mandatory regular medical check-ups during the pregnancy or the requirement to give birth in a designated health facility.<sup>351</sup> Any cash benefits attached to parental leave are generally less than those offered for maternity leave, or the parental leave is unpaid.<sup>352</sup> Adoption benefits generally correspond with the benefits afforded during maternity or parental leave.<sup>353</sup>

### **1.7.6 Employment protection and the elimination of maternity and childcare as a source of discrimination**

Employment protection and non-discrimination in matters concerning work–care reconciliation in South Africa involves two main features. Firstly, employment protection is the right of women employees not to lose their jobs during pregnancy, maternity leave, or upon returning to work following maternity leave.<sup>354</sup> It further includes the right to return to the same or an equivalent position to the one the employee had prior to maternity leave, and to be paid at the same rate upon return from maternity leave.<sup>355</sup> Second, non-discrimination refers to the protection against discrimination on the basis of maternity and family responsibilities.<sup>356</sup> Equal treatment between men and women in the workplace requires that women not be treated less favourably than men because of their reproductive functions.<sup>357</sup>

Employment protection is also a necessary element in the work–care reconciliation package in legal systems which provide rights to paternity leave; parental leave; adoption leave; leave for care emergencies; and flexible working arrangements. These rights cannot be relied on without employment protection against dismissal and discrimination.<sup>358</sup> This is particularly important in the protection against discriminatory workplace attitudes towards men who exercise their rights to leave for caregiving.<sup>359</sup>

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<sup>351</sup> Addati (note 56 above) 89.

<sup>352</sup> ILO Maternity & Paternity at Work (note 35 above) 61.

<sup>353</sup> Dupper (note 58 above) 92.

<sup>354</sup> ILO Maternity & Paternity at Work (note 35 above) 73; Dupper (note 220 above) 412.

<sup>355</sup> Dupper (note 58 above) 83; Landau & Beigbeder (note 41 above) 133; Dupper (note 220 above) 408.

<sup>356</sup> ILO Maternity & Paternity at Work (note 35 above) 73; Dupper (note 220 above) 409.

<sup>357</sup> Dupper (note 58 above) 83; ILO Maternity & Paternity at Work (note 35 above) 73.

<sup>358</sup> Mitchell (note 207 above) 129.

<sup>359</sup> Ibid; James (note 207 above) 111.

### 1.7.7 Health and safety of pregnant, postnatal, or breastfeeding employees

Although working while pregnant is not dangerous for women, the hours of work or the working conditions may cause risks to her health and the health of the unborn baby.<sup>360</sup> Therefore, pregnant and breastfeeding employees require measures which ensure the protection of their health and safety at work.<sup>361</sup> International standards on health and safety as part of maternity protection involve three fundamental aspects. Firstly, pregnant women, women who have recently given birth and women who are breastfeeding must be recognised as special risk groups which require adequate protection.<sup>362</sup> Second, employers must make individual assessments of the risks to pregnant and breastfeeding employees. Employment conditions must be adjusted according to the assessment so as to fit the needs of the employee. The employee may exercise discretion in accepting the conditions of employment.<sup>363</sup> Third, it is important to ensure that pregnant or breastfeeding employees are not exposed to hazardous working conditions, environments, or substances as a result of their responsibilities in the workplace.<sup>364</sup>

### 1.7.8 Breastfeeding arrangements at the workplace

Breastfeeding has medical benefits for both the mother and child.<sup>365</sup> If a woman is not given breaks between working hours to breastfeed or express milk, then it may be detrimental to the health of both mother and child.<sup>366</sup> Breastfeeding must be done at regular intervals.<sup>367</sup> Measures providing breastfeeding breaks at the workplace are an essential aspect of maternity protection.<sup>368</sup> Research has shown that the more supportive a workplace is to the accommodation of a woman's breastfeeding needs, the more likely she is to return to work.<sup>369</sup> Therefore, labour

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<sup>360</sup> ILO Maternity & Paternity at Work (note 35 above) 90.

<sup>361</sup> Dupper (note 19 above) 429; J Paul *Healthy Beginnings: Guidance on Safe Maternity at Work* Geneva, International Labour Office (2004) 9.

[http://www.ilo.org/wcmsp5/groups/public/@ed\\_protect/.../wcms\\_travail\\_pub\\_66.pdf](http://www.ilo.org/wcmsp5/groups/public/@ed_protect/.../wcms_travail_pub_66.pdf), accessed on 20 January 2015; ILO Maternity & Paternity at Work (note 35 above) 90.

<sup>362</sup> Paul (note 361 above) 9; ILO Maternity & Paternity at Work (note 35 above) 90.

<sup>363</sup> Ibid.

<sup>364</sup> Dupper (note 19 above) 429–430.

<sup>365</sup> Paul (note 225 above) 36; ILO Maternity & Paternity at Work (note 35 above) 102.

<sup>366</sup> ILO Maternity & Paternity at Work (note 35 above) 102.

<sup>367</sup> Paul (note 361 above) 9.

<sup>368</sup> Ibid 33.

<sup>369</sup> ILO Maternity & Paternity at Work (note 35 above) 102.

laws must make provisions for the accommodation of women who are breastfeeding in the workplace.<sup>370</sup>

### **1.7.9 Childcare arrangements (including leave for care emergencies)**

The provisions of leave for care emergencies allow employees time off from work to attend to instances of sudden illness of a child, dependant, or other family member.<sup>371</sup> It also assists in situations where the employee has to make sudden alternative care arrangements where the substitute caregiver becomes unavailable.<sup>372</sup> Through leave for emergency care, the employee is entitled to take time off from work to attend to the emergency without the possibility of facing disciplinary action or dismissal.<sup>373</sup>

Childcare facilities at the workplace are essential if both parents of the child are working.<sup>374</sup> The provision of childcare facilities and services to working parents assists in the welfare of children and provides support for the care of children during working hours.<sup>375</sup> One of the most significant factors of a woman's ability to attain a work-life balance is the availability of subsidised childcare.<sup>376</sup> The ILO report notes that there is evidence of adequate childcare facilities improving the ability of employees, especially mothers, to continue to be engaged in paid work.

Where such facilities are not provided, women are often found working in informal, home-based, or self-employment.<sup>377</sup> These types of work allow women the flexibility to meet their care-giving demands while receiving an income from employment.<sup>378</sup> The provision of childcare facilities

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<sup>370</sup> Acas. *Guide on Accommodating Breastfeeding Employees in the Workplace* (January 2014) <http://www.acas.org.uk>, accessed on 11 October 2016.

<sup>371</sup> Dancaster & Baird (note 3 above) 29; Dancaster (note 3 above) 188.

<sup>372</sup> Ibid.

<sup>373</sup> Dancaster & Baird (note 3 above) 29.

<sup>374</sup> Landau & Beigbeder (note 41 above) 168.

<sup>375</sup> International Labour Conference (60th Session) Report VIII: Report on the Declaration on the Equality of Opportunity and Treatment for Women Workers (Geneva, 1975) 50 & 57.

<sup>376</sup> Fredman (note 240 above) 10.

<sup>377</sup> ILO Maternity & Paternity at Work (note 35 above) 111.

<sup>378</sup> Ibid.

and services to working parents assists in the welfare of children and provides support for their care during working hours.<sup>379</sup>

### **1.7.10 Flexible working arrangements**

Flexible working arrangements differ from leave entitlements.<sup>380</sup> The structure of the flexible working arrangement can involve a temporary or permanent change in working arrangements of the employee. The changes could involve a change in location of business offices and could occur with or without a change in hours of work.<sup>381</sup> Flexible working arrangements are considered to be a long-term adjustment aimed at affording employees the time to meet the needs of their family responsibilities.<sup>382</sup> The employee remains in employment but is permitted to make changes in the arrangement of working hours or workplace location to accommodate care-giving responsibilities.<sup>383</sup> There has been an international increase in the adoption of flexible working arrangements as a result of advancements of technology and globalisation on labour markets.<sup>384</sup> Non-traditional structures of the organisation of work have become increasingly attainable.<sup>385</sup> These forms of work include flexible working hours, job-sharing, and part-time work.<sup>386</sup> The adoption of a statutory right to request flexible working arrangements places a duty on the employer to consider the request in line with set statutory procedures.<sup>387</sup>

## **1.8 Central premise of thesis**

This thesis aims to determine the adequacy of the current employment rights and protections of South African labour legislation, which aim to provide time off to care. The central premise of this thesis is that the South African labour laws should adequately accommodate the needs of employees with care-giving responsibilities. Therefore, labour legislation should encompass a comprehensive legislative framework of laws regulating the work–care conflict by providing

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<sup>379</sup> International Labour Conference (60th Session) Report VIII: Report on the Declaration on the Equality of Opportunity and Treatment for Women Workers (Geneva, 1975) 50 & 57.

<sup>380</sup> Dancaster & Cohen (note 3 above) 34; Dancaster (note 3 above) 178.

<sup>381</sup> Dancaster & Baird (note 3 above) 24; Dancaster (note 3 above) 189.

<sup>382</sup> Dancaster & Cohen (note 3 above) 33.

<sup>383</sup> Dancaster (note 3 above) 189.

<sup>384</sup> *Ibid*; Dancaster & Cohen (note 3 above) 34; Dancaster & Baird (note 3 above) 39.

<sup>385</sup> Dancaster & Cohen (note 3 above) 34.

<sup>386</sup> *Ibid*.

<sup>387</sup> Dancaster (note 3 above) 190.

employees with rights and protection to time off from work to care. International and regional organisations will be relied on as a benchmark for the minimum labour standards that should be adopted by laws.<sup>388</sup> These standards prescribe a comprehensive legislative package for the reconciliation of work and care as a means of ensuring adequate employment protections and anti-discrimination measures. These employment protections promote workplace equality; encourage the participation of men in the reconciliation of work and care; and promote satisfactory social security protection for employees with care-giving responsibilities.<sup>389</sup> For these reasons, international labour standards may be relied on to assess the legislative provisions which reconcile work and care in South Africa.

South African labour legislation currently provides employees with rights of time off to care in the form of maternity leave and family responsibility leave.<sup>390</sup> These leave entitlements are set out in the BCEA.<sup>391</sup> Section 25 of the BCEA provides pregnant employees with four consecutive months of maternity leave.<sup>392</sup> Section 27 provides employees with a gender-neutral provision of family responsibility leave, available for the duration of three days to both men and women for the general purpose of caring for a family member.<sup>393</sup> By examining the scope, duration, qualifications, and affordability of maternity leave and family responsibility leave, this thesis will seek to ascertain whether these leave entitlements have limitations in their capacities to accommodate employees with care-giving responsibilities.

The strengths and limitations of the right to maternity leave in South African law will be established through a comparative analysis. The investigation will encompass the scope and coverage of employees to the right to maternity leave. This examination will set out those employees who are included and those who are excluded from the right to maternity leave. The duration of maternity leave and any qualifying requirements for the leave will be analysed. Social security is an essential aspect of maternity protection. Therefore, the right to maternity

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<sup>388</sup> Field, Bagraim & Rycroft (note 2 above) 37; Cohen (note 9 above) 19; Dancaster & Cohen (note 2 above) 2474.

<sup>389</sup> Dancaster & Baird (note 3 above) 26; Cohen (note 9 above) 29; Rickard (note 258 above) 1502.

<sup>390</sup> Section 25 and s 27 of the BCEA.

<sup>391</sup> Dancaster & Baird (note 3 above) 30; Dancaster & Cohen (note 3 above) 33; Field, Bagraim & Rycroft (note 2 above) 33; Huysamen (note 8 above) 72; Dancaster (note 3 above) 185.

<sup>392</sup> Section 25 of the BCEA.

<sup>393</sup> Dancaster & Baird (note 3 above) 30; Dancaster & Cohen (note 3 above) 33; Field, Bagraim & Rycroft (note 2 above) 33; Huysamen (note 8 above) 72; Dancaster (note 3 above) 185.

cash benefits offered by the UIA will be considered and critiqued.<sup>394</sup> The thesis will argue that statutory rights to maternity leave should offer wide and inclusive protection to employees.

The analysis of family responsibility leave will consider the adequacy of the entitlement in light of the failure of South African law to provide a separate leave entitlement applicable to fathers of newborn babies. Essentially, it will question whether the right to family responsibility leave provides fathers with adequate rights to take time off from work to care for their newborn babies.<sup>395</sup> Therefore, this thesis will seek to ascertain whether South African labour laws should provide fathers with an exclusive right to time off from work to care for their newborn babies by introducing the right to paternity leave.<sup>396</sup> Alternatively, this thesis will consider the introduction of a statutory right to time off from work which may be extended to fathers of newborn babies through a non-transferable right to parental leave.<sup>397</sup>

Consideration will be had to essential elements of laws aimed at the reconciliation of work and care omitted from South African labour laws, such as rights of paternity leave, parental leave, adoption leave, and leave for care emergencies; as well as the right to request flexible working arrangements. The examination of the failure to provide adoption leave will rely on the concept of equality. Accordingly, if time off from work is afforded to mothers of newborn babies, then adoptive parents should be afforded time off during the period of the placement of the adopted child into a new family environment.<sup>398</sup>

On account of the current care crisis of South Africa, and the possibilities of unreliable childcare arrangements, this thesis will consider the introduction of parental leave or the right to request flexible working arrangements as a means of accommodating employees with long-term care-

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<sup>394</sup> Bonthuys (note 19 above) 272; Dancaster & Cohen (note 3 above) 34.

<sup>395</sup> Behari (note 36 above) 347.

<sup>396</sup> Dancaster & Baird (note 3 above) 29–33; Dancaster (note 3 above) 188.

<sup>397</sup> Huysamen (note 8 above) 73; J Botes & J Kaplan 'It's leave, Jim, but not as we know it: Employment law' (2015) 15(6) *Without Prejudice* 37, 39; N Motsiri & O Timothy 'Sir, your maternity leave has been granted...' (2015) 06 *HR Future* 44, 46; M Finn 'Fathers still to go: Paternity Leave and the Labour Court's Judgment in MIA v SITA' Posted: 06/04/2015 *African Legal Centre* <http://africanlegalcentre.org/2015/04/06/farther-still-to-go-paternity-leave-and-the-labour-courts-judgment-in-mia-v-sita/>, accessed on 16 February 2016.

<sup>398</sup> Huysamen (note 8 above) 67–72.



giving responsibilities.<sup>399</sup> This thesis will consider further whether the care crisis may also be addressed through separate leave entitlement to provide time off from work to attend to care emergencies.<sup>400</sup>

This thesis aims to illustrate that the development of a comprehensive legislative package aimed at the reconciliation of work and care requires increased government intervention through a commitment towards the protection of the care-giving responsibilities of employees. This argument relies on the premise which will be exposed by a comparative analysis of salient aspects of the laws of the UK, indicating the extent to which the legislative employment rights and protections to time off from work may be developed through government commitment.<sup>401</sup> This premise extends to the consideration of the impact of providing employees with legislative options to tailor their leave entitlements in accordance with their family specifications.<sup>402</sup> Ultimately, this thesis will aim to conclude that employees with care-giving responsibilities should be provided with options and choices of leave entitlements which accommodate their individual needs according to duration, affordability, and family structure.<sup>403</sup>

## 1.9 Methodology

The methodology of this thesis will be a qualitative and comparative analysis of labour law. The research will not be based on an empirical study. Any data that will be referred to in this research will be discussed as they appear in the literature being surveyed. The methodology will be based on comparative international research focused on the integration of work and family through labour laws.<sup>404</sup> The research will reflect primary and secondary sources of legal information. It comprises information from textbooks and journal articles; statutes and bills; international law reports; conference papers; policy documents and considerations; local and international newspapers and magazine articles; and internet sources. These sources of information will

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<sup>399</sup> Dancaster & Baird (note 3 above) 37–38; Dancaster & Cohen (note 14 above) 221; Dancaster & Cohen (note 3 above) 31; Dancaster (note 3 above) 188; Cohen & Dancaster (note 157 above) 207.

<sup>400</sup> Dancaster & Baird (note 3 above) 29, 30; Dancaster (note 3 above) 188–189.

<sup>401</sup> Lewis & Campbell (note 6 above) 21; Conaghan (note 8 above) 27; Golyner (note 204 above) 378; Caracciolo di Torella (note 207 above) 318; Lewis et al (note 207 above) 270; Mitchell (note 207 above) 123; James (note 207 above) 39.

<sup>402</sup> Mitchell (note 207 above) 132; Lewis & Campbell (note 6 above) 21.

<sup>403</sup> Smit (note 58 above) 32; Dancaster (note 3 above) 192.

<sup>404</sup> Dancaster & Cohen (note 3 above) 32.

provide material on each comparative country, which will be synthesised and compared for the purpose of evaluating the central premise of this thesis.<sup>405</sup> This thesis will engage in a comparative analysis of the laws of South Africa and the UK.

The comparative method requires the comparison of selected issues between two or more different legal systems.<sup>406</sup> The study involves describing each national legal system and finding commonalities, differences, and specialities between them. Comparative law will illustrate international perspectives on the topic, which may effectively lead to the standardisation of laws internationally or policy considerations on new legal developments.<sup>407</sup> It is also an effective tool in finding solutions to legal problems and providing a deeper understanding of the domestic legal system of the research.<sup>408</sup> A comparative analysis of international laws and standards is vital to an evaluation of South African law. This resonates from sections 39(1) and section 233 of the Constitution, which compels the consideration of international laws when interpreting the Bill of Rights or any legislation respectively.<sup>409</sup>

Comparative law is particularly useful in the area of labour law.<sup>410</sup> This is because it identifies legal solutions from foreign jurisdictions which can assist the labour markets in less developed countries.<sup>411</sup> Laws regarding labour relations between employer and employee are capable of being transferred from one jurisdiction to another as they deal with standards of protection and rules based on substantive terms of employment.<sup>412</sup> The international standardisation of labour laws is advantageous to both advanced and underdeveloped countries.<sup>413</sup> This is particularly so in a time of economic globalisation, where there is a need to harmonise employment conditions

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<sup>405</sup> TK Hervey *Justifications for Sex Discrimination in Employment* (1993) 21.

<sup>406</sup> *Ibid* 9.

<sup>407</sup> M Martinek 'Comparative jurisprudence – What good does it do? History, tasks, methods, achievements and perspectives of an indispensable discipline of legal research and education' (2013) 1 *TSAR* 39, 40–42; Conaghan & Rittich (note 40 above) 7.

<sup>408</sup> Hervey (note 405 above) 9.

<sup>409</sup> Sections 39(1) and 233 of the Constitution; C Botha *Statutory interpretation: An Introduction for Students* (2012) 155; Jansen van Rensburg & Olivier (note 287 above) 620–621.

<sup>410</sup> L Aparicio-Valdez & JB Alvarado 'The case for comparative and interdisciplinary study of labour relations' in R Blanpain (ed) *The Modernization of Labour Law and Industrial Relations in a Comparative Perspective* (2009) 29, 29.

<sup>411</sup> O Khan-Freud 'On uses and misuses of comparative law' (1974) 37(1) *The Modern Law Review* 1.

<sup>412</sup> *Ibid*.

<sup>413</sup> Smit (note 58 above) 15; D Woolfrey 'Harmonization of Southern Africa's labour laws in context of regional integration' (1991) 12(4) *ILJ* 703, 712.

and uphold minimum standards of basic labour rights in order to redress economic imbalances.<sup>414</sup>

The ILO, as an international organisation, upholds minimum standards of basic labour and has been most successful with its use of comparative labour law.<sup>415</sup> The objectives of comparative labour law are firstly to promote social progress and second, to use international conventions to co-ordinate the improvement of work and life conditions.<sup>416</sup> The ILO does this by setting out proposed minimum standards of law and policy for member countries to adopt.<sup>417</sup> In order to do this, the ILO has to engage in a comparative law methodology.<sup>418</sup> Comparative law methodology is therefore useful in identifying legal trends and setting benchmarks for the adoption of minimum labour standards.<sup>419</sup>

An essential aspect of the comparative method is to consider various socio-political and socio-economic factors in addition to the law as it exists in the respective countries. The economic, social and political factors form the context of the legal systems and lead to a more meaningful comparison.<sup>420</sup> However, it must be recognised that each nation has a different economic, social and political system which informs its laws.<sup>421</sup> The aim is to comprehend how each legal system measures up against another. Therefore, it is best that the comparative countries have some common ground.<sup>422</sup> Solutions from one chosen legal system should be capable of being transferable to the other. In comparative methodology, this is known as ‘transferability’.<sup>423</sup> The idea that the research involved in comparing one legal system to another is based on comparative economic, social and political situations so that the legal solutions of one system can be

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<sup>414</sup> Aparicio-Valdez & Alvarado (note 410 above) 31.

<sup>415</sup> Ibid; Rickard (note 285 above) 1505.

<sup>416</sup> N Valticos ‘Comparative law and the International Labour Organization’ (1977) 2 *Comparative Labour Law* 273, 274; Aparicio-Valdez & Alvarado (note 410 above) 31.

<sup>417</sup> Woolfrey (note 413 above) 716; Aparicio-Valdez and Alvarado (note 410 above) 31.

<sup>418</sup> Valticos (note 416 above) 274.

<sup>419</sup> Dancaster & Baird (note 3 above) 23; Rubin (note 152 above) 695.

<sup>420</sup> M Salter & J Mason *Writing Law Dissertations: An Introduction and Guide to the Conduct of Legal Research* (2007) 183; Khan-Freud (note 411 above) 27.

<sup>421</sup> Dancaster & Baird (note 3 above) 23.

<sup>422</sup> Salter & Mason (note 420 above) 183; Khan-Freud (note 411 above) 27.

<sup>423</sup> Hervey (note 405 above) 11.

transferred to the other. The degree of transferability will depend on the similarities between the economic, social and political climates of the countries.<sup>424</sup>

Even if the legal solution cannot be transferred to another national legal system, comparative law is a valuable research method for gaining a deeper understanding of the identified issue within the relevant domestic legal system.<sup>425</sup> In this thesis, the domestic legal system will be that of South Africa. Therefore, even if the legal comparisons cannot be reconciled, and the laws are not capable of transferability between national legal systems, the comparative analysis will highlight the methods used by other national legal systems in addressing the issue.<sup>426</sup> This examination will be a useful insight into the operation of labour law regulating work–care reconciliation in South Africa.

The thesis will draw from the report of the ILO's 2014 *Maternity and Paternity at Work: Law and Practice across the World*.<sup>427</sup> The report reviewed the national laws and practices with regard to maternity and paternity at work in 185 countries.<sup>428</sup> The comparative content of the report was divided into five chapters, each focusing on an essential element, or a combination of essential elements identified as necessary for the protection of maternity and paternity at work. Chapter Two of the report examines the basic aspects of maternity leave. These are divided into four parts: the duration of maternity leave; maternity cash benefits; financing of maternity cash benefits; and scope and eligibility requirements.

Chapter Three of the report sets out the aspects of paternity, parental and adoption leave. Chapter Four covers employment protection and non-discrimination. Chapter Five examines health protection at the workplace. Chapter Six focuses on breastfeeding arrangements at work and childcare. In each chapter, the report summarises the provisions of ILO labour standards under each topic. It then compares national legal provisions to the ILO labour standards. Therefore, the labour standards relating to each of the identified elements for work–care reconciliation are

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<sup>424</sup> Ibid 37.

<sup>425</sup> Ibid 9.

<sup>426</sup> Ibid 18.

<sup>427</sup> ILO *Maternity & Paternity at Work* (note 35 above).

<sup>428</sup> Ibid.

discussed. Each chapter then incorporates a comparative analysis of the reviewed national legal systems.

The methodology of the ILO report will be followed in this thesis, which will summarise and review the elements of work–care reconciliation for each country. The laws of South Africa and the UK will be examined and discussed individually. Subheadings will indicate the elements of work–care reconciliation for each chapter. As such, a comparative analysis of the commonalities, differences and specialities between each country and against international labour standards will be carried out. Drawing from the comparative analysis, this thesis will make recommendations by identifying more adequate statutory mechanisms that should be adopted to better reconcile the work and care-giving responsibilities of South African employees. The conclusions of this thesis will be based on the findings which will appear from the comparative analysis.

### **1.10 Structure of the study**

The following four chapters of this thesis set out and assess the substantive laws regulating work–care reconciliation.

Chapter Two explores each element of work–care reconciliation in relation to minimum international labour standards. The chapter reflects the minimum labour standards of work–care reconciliation for employees that should be adopted by national legal systems.

Chapter Three explores the extent to which regional organisations set minimum labour standards for the adoption of laws which promote the reconciliation of work and care.

Chapters Four and Five examine the legal frameworks of South Africa and the UK, individually and respectively. Each national legal system is examined according to the objectives and central premise of this thesis. As such, these chapters set out in turn a discussion of the laws of each country which relate to the reconciliation of work and care. In anticipation of the comparative analysis of these legal systems, each of these chapters follows a similar structure for ease of comparison. While these chapters contain reviews and discussions of laws, the contribution of this thesis will be presented in Chapter Seven.

Chapter Six contains the comparative analysis of this thesis. The comparative analysis will compare the laws of South Africa to those of the UK. This chapter aims to determine the adequacy of South African labour legislation regulating and reconciling work and care demands of employees, in relation to the legal frameworks of the comparative countries.

Chapter Seven sets out recommendations for the introduction of new statutory provisions and policies that should be adopted for the effective regulation of work–care conflict.

Chapter Eight concludes this thesis. The conclusion highlights those laws identified in this thesis which require consideration for more effective regulation through amendments and the introduction of new legislative rights.

## **1.11 Conclusion**

The way that family dynamics have changed means that current labour law regulations and policies must be re-examined to ensure that they adequately provide for the dual roles of working women and the family responsibilities of working men. Policies aimed at creating a work–life balance through maternity leave provisions cannot remove the systemic gender inequalities which exist in the workplace unless the policies account for the shift in family dynamics in which men and women are regarded as equal co-carers. If this is not addressed by labour policies, maternity provisions will merely strengthen the assumptions that women are homemakers and child-carers.<sup>429</sup>

Research has indicated that one in three women find it difficult to return to work after maternity leave.<sup>430</sup> While the primary reason for this is the struggle to reconcile work demands with those of childcare, the accompanying difficulties arise from lack of access to childcare services, financial issues, and the attitudes of superiors and fellow employees upon return from maternity leave.<sup>431</sup> Countries which have adopted governmental policies aimed at reconciling the work and care responsibilities of employees have resulted in more inclusive participation of women in

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<sup>429</sup> Huysamen (note 8 above) 48, 50.

<sup>430</sup> Brand & Barrerio-Lucas (note 50 above) 70.

<sup>431</sup> *Ibid.*

employment and a smaller divide in the wage gap between genders.<sup>432</sup> A comparative analysis of legal systems will be beneficial in identifying measures that must be taken for the effective reconciliation of work and care in the context of South Africa as a developing country.

The reconciliation of work and care requires the regulation of employment standards to provide a selection of leave entitlements to caregivers, and flexible work arrangements which will address the needs of workers with long-term care-giving responsibilities.<sup>433</sup> It is clear that a comprehensive legislative package must be adopted to address the conflict between work and care in South Africa.<sup>434</sup> Recognition must be given to the differences which exist between families. Employees must be provided with options of leave entitlements to ensure that they may reconcile their work and care demands according to their family needs.<sup>435</sup> This chapter has shown that further research is needed into the current deficiencies in South African labour laws aimed at providing time off to care, and to make recommendations for the introduction of more effective employment rights and protections for the reconciliation of work and care. Provided that government acknowledges these deficiencies, and takes steps towards legislative reforms, the reconciliation of work and care in South Africa may be supported.

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<sup>432</sup> Haas (note 6 above) 90; International Labour Conference (98th Session) Resolution concerning gender equality at the heart of decent work (Geneva, 19 June 2009).

<sup>433</sup> Dancaster & Cohen (note 2 above) 33.

<sup>434</sup> Dancaster (note 3 above) 179.

<sup>435</sup> *Ibid* 178; Smit (note 58 above) 25.

## CHAPTER TWO

# INTERNATIONAL LABOUR STANDARDS GOVERNING THE RECONCILIATION BETWEEN WORK AND CARE

### 2.1 Introduction

South Africa has numerous international obligations arising from the ratification of international policies and conventions, which promote legal transformation and support the need for extended work–care legislative provisions.<sup>1</sup> International labour standards are significant because they set out the ‘actual terms and conditions of employment’ that exist across different countries and indicate the social and economic standards that should be implemented by national governments and/or employer bodies.<sup>2</sup> They are significantly useful in providing guidelines to nations on the minimum standards that should be adopted, and put in place a guaranteed benchmark for the continuous improvement of labour standards.<sup>3</sup>

The Constitution states that the interpretation of legislation must be consistent with international law.<sup>4</sup> Section 39(1) of the Constitution places an obligation on courts, tribunals and forums to consider international law upon interpreting the Bill of Rights.<sup>5</sup> Section 231 of the Constitution provides that ‘any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been

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<sup>1</sup> CD Field, JJ Bagraim & A Rycroft ‘Parental leave rights: Have fathers been forgotten and does it matter?’ (2012) 36(2) *SALR* 30, 37; T Cohen ‘The efficacy of international standards in countering gender inequalities in the workplace’ (2012) 33 *ILJ* 19; L Dancaster & T Cohen ‘Leave for working fathers in the SADC region’ (2015) 36 *ILJ* 2474.

<sup>2</sup> W Sengenberger ‘Globalization and Social Progress: The role and impact of International Labour Standards’ A report prepared for the Friedrich-Ebert-Stiftung. Second revised and extended edition. (2005) 36, <http://www.newunionism.net>, accessed on 26 January 2015.

<sup>3</sup> A Otting ‘International labour standards: A framework for social security’ (1993) 132(2) *International Labour Review* 163.

<sup>4</sup> Section 233 of the Republic of South Africa 1996 (Constitution) states that ‘[w]hen interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law’. E Fourie ‘The informal economy, social security and legislative attempts to extend social security protection’ in R Blanpain (ed) *The Modernization of Labour Law and Industrial Relations in a Comparative Perspective* (2009) 272, 273; O Dupper & A Govindjee ‘Redesigning the South African unemployment insurance fund: Selected key policy and legal perspectives’ (2011) 22 *Stell LR* 396, 400.

<sup>5</sup> Section 39(1)(b) of the Constitution; Dupper & Govindjee (note 4 above) 400; C Botha *Statutory interpretation: An introduction for students* (2012) 155; L Jansen van Rensburg & MP Olivier ‘International law and supra-national law’ in MP Olivier et al (eds) *Introduction to Social Security* (2004) 619, 620.



approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament'.<sup>6</sup> Therefore, South Africa is obliged to consider international labour standards to ensure that labour laws are consistent with international law. In accordance with the Constitution, international law plays a significant role in South African law. However, a treaty will become part of South African law only once it is enacted as national legislation.<sup>7</sup>

Labour legislation in South Africa also requires conformity to international standards. The LRA states in section 1 that one of its primary objectives is to give effect to obligations incurred as a member state of the ILO.<sup>8</sup> In addition, section 3 of the LRA states that the Act must be interpreted in compliance with the public international law obligations of South Africa. This provision is peremptory; therefore, the legislative provisions of the LRA must be in accordance with any international labour instruments ratified by South Africa.<sup>9</sup> In addition to the above provisions, the BCEA states that one of its primary objectives is 'to give effect to obligations incurred by the Republic as a member state of the International Labour Organisation'; while the EEA must be interpreted 'in compliance with the international law obligations of the Republic, in particular those contained in the International Labour Organisation Convention (No. 111) concerning Discrimination in Respect of Employment and Occupation'.<sup>10</sup>

This chapter is a discussion of the international obligations governing the integration of work and care. South Africa and the UK are signatories of the UN, which makes them subject to the international obligations of UN conventions and its bodies.<sup>11</sup> These international organisations prioritise international labour standards which provide for gender equality in the workplace through the reconciliation of work and family. This chapter sets out the minimum standards of international employment protection, which include maternity protection consisting of antenatal

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<sup>6</sup> Dupper & Govindjee (note 4 above) 400.

<sup>7</sup> Botha (note 5 above) 155; Fourie (note 4 above) 273.

<sup>8</sup> Section 39(1) and s 233 of the Constitution; s 1(b) of the Labour Relations Act 66 of 1995 (LRA). N Rubin 'International labour law and the law of the new South Africa' (1998) 115 *SALJ* 685, 695.

<sup>9</sup> Botha (note 5 above) 155.

<sup>10</sup> Section 3 of the Basic Conditions of Employment Act 75 of 1997 (BCEA); s 3 of the Employment Equity Act 55 of 1998 (EEA); M Van Staden 'Towards a South African understanding of social justice: The International Labour Organisation perspective' (2012) 1 *TSAR* 91, 92; L Dancaster & M Baird 'Workers with care responsibilities: Is work-family integration adequately addressed in South African labour law?' (2008) 29 *ILJ* 22, 26.

<sup>11</sup> Field, Bagraim & Rycroft (note 1 above) 37; Cohen (note 1 above) 19.

and postnatal leave, benefits, employment security, non-discrimination, and health and childcare arrangements; paternity, parental and adoption leave and benefits.

## 2.2 The United Nations

The United Nations and its various bodies are committed to the adoption of international labour standards which promote gender equality in the workplace and give effect to the reconciliation of work and care.<sup>12</sup> The efficacy of international labour standards depends on the ability of the standards to be transferred into the municipal law systems of member states.<sup>13</sup> Therefore, competent international labour standards are those which require the adoption of legislative provisions which are additionally interpreted in such a manner as to give effect to the standards.<sup>14</sup> The *Universal Declaration of Human Rights* (UDHR) was adopted by the UN in 1948.<sup>15</sup> It lays down essential human rights which should be protected by law.<sup>16</sup> On the topic of maternity protection, the UDHR states that motherhood is entitled to special care and assistance.<sup>17</sup> The maternity protection of employees is governed primarily by the ILO. The ILO is a specialised agency of the UN which regulates international labour standards and obligations. Conventions of the ILO are a primary source of international labour law.<sup>18</sup>

## 2.3 The International Labour Organisation

The International Labour Organisation (ILO) is a tripartite organisation which was created with the primary objective of advocating labour issues and with the purpose of promoting employment rights, decent opportunities, and social protection to employees internationally.<sup>19</sup> The Preamble of the ILO Constitution sets out the fundamental principles of the organisation,

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<sup>12</sup> Field, Bagraim & Rycroft (note 1 above) 37.

<sup>13</sup> Van Staden (note 10 above) 92–93.

<sup>14</sup> Ibid.

<sup>15</sup> Jansen van Rensburg & Olivier (note 5 above) 648.

<sup>16</sup> EC Landau & Y Beigbeder *From ILO Standards to EU Law: The case of Equality between Men and Women at Work* (2008) 5; M Forere & L Stone 'The SADC Protocol on Gender and Development: Duplication or complementarity of the African Union Protocol on Women's Rights' (2009) 9 *African Human Rights Law Journal* 434, 435.

<sup>17</sup> Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR) art 25(2).

<sup>18</sup> J Servais *International Labour Law* (2009) 65.

<sup>19</sup> ILO: About the ILO. *Origins and History* <http://www.ilo.org/global/about-the-ilo/history/lang--en/index.htm>, accessed on 26 July 2015; Rubin (note 8 above) 692.

which member states should observe and encourage.<sup>20</sup> It places emphasis on the importance of labour conditions in the achievement of peace and brings attention to the concept of social justice as the foundation for peace. The Preamble discusses labour injustices and hardships as obstacles which stifle the ability of nations to attain peace. This calls for an international improvement of labour conditions.<sup>21</sup> The Preamble of the ILO Constitution also expresses the need to address labour issues which include the regulation of hours of work; the protection of the worker against sickness, disease and injury arising out of his employment; and the protection of children, young persons and women.<sup>22</sup> Ultimately, the goal of the ILO is to implement measures which promote a balance between economic advancement and social justice.<sup>23</sup>

The operation of the ILO involves the preparation and adoption of international labour standards which are drawn up as conventions and recommendations.<sup>24</sup> The conventions are binding once they are ratified by member states. The ratification of a convention is voluntary and does not require the signature of the member state.<sup>25</sup> Upon ratification, obligations are placed on member states to adopt legal measures which correspond with the provisions of the ILO.<sup>26</sup> While the ILO may supervise the obligations, it has no authority to enforce compliance with the ratified convention.<sup>27</sup> The ILO is therefore criticised as being only of persuasive value to the laws of member states since many member states fail to adopt legal measures to address the obligations imposed by conventions.<sup>28</sup> However, member states remain accountable to the ILO upon ratification of conventions through the obligations to adopt and implement provisions of the ratified convention, and to submit to the supervisory methods of the ILO.<sup>29</sup> The Committee of Experts on the Application of Conventions and Recommendations (CEACR) is a body of the ILO which evaluates reports sent by member states regarding the progress that has been made

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<sup>20</sup> Servais (note 18 above) 67; Fourie (note 4 above) 274; M Korda & F Pennings 'The legal character of international social security standards' (2008) 10(2) *European Journal of Social Security* 131, 136.

<sup>21</sup> Rubin (note 8 above) 687.

<sup>22</sup> ILO Constitution: Preamble.

<http://www.ilo.org/global/about-the-ilo/history/lang--en/index.htm>, accessed on 26 July 2015.

<sup>23</sup> Servais (note 18 above) 67.

<sup>24</sup> Landau & Beigbeder (note 16 above) 13; Jansen van Rensburg & MP Olivier (note 5 above) 646.

<sup>25</sup> Servais (note 18 above) 75; Van Staden (note 10 above) 99.

<sup>26</sup> Field, Bagraim & Rycroft (note 1 above) 37.

<sup>27</sup> Van Staden (note 10 above) 100.

<sup>28</sup> *Ibid.*

<sup>29</sup> Servais (note 18 above) 78.

through the adoption of ILO labour standards.<sup>30</sup> Therefore, despite the lack of enforcement measures, the ILO achieves its objectives through the political and moral pressure placed on national governments to observe its standards.<sup>31</sup>

ILO conventions encourage equal social, political and economic opportunities and treatment with regard to both men and women.<sup>32</sup> The terms of the conventions are couched in flexibility in order to account for the various domestic legal systems of member states. Member states enforce the standards set out in the conventions according to whichever actions are deemed necessary.<sup>33</sup> Conventions are aimed at the adoption of national legislation or domestic policy and the implementation of administrative processes.<sup>34</sup> Apart from conventions, the ILO has other instruments which prescribe international labour standards. These are recommendations and declarations or resolutions. Recommendations contain standards which are non-binding and place no obligations on member states.<sup>35</sup> The standards of the recommendations are reference points which advocate for specific labour policies, legislation and practices.<sup>36</sup>

Conventions and recommendations are presented at the ILO annual International Labour Conference (ILC) for approval each year.<sup>37</sup> Declarations are adopted by the ILC as resolute undertakings in acknowledgment of the principles and values attached to member states of the ILO.<sup>38</sup> Resolutions are issued by the ILC and provide guidelines for countries who intend to participate in national statistical programmes or who wish to be included in international comparability reviews. Resolutions are non-binding and contribute context, theories and methodologies regarding the objectives of adopted conventions.<sup>39</sup> Codes of Practice are used by

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<sup>30</sup> Korda & Pennings (note 20 above) 136; ILO. Labour Standards. *Committee of Experts on the Application of Conventions and Recommendations* <http://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/committee-of-experts-on-the-application-of-conventions-and-recommendations/lang--en/index.htm>, accessed on 23 August 2015.

<sup>31</sup> Landau & Beigbeder (note 16 above) 20; Korda & Pennings (note 20 above) 137.

<sup>32</sup> Dancaster & Baird (note 10 above) 25.

<sup>33</sup> Korda & Pennings (note 20 above) 136.

<sup>34</sup> Servais (note 18 above) 76.

<sup>35</sup> Jansen van Rensburg & Olivier (note 5 above) 646.

<sup>36</sup> Servais (note 18 above) 94.

<sup>37</sup> ILO. Departments and Offices. Office of the Legal Advisor <http://www.ilo.org/public/english/bureau/leg/declarations.htm>, accessed on 18 August 2015.

<sup>38</sup> *Ibid.*

<sup>39</sup> ILO. *Standards and Guidelines on Labour Statistics* <http://www.ilo.org/global/statistics-and-databases/standards-and-guidelines/lang--en/index.htm>, accessed on 1 September 2015.

the ILO to supplement conventions and recommendations and include practical or technical guidelines for the implementation of conventions. Codes of Practice do not create legal obligations.<sup>40</sup>

The ILO has adopted specific conventions and recommendations for the protection of pregnancy and maternity, parental leave, and workers with family and childcare responsibilities.<sup>41</sup> These conventions and recommendations support work–family integration. Maternity protection is a core topic of concern for the ILO. The ILO recognised issues relating to maternity protection in the 1944 *Declaration concerning the Aims and Purposes of the International Labour Organisation*, which forms part of the ILO’s Constitution.<sup>42</sup> The Declaration sets out a list of obligations which the ILO must further. One of the obligations listed is the provision for maternity protection.<sup>43</sup> Therefore, the ILO has a responsibility to encourage maternity protection in all of its member states.<sup>44</sup> This responsibility has led to the adoption of conventions and recommendations which exclusively encourage maternity benefits and protection in national legislation.<sup>45</sup> These international labour standards have greatly influenced the protection of working women in terms of their health and welfare as child-bearers; and both their financial and employment security.<sup>46</sup>

The ILO aims to protect working women from harm to themselves and their children which may be encountered during employment, and to ensure that women do not face economic insecurities and discrimination as a result of their roles as the caregivers and child-bearers.<sup>47</sup> This international protection aims to ensure not only the health and well-being of mother and child, but also the secure employment and income of pregnant employees; the promotion of equal

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<sup>40</sup> Servais (note 18 above) 100.

<sup>41</sup> Ibid.

<sup>42</sup> International Labour Conference (26th Session) Declaration of Philadelphia: Declaration concerning the aims and purposes of the International Labour Organisation (adopted 10 May 1944).

<sup>43</sup> Ibid art III.

<sup>44</sup> *Maternity Resource Package: From Aspiration to Reality for All/Module 2: Maternity Protection at Work: For whom?* International Labour Office, Conditions of Work and Employment Programme (TRAVAIL)-Geneva: ILO, 2012, 2 [http://www.ilo.org/global/publications/ilo-bookstore/order-online/books/WCMS\\_193968/lang--en/index.htm](http://www.ilo.org/global/publications/ilo-bookstore/order-online/books/WCMS_193968/lang-en/index.htm), accessed on 30 July 2015 (hereafter referred to as ‘ILO Maternity Resource Package: Module 2’).

<sup>45</sup> Servais (note 18 above) 100.

<sup>46</sup> Ibid.

<sup>47</sup> L Addati ‘Extending maternity protection to all women: Trends, challenges and opportunities’ (2015) 68(1) *International Social Security Review* 70.

unpaid care-giving responsibilities between men and women; and may assist in promoting gender equality at work and in the home.<sup>48</sup> These labour standards jointly acknowledge the significance of maternity protection in achieving equal workplace opportunities between men and women employees and aim to further non-discrimination on the basis of the reproductive role of women.<sup>49</sup>

The *Decent Work Agenda* of the ILO envisions the reconciliation of employment demands with the responsibilities of family life through the creation of a work–family balance which can be achieved by gender equality, equal recognition, and enabling women to make choices and take control of their lives.<sup>50</sup> The *Decent Work Agenda* states that decent work may theoretically be achieved by means which include the following: rights at work aimed at ensuring that work is associated with dignity, freedom, equality, social security, and the participation of all; employment and work which provide opportunities, and proper and reasonable remuneration; social protection such as maternity needs; and social dialogue, which gives rise to discussion and negotiation.<sup>51</sup> In addition to the *Decent Work Agenda*, the *Workers with Family Responsibilities Convention, 1981 (No. 156)*,<sup>52</sup> together with the *Maternity Protection Convention, 2000 (No. 183)*,<sup>53</sup> are two fundamental conventions which call on member states to implement practical and policy measures to protect pregnant women, and reconcile work and family responsibilities.<sup>54</sup>

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<sup>48</sup> Ibid.

<sup>49</sup> Ibid.

<sup>50</sup> International Labour Conference (98th Session) Resolution concerning gender equality at the heart of decent work (Geneva, 19 June 2009) (Resolution on Gender Equality at the Heart of Decent Work); Cohen (note 1 above) 20; E Huysamen 'Women and maternity: Is there truly equality in the workplace between men and women, and between women themselves?' in K Malherbe & J Sloth-Nielsen (eds) *Labour Law into the Future: Essays in Honour of D'Arcy du Toit* (2012) 46, 51.

<sup>51</sup> Ibid.

<sup>52</sup> International Labour Conference (67th Session) Convention concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities (Geneva, adopted 23 June 1981, entry into force: 11 August 1983) (Family Responsibilities Convention, 1981).

<sup>53</sup> International Labour Conference (88th Session) Convention concerning the revision of the Maternity Protection Convention (Revised), 1952 (Geneva, adopted 15 June 2000, entry into force: 7 Feb 2002) (Maternity Protection Convention, 2000).

<sup>54</sup> International Labour Conference (98th Session, Provisional Record 13 Sixth item on the agenda) Gender equality at the heart of decent work (general discussion), Report of the Committee on Gender Equality (Geneva, 2009) art 30; Field, Bagraim & Rycroft (note 1 above) 37; C Rickard 'Getting off the mommy track: An international model law solution to the global maternity discrimination crisis' (2014) 47 *Vanderbilt Journal of Transitional Law* 1465, 1502–1503.

The *Maternity Protection Convention, 2000* and the *Maternity Protection Recommendation, 2000 (No. 191)*<sup>55</sup> were adopted on 15 June 2000. According to the *Maternity Protection Convention, 2000* and *Maternity Protection Recommendation, 2000*, maternity protection consists of the following elements:<sup>56</sup>

- maternity leave for a period of the pregnancy, the childbirth and the postnatal care of the child;
- benefits in the form of cash for the period of maternity leave and health care related to the pregnancy;
- health protection at work during pregnancy and the period of breastfeeding;
- employment protection and non-discrimination which provides security of employment and the right to return to work after maternity leave, as well as the protection against discrimination based on maternity; and
- breastfeeding arrangements to provide employees with periods of breastfeeding breaks.

The ILO's *Maternity and Paternity at Work: Law and Practice across the World* (ILO report), has revealed that while various national legal systems respect maternity protection and support employees with family responsibilities, the implementation of the laws is not carried out effectively enough.<sup>57</sup> The study calls on governments to adopt and implement laws which encourage the reconciliation of work and care so that family responsibilities may be equally shared between working parents.<sup>58</sup> As a member state of the ILO, South Africa has obligations to adopt policies which further social justice and equality between men and women with regard to childcare rights, parental-responsibility rights, and employment-security rights.<sup>59</sup>

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<sup>55</sup> International Labour Conference (88th Session) Recommendation concerning the revision of the Maternity Protection Recommendation, 1952 (Geneva, adopted 15 June 2000) (*Maternity Protection Recommendation, 2000*).

<sup>56</sup> *Maternity Protection Convention 2000* (note 57 above); *Maternity Resource Package: From Aspiration to Reality for All/Module 1: Maternity Protection at Work: What is it?* International Labour Office, Conditions of Work and Employment Programme (TRAVAIL)-Geneva: ILO, 2012, 2 [http://www.ilo.org/global/publications/ilo-bookstore/order-online/books/WCMS\\_193968/lang--en/index.htm](http://www.ilo.org/global/publications/ilo-bookstore/order-online/books/WCMS_193968/lang--en/index.htm), accessed on 30 July 2015; Huysamen (note 50 above) 55.

<sup>57</sup> ILO (2014) *Maternity and Paternity at Work: Law and Practice across the World*, International Labour Organization, Geneva 52 <http://www.ilo.org/maternityprotection>, accessed on 20 January 2015; A Behari 'Daddy's home: The promotion of paternity leave and family responsibilities in the South African workplace' (2016) 37(2) *Obiter* 346, 356.

<sup>58</sup> ILO *Maternity & Paternity at Work* (note 57 above) 115–119.

<sup>59</sup> ILO: About the ILO <http://www.ilo.org/global/about-the-ilo/lang--en/index.htm>, accessed on 18 August 2015; Rubin (note 8 above) 695; Cohen (note 1 above) 19; Behari (note 57 above) 357.

### 2.3.1 Standards relating to the scope and coverage of maternity protection

Since its foundation in 1919, the ILO has adopted three conventions, supplemented by recommendations, which are applicable to maternity protection. The first was the *Maternity Protection Convention, 1919 (No. 3)*.<sup>60</sup> This convention was then revised in the follow-up *Maternity Protection Convention (Revised), 1952 (No. 103)*<sup>61</sup> and the subsequent *Maternity Protection Convention, 2000*.<sup>62</sup> The *Social Security (Minimum Standards) Convention, 1952 (No. 102)*<sup>63</sup> was adopted in recognition of maternity as a social risk.<sup>64</sup> The Convention qualifies maternity as a branch of social security and gives effect to obligations involving social security protection such as maternity cash and medical benefits.<sup>65</sup> The *Social Protection Floors Recommendation, 2012 (No. 202)*<sup>66</sup> was adopted to provide standardised guidelines regarding the provision of minimum levels of social security, with particular attention to gaps in the coverage of social security protection.<sup>67</sup>

The *Declaration on Equality of Opportunity and Treatment for Women Workers* was adopted by the ILC in 1975 as reaffirmation of the ILO's commitment to the promotion of the equal rights of women in the workplace.<sup>68</sup> The Declaration sets out certain measures which would ensure the equal treatment of women in the workplace. These include the elimination of maternity as a source of discrimination; employment security throughout pregnancy; the right to maternity leave; the right to cash benefits to replace wages lost during the leave period; the right to return

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<sup>60</sup> International Labour Conference (1st Session) Convention concerning the Employment of Women before and after Childbirth (Washington, adopted 29 November 1919, entry into force: 13 Jun 1921) (*Maternity Protection Convention, 1919*).

<sup>61</sup> International Labour Conference (35th Session) Convention concerning Maternity Protection (Revised 1952) (Geneva, adopted 28 June 1952, entry into force 7 September 1955) (*Maternity Protection Convention, 1952*).

<sup>62</sup> Otting (note 3 above) 164; Rickard (note 54 above) 1503; CR Matthias 'Neglected terrain: Maternity legislation and the protection of the dual role of worker and parent in South Africa' (1994) 15 *ILJ* 21.

<sup>63</sup> International Labour Conference (35th Session) Convention concerning Minimum Standards of Social Security (Geneva, adopted 28 June 1952, entry into force 27 April 1955) (*Social Security (Minimum Standards) Convention, 1952*).

<sup>64</sup> Korda & Pennings (note 20 above) 134; Jansen van Rensburg & Olivier (note 5 above) 646; Dupper & Govindjee (note 4 above) 401.

<sup>65</sup> Addati (note 47 above) 71–72.

<sup>66</sup> International Labour Conference (101st Session) Recommendation concerning National Floors of Social Protection (Geneva, adopted 14 June 2012) session (*Social Protection Floors Recommendation, 2012*).

<sup>67</sup> Addati (note 47 above) 71–72.

<sup>68</sup> ILO 1975 Declaration on Equal Opportunity and Treatment of Women (Vol LVIII 1975 Series A) (*Declaration on Gender Equality*); O Dupper et al 'The case for increased reform in South African family and maternity benefits' (2001) 4 *Journal of Law, Democracy & Development* 27, 28; O Dupper 'Maternity protection in South Africa: An international and comparative analysis (Part one)' (2001) 3 *Stell LR* 421, 423; Huysamen (note 50 above) 53.



to work without the loss of acquired rights; and the right to adequate health and medical care during the time of pregnancy, childbirth, and postnatal care.<sup>69</sup> This Declaration therefore recognised that the achievement of equal treatment of women in the workplace is dependent on the prohibition of discrimination against women on grounds involving maternity and childcare.<sup>70</sup>

The ILO has recognised that there has been a worldwide increase in the number of women who participate in the workforce.<sup>71</sup> The increase of women workers essentially means that the needs of women in the workplace must be accounted for.<sup>72</sup> Measures should be taken for the equal opportunities and treatment of women at work. Efforts must be made to prevent discriminatory workplace practices.<sup>73</sup> The *Declaration on Equality of Opportunity and Treatment for Women Workers* of 1975 took cognisance of differences between the struggles faced by working women in developed countries and those in developing countries.<sup>74</sup> It noted that in developed countries, women's workplace issues involved the implementation of equality of treatment and opportunity in the workplace and the reconciliation of economic and social lives through the integration of work and family.<sup>75</sup> Many women in developing countries work informally in rural areas and face serious issues such as unemployment and family poverty. These differences indicate that women workers differ internationally according to region, country and development status.<sup>76</sup> Therefore, in order to address the issue of maternity protection within each area of need, international standards should provide a wide and inclusive scope for the categories of workers afforded the protection.<sup>77</sup>

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<sup>69</sup> Ibid.

<sup>70</sup> Dupper (note 68 above) 422; OC Dupper 'Maternity' in MP Olivier et al (eds) *Introduction to Social Security* (2004) 399, 401.

<sup>71</sup> Huysamen (note 50 above) 55; ILO Maternity & Paternity at Work (note 57 above).

<sup>72</sup> KL Adams 'The *Family Responsibilities Convention* reconsidered: The work-family intersection in international law thirty years on' (2013–2014) 22 *Cardozo Journal of International & Comparative Law* 201, 208; J Conaghan 'Work, family, and the discipline of labour law' in J Conaghan & K Rittich (eds) *Labour Law, Work and Family* (2007) 19, 27; R Crompton *Employment and the Family: The Reconfiguration of Work and Family Life in Contemporary Societies* (2006) 78–79.

<sup>73</sup> Adams (note 72 above) 208.

<sup>74</sup> Declaration on Gender Equality (note 68 above).

<sup>75</sup> Dupper (note 68 above) 422.

<sup>76</sup> Declaration on Gender Equality (note 68 above).

<sup>77</sup> Ibid.

Statutory maternity protection involves certain exclusions which create gaps in the maternity coverage of employees.<sup>78</sup> Employee protection could be excluded based on the category or economic sector of work, or the eligibility of the employee for protection through labour laws and/or social security legalisation. In most instances, self-employed workers and informal workers are not covered. These employees often remain vulnerable if the country does not provide alternative social security measures.<sup>79</sup> Women employed in atypical work are also left vulnerable if their employment contracts are temporary, unclear or uncertain with regard to maternity protection. The workplace of the employee may also be excluded from maternity protection provisions. These could include employees of small- and medium-sized businesses or households which employ domestic workers.<sup>80</sup>

In 1985, the ILC issued the *Resolution on Equal Opportunities and Equal Treatment for Men and Women in Employment*<sup>81</sup> which states that measures should be taken to provide adequate standards of maternity protection and benefits, and in 2004 the *Resolution concerning the Promotion of Gender Equality, Pay Equality and Maternity Protection* was issued as recognition for the lack of maternity protection for certain categories of workers.<sup>82</sup> In 2009, the ILC adopted the *Resolution on Gender Equality at the Heart of Decent Work*.<sup>83</sup> Article 27 of the resolution states that the responsibilities of governments for the inclusion of maternity protection in social and economic policy must be recognised and applied.<sup>84</sup> Therefore, maternity protection is indicated as a priority for social and economic development by the ILO.<sup>85</sup>

The scope of maternity protection determines which employees are included in the protection afforded by the minimum standards of the ILO.<sup>86</sup> National coverage of maternity protection includes which employed women are covered by or excluded from legislation providing

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<sup>78</sup> Addati (note 47 above) 86.

<sup>79</sup> Ibid.

<sup>80</sup> Ibid 87.

<sup>81</sup> International Labour Conference (71st Session) Report VIII: Resolution on equal opportunities and equal treatment for men and women in employment (Geneva 1985) art 7(a).

<sup>82</sup> Ibid par 7(a); International Labour Conference (92nd Session) Resolution concerning the Promotion of Gender Equality, Pay Equality and Maternity Protection (Geneva June 2004).

<sup>83</sup> International Labour Conference (98th Session) Resolution concerning gender equality at the heart of decent work (Geneva 17 June 2009).

<sup>84</sup> Ibid.

<sup>85</sup> Ibid.

<sup>86</sup> Addati (note 47 above) 76.

maternity protection or social security; and the eligibility of such employees to receive maternity benefits.<sup>87</sup> As of October 2014, 67 member states have ratified at least one of the three maternity protection conventions and have adopted legislated maternity protection provisions in line with the conventions.<sup>88</sup>

### **2.3.1.1 *The Maternity Protection Convention, 1919 (No. 3)***

ILO conventions on maternity protection have been developed to broaden the scope and benefits of maternity protection as well as to widen provisions for equal employment opportunities and gender equality at work. This is evident in the changes between the *Maternity Protection Convention, 1919* and the *Maternity Protection Convention, 1952*.<sup>89</sup> As the first maternity protection convention adopted by the ILO, the *Maternity Protection Convention, 1919* sets out the foundations for basic maternity protection.<sup>90</sup> It applies to women working in any public or private industrial or commercial undertaking.<sup>91</sup> A woman is provided with the right to take leave from work upon the production of a medical certificate stating that she will start her confinement within six weeks of the notice.<sup>92</sup> It states that she is not required to work during her six weeks of confinement and that while on leave from work, the employee is entitled to benefits ‘sufficient for the full and healthy maintenance of herself and her child’.<sup>93</sup> Article 3(c) of the convention provides that these benefits may be paid out of either a system of public funding, or a system of insurance.<sup>94</sup> The amount of the benefit may be determined by the ‘competent national authority’ of the ratifying member state.<sup>95</sup> As an additional benefit, the employee is entitled to free attendance by a doctor or midwife.<sup>96</sup> Article 3(d) allows for breastfeeding arrangements by permitting the employee to nurse her child for half an hour twice a day during her working hours.<sup>97</sup>

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<sup>87</sup> *Maternity at Work: A Review of National Legislation* 2 ed International Labour Office, Conditions of Work & Employment Branch. Geneva: ILO (2010), 35 [http://www.ilo.org/wcmsp5/groups/public/---dgreports/---/wcms\\_124442.pdf](http://www.ilo.org/wcmsp5/groups/public/---dgreports/---/wcms_124442.pdf), accessed on 8 August 2015.

<sup>88</sup> Addati (note 47 above) 76.

<sup>89</sup> Ibid 71–72.

<sup>90</sup> Otting (note 3 above) 164; Dupper (note 68 above) 423.

<sup>91</sup> Dupper (note 68 above) 423.

<sup>92</sup> *Maternity Protection Convention 1919* (note 60 above) art 3(a)–(c); Dupper (note 70 above) 405.

<sup>93</sup> Ibid.

<sup>94</sup> Ibid.

<sup>95</sup> *Maternity Protection Convention 1919* (note 60 above) art 3(c).

<sup>96</sup> Ibid.

<sup>97</sup> Ibid art 3(d).

Provisions of the convention also protect women against unfair dismissal.<sup>98</sup> Article 4 provides that it would not be lawful for an employer to give a notice of dismissal to an employee during her period of absence from work, or as a result of any illness arising out of her pregnancy. A notice of dismissal cannot be issued until the employee has completed her maximum period of leave fixed by the national authority.<sup>99</sup> These foundational principles of maternity protection have led to the adoption of more extensive maternity protection standards through the *Maternity Protection Convention, 1952* and the *Maternity Convention, 2000*.<sup>100</sup>

### **2.3.1.2 The Maternity Protection Convention, 1952 (No. 103)**

The *Maternity Protection Convention, 1952* slightly altered the *Maternity Convention, 1919*, with the greatest change being the extension of the application of the convention to wider categories of employed women.<sup>101</sup> This development may be attributed to the increase of women's participation in the labour market; the recognition by international bodies of diverse national identities, the acknowledgement that a large number of women are employed in atypical forms of employment, and the international undertaking towards achieving gender equality in the workplace.<sup>102</sup> While the *Maternity Protection Convention, 1919* states that all women working in any public or private industrial or commercial undertaking are entitled to maternity protection, *Maternity Protection Convention, 1952* applies to all women employed in industrial, non-industrial and agricultural occupations, including women wage earners working at home.<sup>103</sup> Member states of the *Maternity Protection Convention, 1952* are afforded the right to exclude certain categories of workers in non-industrial occupations, workers employed in agricultural undertakings, paid domestic work in private houses, home-based workers, and workers employed in the transportation of passengers or goods by sea.<sup>104</sup>

While the *Maternity Protection Convention, 1952* allows member states to exclude specific categories of workers from the scope of maternity protection, the *Declaration on Equality of*

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<sup>98</sup> Ibid art 4.

<sup>99</sup> Ibid.

<sup>100</sup> Otting (note 3 above) 164.

<sup>101</sup> Matthias (note 62 above) 21.

<sup>102</sup> ILO Maternity Resource Package: Module 2, 2.

<sup>103</sup> Art 1(1) states that '[t]his Convention applies to women employed in industrial undertakings and in non-industrial and agricultural occupations, including women wage earners working at home'.

<sup>104</sup> Landau & Beigbeder (note 10 above) 135; Matthias (note 62 above) 21.

*Opportunity and Treatment for Women Workers* states that maternity protection should be afforded to ‘all women workers’, and paid for by social security.<sup>105</sup> The ILC *Resolution on Equal Opportunities and Equal Treatment for Men and Women in Employment (ILC, 1985)* calls for the gradual extension of maternity protection to all women irrespective of the sector of activity or enterprise and even those women employed as casual, temporary, part-time, sub-contract, home-based, or self-employed workers.<sup>106</sup>

### **2.3.1.3 The Maternity Protection Convention, 2000 (No. 183)**

The *Maternity Protection Convention, 2000* extends the progress of maternity protection by extending the scope of women who should be eligible for maternity protection.<sup>107</sup> Article 1 redefines the term ‘woman’ for the purpose of the convention. It states that the term ‘woman’ refers to ‘any female person without discrimination whatsoever’.<sup>108</sup> This new definition aims to eliminate discrimination by creating an inclusive scope of women who should be entitled to maternity protection, irrespective of age, nationality, race or creed, or marital status.<sup>109</sup> The convention states that all women are covered by the maternity protection standards including women employed in ‘atypical forms of dependent work’. The words ‘atypical forms of dependent work’ were given a comprehensive meaning by the ILC preparatory works on the *Maternity Protection Convention, 2000*, which states that [in] ‘...all circumstances an employment relationship was being considered, irrespective of the type of work being performed or where it took place’.<sup>110</sup> Therefore, the *Maternity Protection Convention, 2000* grants maternity cover to women employed in ‘non-standard work arrangements’ which include ‘casual and seasonal work, job sharing, fixed-term contracts, temporary agency work, home work and remote working; pieceworkers; and informal employees in all sectors; as well as women in disguised employment relationships (disguised self-employment)’.<sup>111</sup>

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<sup>105</sup> Resolution on equal opportunities and equal treatment for men and women in employment (note 81 above); ILO Maternity Resource Package: Module 2, 1 and 2.

<sup>106</sup> Resolution on equal opportunities and equal treatment for men and women in employment (note 81 above); Addati (note 47 above) 72.

<sup>107</sup> Addati (note 47 above) 73; Dupper (note 66 above) 423.

<sup>108</sup> Maternity Protection Convention 2000 (note 53 above) art 1.

<sup>109</sup> Addati (note 47 above) 73.

<sup>110</sup> Ibid.

<sup>111</sup> Ibid.

Article 2(2) of the *Maternity Protection Convention, 2000* states that a ratifying member may consult with social partners to exclude certain categories of workers from its application in instances where the inclusion of those workers would raise special problems of a substantial nature.<sup>112</sup> It must be noted that this exclusion is broadly worded and does not specify the circumstances which would lead to such special problems of a substantive nature.<sup>113</sup> However, article 2(3) of the convention states that any exclusion by a member state must be justified with reasons, and the member state must regularly report on the measures taken to extend the provisions of the convention progressively to these categories.<sup>114</sup>

According to a 2008 report by the ILO Committee of Experts, many categories of workers remain excluded from paid maternity leave in those countries which have ratified at least one of the Maternity Protection conventions.<sup>115</sup> The right to exclude certain categories of workers is inconsistent with the objective of obtaining social justice through maternity protection.<sup>116</sup> Exceptions created for exclusions to maternity protection create the risk that some governments or employers may be permitted to group women workers into a specific category which is excluded from maternity protection in order to reduce their obligations of providing benefits.<sup>117</sup> There are a large number of women who remain employed in non-standard work throughout the world. For this reason, efforts must be made by national governments to expand the scope of maternity protection.<sup>118</sup>

#### **2.3.1.4 Maternity protection as a branch of social security**

The *Social Security (Minimum Standards) Convention, 1952* established minimum standards of social security for the protection of employees.<sup>119</sup> However, the convention fails to account for the implementation of a comprehensive and universal social security system. It provides that member states need comply with only at least three out of nine social security branches

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<sup>112</sup> Maternity Protection Convention 2000 (note 53 above) art 2(2).

<sup>113</sup> *Ibid*; Landau & Beigbeder (note 16 above) 136.

<sup>114</sup> Maternity Protection Convention 2000 (note 53 above) art 2(3).

<sup>115</sup> ILO Maternity & Paternity at Work (note 57 above) 39.

<sup>116</sup> *Ibid*.

<sup>117</sup> J Earle 'The International Labour Organisation and maternity rights: Evaluating the potential for progress' (1999) *The Economic and Labour Relations Review* 203, 206–207.

<sup>118</sup> ILO Maternity & Paternity at Work (note 57 above) 41.

<sup>119</sup> Otting (note 3 above) 166; Jansen van Rensburg & Olivier (note 5 above) 646; Dupper & Govindjee (note 4 above) 401.

recognised and accounted for in the convention.<sup>120</sup> This means that ratifying member states may limit the coverage of social security and employees can be left without basic protections throughout their lives. The *Social Security (Minimum Standards) Convention, 1952* includes maternity as a branch of social security. The maternity protection includes antenatal care and confinement, as well as postnatal care, which is granted with a view to maintaining, restoring or improving the health of the woman, her ability to work, and her ability to attend to her personal needs.<sup>121</sup>

The convention provides that the incidents covered by the maternity protection as a form of social security include pregnancy and confinement, the consequences of pregnancy and confinement, and the suspension of earnings. However, the protection may be limited. The *Social Security (Minimum Standards) Convention, 1952*, states that maternity protection must be provided to at least 50 per cent of employees within prescribed classes of employment; 20 per cent of the economically active population' and 50 per cent of employees in industrial workplaces employing 20 persons or more. This provision also applies to the wives of men who fall within these classes.<sup>122</sup>

In 2004, the ILC adopted *the Resolution concerning the Promotion of Gender Equality, Pay Equality and Maternity Protection*, which acknowledges that many women, in particular those of informal or otherwise vulnerable employment, are excluded from maternity protection. Article (1)(c) calls on all governments and their social partners to take steps actively to ensure that all employed women are provided with access to maternity protection.<sup>123</sup> The resolution also calls upon governments to consider how those of informal or otherwise vulnerable employment can be provided with access to maternity protection.<sup>124</sup>

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<sup>120</sup> Art 2(a)(ii). The nine branches of social security are medical care, sickness benefits, unemployment benefits, old age benefits, employment injury benefits, family benefits, maternity benefits, invalidity benefits and survivors' benefits; Otting (note 3 above) 166; Dupper & Govindjee (note 4 above) 401.

<sup>121</sup> Art 49(2)(a) and 49(3); Jansen van Rensburg & Olivier (note 5 above) 646.

<sup>122</sup> Art 48(c).

<sup>123</sup> Resolution on Equal Opportunities and Equal Treatment for Men and Women in Employment (note 81 above) art 1(c).

<sup>124</sup> Art 1(d).

The ILO has consistently taken steps to increase the scope of maternity protection.<sup>125</sup> Despite these efforts, a large number of women throughout the world remain vulnerable and unprotected during their pregnancies.<sup>126</sup> The primary contributing reasons for this are either that there is no national law or regulation which provides maternity protection, or the women do not qualify for or cannot claim the protection.<sup>127</sup> The requirements for the right to qualify and claim maternity protection differ between international standards and national law and practice.<sup>128</sup>

The ILO *Recommendation concerning National Floors of Social Protection, 2012 (No. 202)*<sup>129</sup> was adopted with the primary intention of increasing the coverage through the extension of social security.<sup>130</sup> The *Social Protection Floors Recommendation, 2012* complements the *Social Security (Minimum Standards) Convention, 1952* and calls for maternity protection to be provided through social security measures. It states that maternity care is a basic ‘social security guarantee’.<sup>131</sup> Accordingly, member states are obliged to provide maternity care to ‘at least all residents and children’. The *Recommendation concerning National Floors of Social Protection, 2012* goes further in extending the scope of maternity protection.<sup>132</sup> It provides that maternity care and income security should be provided as a minimum social security guarantee to persons of an active age who are unable to earn sufficient income as a result of reasons such as pregnancy.<sup>133</sup>

### 2.3.2 Standards relating to maternity leave

The duration of maternity leave afforded to employees is a significant aspect of maternity protection. If the leave is too short then the mother is more likely to leave the workforce because she may not be ready to return to work.<sup>134</sup> However, if the period of leave is very long, it may

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<sup>125</sup> Addati (note 47 above) 73.

<sup>126</sup> ILO Maternity and Paternity at Work (note 57 above) xiv.

<sup>127</sup> Addati (note 47 above) 87.

<sup>128</sup> ILO Maternity Resource Package: Module 2, 7.

<sup>129</sup> Social Protection Floors Recommendation (note 66 above).

<sup>130</sup> U Kulke & E Saint-Pierre Guilbault ‘The Social Protection Floors Recommendation, 2012 (No. 202): Completing the standards to close the coverage gap’ (2013) 66(3–4) *International Social Security Review* 96.

<sup>131</sup> Social Protection Floors Recommendation, 2012 (note 66 above), par 5(a).

<sup>132</sup> Addati (note 47 above) 74.

<sup>133</sup> Social Protection Floors Recommendation, 2012 (note 66 above) par 5(a).

<sup>134</sup> ILO Maternity & Paternity at Work (note 57 above) 8.



create disadvantages for the woman, such as ruining her chances of advancement at her job.<sup>135</sup> The ILO report has indicated that there is currently no consensus regarding the most favourable length of maternity leave to support job continuity across nations.<sup>136</sup>

The *Maternity Protection Convention, 1919* provides that women who fall within the scope of the convention are entitled to twelve weeks of maternity leave.<sup>137</sup> Article 4 states that women have the right to begin their leave six weeks before their confinement upon the production of a medical certificate stating that the confinement will probably take place within six weeks. The convention grants women compulsory leave of six weeks after the confinement.<sup>138</sup> The *Maternity Protection Convention, 1952* similarly provides women with twelve weeks of maternity leave, six of which are compulsory after the confinement. The remaining six weeks of leave may be used at any time before or after the confinement period.<sup>139</sup>

The most recent *Maternity Protection Convention, 2000* extends the duration of maternity leave to fourteen weeks.<sup>140</sup> Article 4(1) provides that ‘a woman to whom this Convention applies shall be entitled to a period of maternity leave of not less than fourteen weeks’. The convention provides that the maternity leave must include six weeks compulsory leave after the birth of the child, as was done in the 1919 and 1952 *Maternity Protection Conventions*.<sup>141</sup> The provision of fourteen weeks maternity leave is in line with the *Maternity Protection Recommendation, 1952 (No. 95)*,<sup>142</sup> which makes the suggestion that maternity leave should be extended to a total period of fourteen weeks.<sup>143</sup> However, the *Maternity Protection Recommendation, 2000* suggests that the period should be extended to at least eighteen weeks.<sup>144</sup>

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<sup>135</sup> *Ibid.*

<sup>136</sup> *Ibid.* 9.

<sup>137</sup> *Maternity Protection Convention 1919* (note 60 above) art 3.

<sup>138</sup> *Ibid.*

<sup>139</sup> *Ibid.* art 3(3); Jansen van Rensburg & Olivier (note 5 above) 646.

<sup>140</sup> *Maternity Protection Convention 2000* (note 53 above) art 4(1); Jansen van Rensburg & Olivier (note 5 above) 646; Huysamen (note 50 above) 53–54; Rickard (note 53 above) 1503.

<sup>141</sup> *Maternity Protection Convention 2000* (note 53 above) art 4(4).

<sup>142</sup> International Labour Conference (35th Session) Recommendation concerning Maternity Protection (Geneva, adopted 27 June 1952) (*Maternity Protection Recommendation, 1952*).

<sup>143</sup> *Ibid.* art 1(1); Dupper (note 68 above) 423.

<sup>144</sup> *Maternity Protection Recommendation 1952* (note 142 above) art 5; Dupper (note 70 above) 423; L Dancaster ‘State measures towards work–care integration in South Africa’ in Z Mokomane *Work-Family Interface in Sub-Saharan Africa: Challenges and Responses* (2014) 177, 179.

The ILO report reviewed national conformity with ILO standards on the duration of maternity leave.<sup>145</sup> The review found that 98 countries of the 167 met the criteria set out in the *Maternity Protection Convention, 2000* by providing a minimum of fourteen weeks. Of these 98 countries, 42 countries met or exceeded the requirements of a minimum duration of eighteen weeks' maternity leave as set out in the *Maternity Protection Recommendation, 2000*.<sup>146</sup> The *Maternity Protection Convention, 1919* and the *Maternity Protection Convention, 1952* stated that there should be a minimum of twelve weeks of leave. Sixty countries met these requirements by offering twelve to thirteen weeks of maternity leave. While the numbers of countries who have provided less than twelve weeks of leave have decreased by seven per cent, 27 countries provide fewer than twelve weeks of maternity leave.<sup>147</sup>

A distinction is made in each convention providing for maternity leave between compulsory weeks of leave and non-compulsory weeks of leave. The three maternity protection conventions all provide for six weeks of compulsory maternity leave after the birth of the child.<sup>148</sup> However, with a different approach from previous conventions, the *Maternity Protection Convention, 2000* does not state how the remaining six weeks of non-compulsory leave ought to be taken.<sup>149</sup> In addition, the *Maternity Protection Recommendation, 2000* suggests that the woman should be entitled to choose freely the time at which she takes the non-compulsory portion of the leave, whether it is before or after childbirth.<sup>150</sup>

Compulsory leave ensures that the mother takes a leave of absence from work in order to rest. Compulsory postnatal leave removes the pressure of returning to work before the mother is ready, thus risking her health and that of her newborn child.<sup>151</sup> A large majority of national legislation provides compulsory maternity leave.<sup>152</sup> The ILO has reported that out of 162

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<sup>145</sup> ILO Maternity & Paternity at Work (note 57 above) 9.

<sup>146</sup> Ibid.

<sup>147</sup> Ibid; Addati (note 47 above) 78.

<sup>148</sup> Huysamen (note 50 above) 54.

<sup>149</sup> Maternity Resource Package: From Aspiration to Reality for All/Module 6 Part 2: Maternity leave and related types of leave International Labour Office, Conditions of Work and Employment Programme (TRAVAIL)-Geneva: ILO, 2012, 8 [http://www.ilo.org/global/publications/ilo-bookstore/order-online/books/WCMS\\_193968/lang--en/index.htm](http://www.ilo.org/global/publications/ilo-bookstore/order-online/books/WCMS_193968/lang--en/index.htm), accessed on 30 July 2015, hereafter referred to as 'ILO Maternity Protection Package: Module 6'.

<sup>150</sup> Art 1(2).

<sup>151</sup> ILO Maternity Protection Package: Modules 6, 9.

<sup>152</sup> Dupper (note 70 above) 424.

countries of which they have detailed information regarding the duration of maternity leave, 72 per cent provide compulsory antenatal or postnatal maternity leave.<sup>153</sup> It has further indicated that 62 per cent meet the conditions of the *Maternity Protection Convention, 2000* by providing at least six weeks of compulsory postnatal leave and 29 per cent exceed the six week duration of compulsory leave. Countries which do not provide any compulsory maternity leave amount to 27 per cent.<sup>154</sup>

Non-compulsory maternity leave gives women the flexibility to choose to take their leave at a time which suits them.<sup>155</sup> This flexible non-compulsory leave is provided for by the *Maternity Protection Convention, 2000* and is reiterated in the *Maternity Protection Recommendation, 2000*.<sup>156</sup> Of 167 countries reviewed by the ILO on this aspect of maternity leave, 86 countries provide non-compulsory maternity leave.<sup>157</sup> However, many countries set out precisely how the days of leave should be taken, as well as how many days can be taken as postnatal leave and how many can be taken as antenatal leave. This type of over-regulation prevents women from taking their maternity leave at a time which meets their own needs and the needs of their families.<sup>158</sup>

The *Maternity Protection Convention, 2000* also provides for additional leave in the case of illness and complications or risk of complications arising out of pregnancy or childbirth.<sup>159</sup> It states that the nature and duration of the leave may be specified by national law and practice.<sup>160</sup> The *Maternity Protection Convention, 2000* provides greater protection to women by stating that the antenatal portion of the maternity leave shall be extended by any period provided it occurs between the presumed date of childbirth and the actual date of childbirth.<sup>161</sup> This may be done without reduction to the compulsory portion of the postnatal leave.<sup>162</sup> This item allows women to extend or reduce the duration of their maternity leave in the event of unexpected complications

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<sup>153</sup> ILO Maternity & Paternity at Work (note 57 above) 12.

<sup>154</sup> *Ibid.*

<sup>155</sup> *Ibid* 13.

<sup>156</sup> Maternity Protection Convention 2000 (note 53 above) art 4(4); Maternity Protection Recommendation 2000 (note 55 above) par 1(2).

<sup>157</sup> ILO Maternity & Paternity at Work (note 57 above) 13.

<sup>158</sup> *Ibid* 13–14.

<sup>159</sup> Maternity Protection Convention 2000 (note 53 above) art 5.

<sup>160</sup> *Ibid.*

<sup>161</sup> Maternity Protection Convention 2000 (note 53 above) art 4(5).

<sup>162</sup> *Ibid.*

resulting from pregnancy and childbirth. The *Maternity Protection Recommendation, 2000* also states that provision should be made to allow the extension of maternity leave in the event of multiple births.<sup>163</sup>

The unexpected events which have been recognised by the ILO include the early or late delivery of the child; in which case the entire leave period is still granted to the mother.<sup>164</sup> National legislation of certain countries may also provide only for the extension of the antenatal period of leave if the delivery is delayed, or the extension of either antenatal or postnatal leave if the delivery occurs early or late.<sup>165</sup> Illness and complications may result in additional maternity leave. Difficulties during childbirth and reasons related to the child may lead to an extension of maternity leave as well. Difficulties during childbirth may involve instances such as premature delivery, the birth of a child with special medical needs, miscarriages, and stillbirths.<sup>166</sup> The *Maternity Protection Recommendation, 2000* states that provisions should be made to allow the extension of maternity leave in the event of multiple births.<sup>167</sup> Family size or composition may warrant the extension of maternity leave as well. For example, in France, a woman is awarded an extended sixteen- to 26-week period of maternity leave for the birth of her third child. Furthermore, unpaid extended maternity leave is made available to mothers upon request in certain countries.<sup>168</sup>

As a result of the effort to achieve the equal opportunity and treatment of women in the workplace, there is a movement towards affording maternity leave primarily for the reason of medical and psychological recovery of the mother while adding leave which is available for fathers to assist in childcare.<sup>169</sup> This movement recognises the equal position of men in childcare by providing paternity leave or parental leave which may be used by either the father or the mother. For this reason, ILO Maternity Protection Conventions and Recommendations will in

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<sup>163</sup> Maternity Protection Recommendation 2000 (note 55 above) par 1(2).

<sup>164</sup> ILO Maternity & Paternity at Work (note 57 above) 14.

<sup>165</sup> *Ibid.*

<sup>166</sup> *Ibid.*

<sup>167</sup> Maternity Protection Recommendation 2000 (note 55 above) par 1(2).

<sup>168</sup> ILO Maternity & Paternity at Work (note 57 above) 14–15.

<sup>169</sup> ILO Maternity Protection Package: Module 6, 7–8.

future provide for more paternity leave or parental leave rather than increasing the duration of maternity leave.<sup>170</sup>

### 2.3.3 Standards relating to maternity cash benefits and coverage

There is a distinction between the number of employees covered by paid maternity leave systems at law (legal coverage) and in practice (practical coverage). The legal coverage of paid maternity leave involves legislative maternity protection coverage.<sup>171</sup> Aspects of legal coverage involve the scope of the legislation, the categories of employees excluded from maternity protection, the eligibility of employees to receive benefits, and the determination of whether the benefits are mandatory.<sup>172</sup> Practical coverage looks at how the law is implemented by determining how many employees are covered and benefiting from the law. It refers to the actual coverage of employees within a population. Practical coverage includes the number of employees who have access to the right to maternity protection, or the number of employees who potentially have a guaranteed right to maternity protection.<sup>173</sup>

The *Maternity Protection Convention, 1919* provides that women should be afforded benefits which are sufficient for the healthy maintenance of herself and her child.<sup>174</sup> The *Maternity Protection Convention, 1952* states that a woman is entitled to cash benefits during her maternity leave and any extension thereof at an amount of two-thirds of her previous earnings.<sup>175</sup> According to the *Maternity Protection Convention, 2000*, employees should receive cash benefits during their fourteen weeks of maternity leave set out in the convention. The cash benefits should be at least two-thirds of a woman's previous earnings, or not less than two-thirds of those earnings as are taken into account for the purposes of computing benefit.<sup>176</sup> However, the convention does not provide a definition for the terms 'previous earnings' or 'those earnings as are taken into account for the purposes of computing benefit'. Therefore, in quantifying the

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<sup>170</sup> Ibid.

<sup>171</sup> ILO Maternity & Paternity at Work (note 57 above) 34–35; Landau & Beigbeder (note 16 above) 133.

<sup>172</sup> ILO Maternity & Paternity at Work (note 57 above) 34–35; Addati (note 47 above) 81.

<sup>173</sup> Ibid.

<sup>174</sup> Dupper (note 70 above) 405; Dancaaster (note 142 above) 143.

<sup>175</sup> Maternity Protection Convention 1952 (note 142 above) art 4(6); Dancaaster (note 142 above) 182.

<sup>176</sup> Maternity Protection Convention 2000 (note 55 above) art 6(3); Dupper (note 70 above) 405; Dupper & Govindjee (note 4 above) 406.

cash benefits, the set guideline is that cash benefits should be enough to ensure the maintenance of the women and her child in proper health conditions and suitable standards of living.<sup>177</sup>

According to the *Social Security (Minimum Standards) Convention, 1952*, maternity benefits should be paid for a minimum period of twelve weeks.<sup>178</sup> The *Social Protection Floors Recommendation, 2012* provides that ‘basic income security should allow life in dignity’. It also makes provision for nations to consult on methods of quantifying cash benefits and provides a non-exhaustive list of income limitations for reference.<sup>179</sup>

### **2.3.3.1 Funding maternity cash benefits**

The *Maternity Protection Conventions, 1919 and 1952*, state that benefits should be provided by means of compulsory social insurance or public funds, and place a prohibition on individual employer liability for the costs of the benefits.<sup>180</sup> According to the *Maternity Protection Convention, 2000*, employers should not be solely responsible for the financing of maternity benefits to an employee. The convention requires benefits to be paid through compulsory social insurance or public funding.<sup>181</sup>

The lesser-used system of funding is financing through public funds (non-contributory-schemes), together with social assistance or employer liability to finance maternity protection.<sup>182</sup> There is an increase in the number of countries relying on non-contributory schemes to finance maternity benefits.<sup>183</sup> These schemes are financed through public funding. The *Maternity Protection Convention, 2000* and the *Social Protection Floors Recommendation, 2012* promote reliance on non-contributory schemes.<sup>184</sup>

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<sup>177</sup> Maternity Protection Convention 2000 (note 53 above) art 6(2); Huysamen (note 50 above) 54; Addati (note 47 above) 76; ILO Maternity & Paternity at Work (note 57 above) 16; Dupper & Govindjee (note 4 above) 406.

<sup>178</sup> Social Security (Minimum Standards) Convention 1952 (note 63 above) art 52; MP Olivier & A Govindjee ‘A critique of the Unemployment Insurance Amendment Bill, 2015’ (2015) 18(7) *PER/PELJ* 2739, 2743.

<sup>179</sup> The Social Protection Floors Recommendation 2012 (note 66 above) par 8(b).

<sup>180</sup> Maternity Protection Convention 1919 (note 60 above) art 3(c); Maternity Protection Convention 1952 (note 61 above) art 4(8); Dancaster (note 142 above) 182.

<sup>181</sup> Maternity Protection Convention 2000 (note 55 above) art 6(8).

<sup>182</sup> Addati (note 47 above) 78.

<sup>183</sup> M Nyenti & LG Mpedi ‘The impact of the SADC social protection instruments on the setting up of a minimum social protection floor in Southern African countries’ (2012) 15(1) *PER/PELJ* 243, 268.

<sup>184</sup> Addati (note 47 above) 89.

The ILO report indicated a shift from employer financing by showing that such systems have declined from 48 to 37 countries in 2013.<sup>185</sup> The reliance on social insurance schemes has increased from 68 to 76 countries between 1994 and 2013, whereas the mixed system has also increased. The report reflected that 107 countries used funding through national social insurance schemes; 47 countries used individual employer financing; and 29 countries used a mixture of social insurance schemes and employer financing to fund maternity benefits.<sup>186</sup>

### **2.3.3.2 Methods of calculating maternity benefits**

The ILO report on *Maternity and Paternity at Work – Law and Practice across the World*, has indicated that there are various methods for calculating maternity cash benefits, with the simplest and most common method being calculating benefits based on the woman's past earnings and granting a constant benefit throughout the leave period.<sup>187</sup> In assessing the conformity with *Maternity Protection Convention, 2000* the report found that 74 of the 167 countries studied provide cash benefits amounting to at least two-thirds of the employees' previous earnings for the fourteen weeks leave. Sixty-one of these 74 countries offered 100 per cent of previous earnings for at least fourteen weeks. However, 93 out of the 167 countries (over half of the countries), pay less than two-thirds of previous earnings during the fourteen weeks of maternity leave.<sup>188</sup>

### **2.3.4 Standards relating to eligibility and exclusions for maternity leave and cash benefits**

Statutory maternity protection involves certain exclusions which create gaps in the maternity coverage of employees. Employee protection could be excluded based on the category or economic sector of work, or their eligibility for protection through labour and/or social insurance legislation.<sup>189</sup> A failure to fulfil statutory requirements may prevent employees from being qualified for statutory benefits and therefore, may exclude them. All maternity protection conventions state that the only requirement for maternity leave is the production of a medical certificate by the employee indicating the expected date of birth of the child. According to the

<sup>185</sup> ILO *Maternity & Paternity at Work* (note 57 above) 29.

<sup>186</sup> *Ibid* 25; Addati (note 47 above) 80.

<sup>187</sup> ILO *Maternity & Paternity at Work* (note 57 above) 17.

<sup>188</sup> *Ibid* 18–19; Addati (note 47 above) 78.

<sup>189</sup> Addati (note 47 above) 89.

*Maternity Protection Convention, 2000*, this is the only requirement that needs to be fulfilled in order to claim maternity leave.<sup>190</sup> National laws include requirements such as a notice period, and a minimum period of employment or service with the same employer.<sup>191</sup>

With regard to eligibility for cash benefits, article 6(5) of the *Maternity Protection Convention, 2000* states that member states may set out criteria which the employee must meet to qualify for the cash benefits, provided that these criteria are capable of being met by the majority of women to whom the convention applies.<sup>192</sup> The ILO envisions that these criteria should not lead to abuse and should promote social security systems which guarantee rights to pregnant employees.<sup>193</sup> Article 6(6) of the convention states that women who do not satisfy the criteria for cash benefits should be given access to adequate benefits paid out of social assistance funds.<sup>194</sup> These benefits should be determined with a means test. Social assistance is administered through the government and involves benefits financed through general revenues. It is generally offered at a flat-rate, and offers inferior benefits to those provided by social security schemes.<sup>195</sup> However, CEACR has pointed out that in terms of the *Maternity Protection Convention, 2000*, social assistance benefits should be adequate to meet the needs of the mother and her child throughout the period of leave provided for in the convention (fourteen weeks).<sup>196</sup>

In accordance with article 6(5), the conditions for the qualification of cash benefits differ among countries. Certain countries require the employee to belong to a social insurance or public scheme for a minimum period of time before she can claim maternity cash benefits,<sup>197</sup> while many countries which provide cash benefits through social insurance schemes often require contributions to have been made for a minimum period prior to the period of maternity leave. In such instances, the qualifying criteria must be such as to preclude abuse as envisioned by the *Social Security (Minimum Standards) Convention, 1952*, and should in any event ensure that the

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<sup>190</sup> *Maternity Protection Convention 2000* (note 53 above) art 4(1).

<sup>191</sup> ILO *Maternity & Paternity at Work* (note 57 above) 42–43.

<sup>192</sup> *Maternity Protection Convention 2000* (note 53 above) art 6(5).

<sup>193</sup> *Social Security (Minimum Standards) Convention 1952* (note 63 above) art 51; Addati (note 47 above) 88.

<sup>194</sup> *Maternity Protection Convention 2000* (note 53 above) art 6(6).

<sup>195</sup> Addati (note 47 above) 88.

<sup>196</sup> International Labour Conference (97th Session) Direct Request on the [Maternity Protection Convention, 2000 \(No. 183\)](#) CEACR 2008 (adopted 2007); ILO *Maternity & Paternity at Work* (note 57 above) 43.

<sup>197</sup> ILO *Maternity & Paternity at Work* (note 57 above) 43.



majority of employed women qualify for the benefits in accordance with article 6(5) of the *Maternity Protection Convention, 2000*.<sup>198</sup>

Contrary to ILO maternity protection standards, certain countries limit the number of times which a woman is entitled to maternity leave. However, CEACR has stated that the limitation of the amount of maternity leave that may be taken by an employee goes against maternity protection conventions. CEACR has stated further that employees should be entitled to full leave, irrespective of the number of children they have.<sup>199</sup> There is an emphasis placed by the ILO on maintenance of the health of the woman and her child according to a ‘suitable standard of living’.<sup>200</sup> Furthermore, benefits should be paid to the woman throughout the period of maternity leave.<sup>201</sup> In accordance with these standards, CEACR has stated that member states should attempt to remove gradually a minimum qualifying period for cash benefits so as to ensure that a larger number of working women have access to financial and health protection during pregnancy.<sup>202</sup> While an argument exists that restrictive requirements for the eligibility of cash benefits makes such financing schemes viable and sustainable, these requirements exclude a great number of employees from the financial security of cash benefits.<sup>203</sup>

### 2.3.5 Standards relating to paternity, parental and adoption leave

The conflict between work–care responsibilities rests on the burden placed on women as the primary family caregivers. International labour standards recognise the burden and attempt to alleviate it by imposing international obligations to provide maternity protection. The ILO places emphasis on the objective of achieving equal treatment between men and women in the workplace. Providing maternity leave without a corresponding period of paternity leave or gender-neutral parental leave creates an imbalance in family dynamics as well as in the workplace.<sup>204</sup> The *Resolution on Gender Equality at the Heart of Decent Work*, which was

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<sup>198</sup> Ibid 44–45.

<sup>199</sup> International Labour Conference (104th Session) Observation on the [Maternity Protection Convention \(Revised\), 1952 \(No. 103\)](#) CEACR 2015 ( adopted 2014); Addati (note 47 above) 88.

<sup>200</sup> Ibid.

<sup>201</sup> Ibid.

<sup>202</sup> International Labour Conference (92nd Session) Report III (Part 1A): Report of the Committee of Experts on the Application of Conventions and Recommendations (Geneva, June 2004); Addati (note 47 above) 88–89.

<sup>203</sup> ILO Maternity Resource Package: Module 2, 7.

<sup>204</sup> Dancaster & Baird (note 10 above) 35; Behari (note 57 above) 360.

adopted by the ILO in 2009, recognises the progress made to gender equality in the workplace but identifies the need to incorporate men in family participation through the reconciliation of work and care as a remaining challenge.<sup>205</sup> The Resolution states that work–family reconciliation is an issue which includes men. Evidence shows an increase in women’s labour force participation where legislative measures or policies offer parental leave. Parental leave also assists in breaking down gender stereotypes.<sup>206</sup>

### 2.3.5.1 Paternity leave

The ILO report has indicated that at least 79 of the 167 countries for which data were available provide some form of paternity leave.<sup>207</sup> As with maternity leave, the length of the leave, the eligibility requirements for the leave, and the benefits attached to the leave vary between countries.<sup>208</sup> The report has reflected that compulsory paternity leave is rare. Most of the countries which offer paternity leave give working fathers the option to take paternity leave to care for their newborn child.<sup>209</sup> The length of the paternity leave period may range from one day to 90 days.<sup>210</sup> With regard to cash benefits, 71 of the 79 countries which offer paternity leave provide paid leave.<sup>211</sup> The report states that there has been progress in the inclusion of paternity leave into national legislation between 1994 and 2013.<sup>212</sup>

Although the *Family Responsibilities Convention, 1981* recognises the role of fathers in their contribution to family responsibilities, and paternity leave is mentioned in the *Resolution on Gender Equality at the Heart of Decent Work*, the ILO has not adopted any standards which offer paternity leave.<sup>213</sup> However, the *Recommendation concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities, 1981* (No.

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<sup>205</sup> Resolution on Gender Equality at the heart of Decent Work (note 50 above).

<sup>206</sup> Ibid par 5.

<sup>207</sup> Behari (note 57 above) 357.

<sup>208</sup> ILO Maternity & Paternity at Work (note 57 above) 52–59.

<sup>209</sup> Ibid 56.

<sup>210</sup> Ibid 53; O Dupper ‘Maternity protection in South Africa: An international and comparative analysis (Part Two)’ (2002) *Stell LR* 83, 89.

<sup>211</sup> ILO Maternity & Paternity at Work (note 57 above) 57.

<sup>212</sup> Ibid 59; Behari (note 57 above) 357.

<sup>213</sup> Field, Bagraim & Rycroft (note 1 above) 37.

165)<sup>214</sup> and the *Maternity Protection Recommendation, 2000* mention the necessity to extend leave provisions to fathers as well as mothers.<sup>215</sup>

### **2.3.5.2 Parental leave**

The *Family Responsibilities Recommendation, 1981* complements the *Family Responsibilities Convention, 1981* and states that through gradual introduction of this measure, ‘either parent should have the possibility, within a period immediately following maternity leave, of obtaining leave of absence (parental leave), without relinquishing employment and with rights resulting from employment being safeguarded’.<sup>216</sup> The *Family Responsibilities Recommendation, 1981* provides that the length and conditions attached to the leave may be determined by national policy or practice.<sup>217</sup>

The *Maternity Protection Recommendation, 2000* provides that, following the expiry of the maternity leave period, the employed mother or the employed father of the child should be entitled to parental leave.<sup>218</sup> The *Family Responsibilities Recommendation, 1981*, in suggesting parental leave, provides that the ‘period during which parental leave might be granted, the length of the leave and other modalities, including the payment of parental benefits and the use and distribution of parental leave between the employed parents’ may be determined by national policy or practice.<sup>219</sup> The ILO report has indicated that at least 66 of the 169 countries for which data were available provide some form of parental leave.<sup>220</sup>

### **2.3.5.3 Adoption benefits**

The *Maternity Protection Recommendation, 2000* provides that adoptive parents should be afforded the protection set out under the *Maternity Protection Convention, 2000*.<sup>221</sup> It states that

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<sup>214</sup> International Labour Conference (67th Session) Recommendation concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities (Geneva, adopted 23 June 1981) (Family Responsibilities Recommendation, 1981).

<sup>215</sup> *Ibid* par 22; Maternity Protection Recommendation 2000 (note 55 above) par 10(1).

<sup>216</sup> Field, Bagraim and Rycroft (note 1 above) 37; Rickard (note 53 above) 1502; Behari (note 57 above) 357.

<sup>217</sup> Family Responsibilities Recommendation 1981 (note 214 above) art 22(1)–(3).

<sup>218</sup> Dancaster (note 142 above) 187.

<sup>219</sup> Maternity Protection Recommendation 2000 (note 55 above) art 10(3)–(4); Behari (note 57 above) 357.

<sup>220</sup> ILO Maternity & Paternity at Work (note 57 above) 64; Behari (note 57 above) 357.

<sup>221</sup> Dancaster (note 142 above) 180.

‘where national law and practice provide for adoption, adoptive parents should have access to the system of protection offered by the Convention, especially regarding leave, benefits and employment protection’.<sup>222</sup> Although the *Maternity Protection Convention, 2000* applies only to women employees, the *Maternity Protection Recommendation, 2000* states that adoption leave should be made available to both the working mother as well as the working father.<sup>223</sup>

### 2.3.6 Standards relating to employment protection and non-discrimination

The ILO maternity protection standards provide employment protection during maternity leave and prevent discrimination against an employee on maternity leave.<sup>224</sup> According to the ILO, employment protection is the assurance that a woman will not lose her job during maternity leave or any period of leave following her return to work and is secure to return to her same position of employment with the same pay.<sup>225</sup> Employees who transfer their employment to another employer usually incur wage reductions. Therefore, national laws which provide the right to return to the same position or an equivalent position with the same pay are an essential aspect of maternity protection.<sup>226</sup>

The Organisation for Economic Co-operation and Development (OECD) released a report in collaboration with the ILO, the World Bank, and the International Monetary Fund, in preparation for the G20 Labour and Employment Ministerial Meeting in September 2014.<sup>227</sup> The report identified measures which are necessary to narrow the gender gaps in labour force participation which exist in G20 countries.<sup>228</sup> These measures largely include efforts to provide maternity

<sup>222</sup> Maternity Protection Recommendation 2000 (note 55 above) art 10(5).

<sup>223</sup> ILO Maternity & Paternity at Work (note 57 above) 69; Dancaster (note 142 above) 181.

<sup>224</sup> ILO Maternity & Paternity at Work (note 57 above) 73–75.

<sup>225</sup> Ibid; Maternity Protection Convention 2000 (note 53 above), art 8.

<sup>226</sup> ILO Maternity & Paternity at Work (note 57 above) 77.

<sup>227</sup> OECD, ILO, IMF and WBG (2014): ‘Achieving stronger growth by promoting a more gender-balanced economy’. Report prepared for the G20 Labour & Employment Ministerial Meeting Melbourne, Australia, 10–11 September 2014 <http://www.oecd.org>, accessed on 21 October 2015. The OECD is an international organisation which recommends economic policy considerations regarding its 34 Member states and more than 70 non-member economies. The United Kingdom and Australia are Member states of the OECD. South African is involved with the OECD as a non-member. On 27 May 2007, the OECD Council adopted a resolution to effect co-operation with South Africa. The benefits of such a relationship are firstly; that South Africa receives access to OECD expertise and good policy practices and second, the OECD is allowed to broaden its policy perspective through the exposure to South African initiative. See <http://www.oecd.org/southafrica/south-africa-and-oecd.htm>.

<sup>228</sup> The G20 countries are Argentina, Australia, Brazil, Canada, China, France, Germany, India, Indonesia, Italy, Japan, Korea, Mexico, Russia, Saudi Arabia, South Africa, Spain, Turkey, the United Kingdom and the United States.

protection and are aimed at the reconciliation of work and care.<sup>229</sup> The report stated that measures had to be taken to eliminate the unequal treatment of men and women through the protection of all women against discrimination.<sup>230</sup> Discrimination includes unequal treatment on the grounds of gender, maternity, paternity, and family responsibilities. Furthermore, governments should provide employees, even those in informal employment, with paid maternity leave and paternity leave, as well as family-friendly workplace support such as breastfeeding opportunities and flexible working hours.<sup>231</sup> The report indicates that these principles are set out in the ILO conventions and efforts must be made by governments to give effect to the promotion of gender equality.<sup>232</sup>

### **2.3.6.1 Employment protection**

Employment protection has been included in all three maternity protection conventions.<sup>233</sup> The *Maternity Protection Conventions*, 1919 and 1952, both state that it will not be lawful for an employer to serve a notice of dismissal on an employee during maternity leave, or leave granted for illness resulting from the pregnancy or childbirth, and to serve a notice of dismissal at such a time that the notice would expire during the absence.<sup>234</sup> Such a provision aims to ensure that an employee cannot be dismissed while she is on maternity leave.<sup>235</sup> However, these conventions provide limited protection as they provide no security against dismissal during pregnancy and during the period of the employee's return to work.<sup>236</sup> The *Maternity Protection Convention, 2000* provides in article 8(1) that it is unlawful for the employer to terminate the employment of a woman during her pregnancy, or absence on maternity leave, or during a period following her

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<sup>229</sup> *Ibid.*

<sup>230</sup> *Ibid.*

<sup>231</sup> *Ibid.*

<sup>232</sup> OECD, ILO, IMF and WBG (2014): 'Achieving stronger growth by promoting a more gender-balanced economy'. Report prepared for the G20 Labour & Employment Ministerial Meeting Melbourne, Australia, 10–11 September 2014; 7–8 <http://www.oecd.org/>, accessed on 21 October 2015; Field, Bagraim & Rycroft (note 1 above) 36.

<sup>233</sup> Maternity Protection Convention 1919 (note 60 above); Maternity Protection Convention 1952 (note 61 above); Maternity Protection Convention 2000 (note 53 above).

<sup>234</sup> Maternity Protection Convention 1919 (note 60 above) art 4. Art 6 of Maternity Protection Convention (Revised), 1952 states that '[w]hile a woman is absent from work on maternity leave in accordance with the provisions of art 3 of this Convention, it shall not be lawful for her employer to give her notice of dismissal during such absence, or to give her notice of dismissal at such a time that the notice would expire during such absence'.

<sup>235</sup> ILO Maternity & Paternity at Work (note 57 above) 76; Maternity Protection Convention 2000 (note 53 above).

<sup>236</sup> Dupper (note 210 above) 87.

return to work.<sup>237</sup> Therefore, the *Maternity Protection Convention, 2000* is broader and extends employment protection against dismissal to the period following her return to work. However, national legislation and regulations are permitted to determine the length of this period. Such protection against dismissal is often necessary where the employee is provided with additional leave for the purpose of breastfeeding a newborn baby.<sup>238</sup>

The ILO report has indicated that national law and regulatory measures of 56 countries provide protection against dismissal for any specified period during an employee's pregnancy.<sup>239</sup> The *Maternity Protection Convention, 2000* provides additional protection by stating that the burden of proof rests on the employer to prove that the reasons for the dismissal are unrelated to pregnancy or childbirth and its consequences or breastfeeding.<sup>240</sup> Placing the burden of proof on the employer adds to the protection of the employee as it requires the employer to show that the dismissal was not maternity related.<sup>241</sup> The *Maternity Protection Convention, 2000* guarantees women the right to return at the end of the maternity leave to the same position or an equivalent position which will be paid at the same rate.<sup>242</sup>

The *Maternity Protection Recommendation, 1952* complements the provisions of the *Maternity Protection Convention, 1952* by setting out a longer period of employment protection and the reasons which would result in a legitimate dismissal during the period of employment protection.<sup>243</sup> Furthermore, the ILO provides maternity protection in the *Termination of Employment Convention 1982 (No. 158)* which specifies that sex [sic], marital status, family

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<sup>237</sup> Art 8(1) of the *Maternity Protection Convention 2000*, states that '[i]t shall be unlawful for an employer to terminate the employment of a woman during her pregnancy or absence on leave referred to in arts 4 or 5 or during a period following her return to work to be prescribed by national laws or regulations, except on grounds unrelated to the pregnancy or birth of the child and its consequences or nursing. The burden of proving that the reasons for dismissal are unrelated to pregnancy or childbirth and its consequences or nursing shall rest on the employer'. Huysamen (note 50 above) 55.

<sup>238</sup> ILO *Maternity & Paternity at Work* (note 57 above) 77.

<sup>239</sup> *Ibid.*

<sup>240</sup> *Maternity Protection Convention 2000* (note 53 above) art 8(1).

<sup>241</sup> ILO *Maternity & Paternity at Work* (note 57 above) 79.

<sup>242</sup> *Maternity Protection Convention 2000* (note 53 above) art 8(2).

<sup>243</sup> *Maternity Protection Recommendation 1952* (note 142 above) par 4. Paragraph 4(2) states that '[a]mong the legitimate reasons for dismissal during the protected period to be defined by law should be included cases of serious fault on the part of the employed woman, shutting down of the undertaking or expiry of the contract of employment'. Matthias (note 60 above) 22.

responsibilities, pregnancy, and absence from work during maternity leave, among other issues, are not valid reasons for the termination of employment.<sup>244</sup>

### 2.3.6.2 *Non-discrimination*

The protection against discrimination in the workplace based on maternity ensures that women are not treated less favourably in the workplace by virtue of their gender or their functions as child-bearers or primary child-carers.<sup>245</sup> Such protection is recognised as an essential element of the ILO's maternity protection standards which is necessary to prevent the various discriminatory practices related to pregnancy and maternity which still occur in the workplace.<sup>246</sup> The discrimination takes the form of instances where the employer intentionally refuses to appoint young women based on the foreknowledge that the employee will probably require maternity protection at some point in her future career paths; or where pregnant or breastfeeding employees are treated less favourably than men or women who do not have children; or any other instances where women lose their jobs for reasons related to their pregnancy.<sup>247</sup>

The *Maternity Protection Conventions*, 1919 and 1952, do not include any provisions prohibiting discrimination against women in the workplace based on maternity. However, in 1958, the ILC adopted the *Discrimination (Employment and Occupation) Convention, 1958 (No. 111)*,<sup>248</sup> which aims to eliminate discrimination in employment or occupation and promote equal treatment and opportunity in employment or occupation.<sup>249</sup> While the definition of 'discrimination' in the *Discrimination (Employment and Occupation) Convention, 1958* includes any distinction, exclusion or preference based on sex [sic], it does not specify pregnancy and maternity as grounds of discrimination.<sup>250</sup> However, CEACR has stated that discrimination based on sex

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<sup>244</sup> International Labour Conference (68th Session) Convention concerning Termination of Employment at the Initiative of the Employer (Geneva, adopted 22 June 1982, entry into force 23 November 1985) art 5(9).

<sup>245</sup> ILO Maternity & Paternity at Work (note 57 above) 82.

<sup>246</sup> *Ibid.*

<sup>247</sup> *Ibid* 82–83.

<sup>248</sup> International Labour Conference (42nd Session) Convention concerning Discrimination in Respect of Employment and Occupation (Geneva, adopted 25 June 1958, entry into force 15 June 1960) (*Discrimination (Employment & Occupation) Convention, 1958*).

<sup>249</sup> *Ibid* art 1. The *Discrimination (Employment & Occupation) Convention, 1958* is a one of eight 'Fundamental' ILO Conventions and has been ratified by 172 member states; Jansen van Rensburg & Olivier (note 5 above) 648; Dancaster & Baird (note 10 above) 26; Cohen (note 1 above) 29.

<sup>250</sup> *Discrimination (Employment & Occupation) Convention 1958* (note 248 above) art 1(a).

includes the grounds of marital status, pregnancy and childbirth as discrimination.<sup>251</sup> The *Declaration on Equality of Opportunity and Treatment for Women Workers* reaffirms the ILO principle of non-discrimination and states that there shall be no discrimination against employees on the grounds of pregnancy and childbirth.<sup>252</sup>

The *Maternity Protection Convention, 2000* is the only maternity protection convention to prohibit explicitly discrimination on the basis of pregnancy and maternity.<sup>253</sup> It provides that member states must adopt appropriate measures to ensure that maternity is not a source of discrimination in the workplace.<sup>254</sup> The provision goes on to prohibit pregnancy testing at the time of applying for employment.<sup>255</sup> Furthermore, the *Family Responsibilities Convention, 1981* states in the interest of promoting equal opportunity and treatment for men and women workers that member states shall make it an aim of national policy to enable workers with family responsibilities to engage in employment without being subjected to discrimination.<sup>256</sup>

### **2.3.7 Standards relating to health and safety of pregnant, postnatal, or breastfeeding employees**

The *Maternity Protection Conventions, 1952 and 2000*, both recognise the health and safety of pregnant employees as part of maternity protection. The conventions includes measures relating to medical benefits such as antenatal, confinement and postnatal care by qualified midwives and medical practitioners, and provides for any necessary hospitalisation.<sup>257</sup> Article 3 of the *Maternity Protection Convention, 2000* states that each member should adopt appropriate measures to ensure that pregnant or breastfeeding women are not obliged to perform work which has been determined to be prejudicial to the health of the mother or the child, or where an assessment has established a significant risk to the mother's health or that of her child.<sup>258</sup> Furthermore, the *Maternity Protection Recommendation, 2000* states that member states should

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<sup>251</sup> ILO Maternity & Paternity at Work (note 57 above) 83.

<sup>252</sup> Declaration on Gender Equality (note 68 above); Dupper (note 68 above) 423.

<sup>253</sup> Huysamen (note 50 above) 55.

<sup>254</sup> Maternity Protection Convention 2000 (note 53 above) art 9(1).

<sup>255</sup> Ibid art 9(2).

<sup>256</sup> Family Responsibilities Convention 1981 (note 52 above) art 3(1); Dancaster & Baird (note 10 above) 26; Cohen (note 1 above) 29; Rickard (note 53 above) 1502.

<sup>257</sup> Maternity Protection Convention 1952 (note 61 above); Maternity Protection Convention 2000 (note 53 above).

<sup>258</sup> Maternity Protection Convention 2000 (note 53 above) art 3.



take measures to assess the workplace risks attached to the health and safety of the pregnant or breastfeeding woman or her child.<sup>259</sup>

Maternity protection for the health and safety of the employee includes a restriction of the length of hours which the employee can work. The *Night Work Convention, 1990 (No. 171)* calls for specific measures to be made regarding night work to ensure the maternity protection of workers and to assist them to meet their family responsibilities.<sup>260</sup> Article 7 of the convention provides that measures should be taken to make alternative arrangements to night work available to women who work nights, before and after childbirth, for a period of sixteen weeks or longer if necessary.<sup>261</sup> The alternative measures which may be taken include transfer to day work, the provision of social security benefits, or the extension of maternity leave.<sup>262</sup> The *Maternity Protection Recommendation, 2000* states that pregnant or breastfeeding women should not be obliged to do night work on the production of a medical certificate which declares that such work is incompatible with the pregnancy or breastfeeding of the woman.<sup>263</sup>

### **2.3.8 Standards relating to breastfeeding at the workplace**

The *Maternity Protection Convention, 1919* provides that a woman shall be allowed to nurse every half an hour twice a day during her working hours.<sup>264</sup> This convention extends the breastfeeding break. It provides that ‘if a woman is nursing her child she shall be entitled to interrupt her work for this purpose at a time or times to be prescribed by national laws or regulations’. These interruptions for the purpose of breastfeeding are to be counted as working hours and remunerated accordingly.<sup>265</sup> The *Maternity Protection Convention, 2000* states that the employee should be provided with the right to one or more daily breaks or a daily reduction of hours of work to breastfeed her child. These breastfeeding breaks, their number, duration and the procedures for the reduction of daily hours of work are to be determined by national law and practice. The convention reiterates that these breaks or the reduction of daily hours of work

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<sup>259</sup> Maternity Protection Recommendation 2000 (note 55 above) par 6(1).

<sup>260</sup> International Labour Conference (77th Session) Convention concerning Night Work (Geneva, adopted 26 June 1990; entry into force 4 January 1995).

<sup>261</sup> Ibid art 6.

<sup>262</sup> Ibid.

<sup>263</sup> Maternity Protection Convention 2000 (note 53 above) par 6(4).

<sup>264</sup> Maternity Protection Convention 1919 (note 60 above) art 3(d).

<sup>265</sup> Maternity Protection Convention 1952 (note 61 above) art 5.

should be counted as working time and remunerated accordingly.<sup>266</sup> While the *Maternity Protection Conventions* provide breastfeeding breaks to breastfeeding employees, the standards should be broadened to allow for fathers to take breaks at work to bottle feed their newborn baby. The inclusion of fathers would promote the equal sharing of care-giving roles between mothers and fathers.<sup>267</sup>

### **2.3.9 Standards relating to childcare arrangements (including leave for care emergencies)**

The ILO report states that leave for emergency care must be considered as an additional measure to aiding the reconciliation of work and care.<sup>268</sup> Measures to adopt time off from work for care emergencies are implied by the *Family Responsibilities Convention, 1981*.<sup>269</sup> One of the means through which this convention aims to achieve work–care reconciliation is by providing childcare.<sup>270</sup> Article 5 of the convention states that national conditions and possibilities must be made to take into account the needs of employees with family responsibilities in community planning, and to develop and promote childcare and family services and facilities.<sup>271</sup>

The *Family Responsibilities Convention, 1981* suggests that countries must take steps to encourage and facilitate the establishment of plans for the systematic development of childcare and family services and facilities.<sup>272</sup> Furthermore, steps must be taken to organise or encourage and facilitate the provision of adequate and appropriate childcare and family services and facilities.<sup>273</sup> These facilities may be free of charge or at a reasonable charge in accordance with the workers' ability to pay and should be developed along flexible lines in order to meet the needs of children of different ages, of other dependants requiring care, and of workers with family responsibilities.<sup>274</sup>

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<sup>266</sup> Maternity Protection Convention 2000 (note 53 above) art 10.

<sup>267</sup> ILO Maternity & Paternity at Work (note 57 above) 106.

<sup>268</sup> *Ibid* 118.

<sup>269</sup> Family Responsibilities Convention 1981 (note 52 above) art 5.

<sup>270</sup> *Ibid*.

<sup>271</sup> *Ibid*.

<sup>272</sup> *Ibid*.

<sup>273</sup> *Ibid*.

<sup>274</sup> Family Responsibilities Recommendation 1981 (note 213 above) par V, 25(a) and (b).

## 2.4 The Convention on the Elimination of All Forms of Discrimination against Women

In 1979, the UN General Assembly adopted the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW).<sup>275</sup> South Africa ratified the CEDAW in 1995.<sup>276</sup> The convention sets out to eliminate all forms of discrimination against women with the aim of achieving gender equality and calls for nations to take action to address such discrimination.<sup>277</sup> There are currently 189 parties and 99 signatories of the CEDAW.<sup>278</sup> According to the Preamble of the convention, discrimination against women ‘is an obstacle to the participation of women, on equal terms with men’.<sup>279</sup> It states that there has been a failure to recognise fully the social significance of maternity and the role of both parents in the family and in the upbringing of children.<sup>280</sup> The Preamble expressly states that ‘the role of women in procreation should not be a basis for discrimination but that the upbringing of children requires a sharing of responsibility between men and women and society as a whole’.<sup>281</sup> Article 16(1)(d) reiterates the shared responsibility of childcare between parents by stating that state parties should ensure that the men and women in family relations have the same rights and responsibilities as parents, and in all instances the best interests of the child are of paramount importance.<sup>282</sup>

Article 11(2) of the CEDAW attends to measures which should be taken to eliminate ‘discrimination against women on the grounds of marriage or maternity, and to ensure their effective right to work’.<sup>283</sup> Accordingly, parties to the CEDAW should take appropriate measures to prohibit dismissals on the grounds of pregnancy or maternity leave; to introduce paid leave or social benefits; to encourage the implementation of social security services which

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<sup>275</sup> Convention on the Elimination of all forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW).

<sup>276</sup> Jansen van Rensburg & Olivier (note 5 above) 631; Dancaster & Baird (note 10 above) 25; Huysamen (note 50 above) 54.

<sup>277</sup> S Cusack & L Pusey ‘CEDAW and the rights to non-discrimination and equality’ (2013) 14 *Melbourne Journal of International Law* 54, 57; Field, Bagraim & Rycroft (note 1 above) 38; Cohen (note 1 above) 29.

<sup>278</sup> Behari (note 57 above) 358.

<sup>279</sup> Huysamen (note 50 above) 54; Behari (note 57 above) 358.

<sup>280</sup> Dancaster & Baird (note 10 above) 25.

<sup>281</sup> CEDAW (note 257 above) preamble; Field, Bagraim & Rycroft (note 1 above), 37; Dancaster & Baird (note 10 above) 25.

<sup>282</sup> CEDAW (note 257 above) art 16(1)(d); A Louw ‘The constitutionality of a biological father’s recognition as a parent’ (2010) 13(3) *PER/PELJ* 156, 156.

<sup>283</sup> Jansen van Rensburg & Olivier (note 5 above) 631; Dancaster & Baird (note 10 above) 25; Rickard (note 53 above) 1498.

will support the work–life balance of parents, with particular reference to childcare facilities; and to protect pregnant employees against types of work which may be harmful to them or their unborn child(ren).<sup>284</sup>

Article 11(2) of the CEDAW has raised a number of concerns with regard to enforcement.<sup>285</sup> State parties are entitled to enforce the convention against one another through arbitration. This is set out in article 29 of the CEDAW. If arbitration is not possible, the matter may be appealed to the International Court of Justice.<sup>286</sup> This enforcement mechanism of article 29 has never been invoked by a state party.<sup>287</sup> The only remaining effective method of enforcement of the CEDAW is through the *Optional Protocol* which was adopted by the UN General Assembly in 1999.<sup>288</sup> The *Optional Protocol* empowers the Committee on the Elimination of Discrimination Against Women (the Committee) to receive and consider complaints from individuals or groups within its jurisdiction.<sup>289</sup> The Committee acts as a court in making decisions for or against state parties. The *Optional Protocol* has been used in addressing maternity discrimination complaints and has been recognised for its potential as an effective enforcement mechanism for international maternity protection.<sup>290</sup>

## 2.5 International Covenant on Economic, Social and Cultural Rights

The *International Covenant on Economic, Social and Cultural Rights* (ICESCR) was adopted by the UN General Assembly in 1966.<sup>291</sup> South Africa ratified the ICESCR in 1994.<sup>292</sup> According to the ICESCR, state parties are obliged to recognise family as a fundamental group of society

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<sup>284</sup> CEDAW (note 257 above) art 11(2)(a)–(d); Jansen van Rensburg & Olivier (note 5 above) 631; Huysamen (note 50 above) 54.

<sup>285</sup> Rickard (note 53 above) 1498.

<sup>286</sup> CEDAW (note 257 above) art 29.

<sup>287</sup> Rickard (note 53 above) 1500.

<sup>288</sup> Ibid 1498.

<sup>289</sup> Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (adopted 21 December 2000) 2131 UNTS 83; E Bonthuys & W Domingo ‘Constitutional and International Law Context’ in E Bonthuys & C Albertyn (eds) *Gender, Law & Justice* (2007) 51, 63.

<sup>290</sup> Rickard (note 53 above) 1498–1501. See *Dung Thi Thuy Nguyen vs The Netherlands*, 3/2004. Convention on the elimination of all forms of discrimination against women: Decisions/Views, UN Women <http://www.un.org/womenwatch/daw/cedaw/protocol/dec-views.htm>, accessed on 17 December 2015.

<sup>291</sup> Jansen van Rensburg & Olivier (note 5 above) 635; Servais (note 18 above) 65.

<sup>292</sup> OHCHR *Status of Ratification* <http://indicators.ohchr.org/>, accessed on 21 November 2016.

which is responsible for the care of dependent children.<sup>293</sup> The ICESCR has a bearing on maternity protection by stating that mothers should be granted special protection during and after childbirth.<sup>294</sup> During this period, mothers should be provided with paid leave, or leave with adequate social security benefits.<sup>295</sup> It provides that mothers should be afforded a reasonable period of special protection before and after childbirth, during which they should receive paid leave or leave with adequate social security benefits.<sup>296</sup> However, it defines social security as the access to and the maintenance of benefits without discrimination and for the purpose of ensuring protection for, among other items, maternity.<sup>297</sup> The ICESCR obliges member states to recognise the rights of everyone to social security, including social insurance.<sup>298</sup>

## 2.6 United Nations Convention on the Rights of the Child

The *United Nations Convention on the Rights of the Child* (UNCRC) was adopted in recognition of the need to extend particular attention to children.<sup>299</sup> South Africa ratified the UNCRC in 1995.<sup>300</sup> Article 18 of the UNCRC states that efforts must be made by state parties to ensure that recognition is given to the principle that both parents have common responsibilities for the upbringing and development of the child, and that the best interests of the child will be their basic concern.<sup>301</sup> According to these provisions, state parties must ensure the shared responsibility of care giving between parents in the upbringing and development of the child. This means that fathers must be encouraged to participate in the care-giving duties, together with the mother of the child.<sup>302</sup>

The UNCRC places an obligation on state parties to render appropriate assistance to parents in the performance of their child-rearing responsibilities and to ensure the development of

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<sup>293</sup> International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) art 10(1).

<sup>294</sup> *Ibid* art 10(2).

<sup>295</sup> *Ibid*.

<sup>296</sup> Art 10(2); Jansen van Rensburg & Olivier (note 5 above) 638.

<sup>297</sup> Committee on Economic, Social and Cultural Rights (CESCR) General Comment No. 19: The right to social security (adopted on 23 November 2007, entered into force 4 February 2008) E/C.12/GC/19, art 9.

<sup>298</sup> ICESCR (note 292 above) art 9.

<sup>299</sup> Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (UNCRC); Behari (note 57 above) 359.

<sup>300</sup> *Ibid*.

<sup>301</sup> UNCRC (note 299 above) art 18(1).

<sup>302</sup> Louw (note 282 above) 156.

institutions, facilities and services for the care of children.<sup>303</sup> Most significantly, it provides that state parties shall take all appropriate measures to ensure that children of working parents have the right to benefit from childcare services and facilities for which they are eligible.<sup>304</sup> In terms of these provisions, member states have a positive duty to assist parents with the provision of childcare services and facilities, in the best interests of the child.<sup>305</sup>

## 2.7 Analysis of international labour standards

The ILO, as an international organisation, has extensive provisions providing rights and protections which support the reconciliation of work and care. In particular, the *Maternity Protection Convention, 2000* and the *Family Responsibilities Convention, 1981* directly call for the adoption of mechanisms to regulate the work–care conflicts.<sup>306</sup> The ILO’s commitment to maternity protection began in 1919 with the introduction of the *Maternity Protection Convention, 1919*. The convention has been revised twice, resulting in the *Maternity Protection Convention, 2000*. This convention has made significant progress in its provisions. It broadens the scope of maternity protection to a wider range of women employees and has limited the statutory eligibility requirements to be met in claiming maternity leave. It extends the duration of maternity leave to fourteen weeks and provides for additional leave from work due to illness and complications arising out of childbirth.<sup>307</sup> The convention prescribes cash benefits at the amount of at least two-thirds of the women’s previous earnings. Employment protection is extended to pregnant and antenatal employees, and it expressly prohibits discrimination on the basis of pregnancy and maternity. The *Maternity Protection Convention, 2000* is commended for its exclusive commitment towards the protection of pregnancy and maternity.<sup>308</sup>

The exclusion of ILO standards relating to paternity and parental leave indicates that more initiative must be taken to ensure the participation of men in the reconciliation of work and care. Paternity and parental leave are encouraged only, through ILO recommendations which are non-

<sup>303</sup> UNCRC (note 299 above), art 18(2); Behari (note 57 above) 359.

<sup>304</sup> UNCRC (note 299 above) art 18(3).

<sup>305</sup> BD Memzur ‘The African Children’s Charter versus the UN Convention on the Rights of the Child: A zero-sum game?’ (2008) 23 *SA Publiekreg/Public Law* 1, 26; Behari (note 55 above) 359.

<sup>306</sup> Dancaster & Baird (note 10 above) 26.

<sup>307</sup> Rickard (note 53 above) 1504.

<sup>308</sup> *Ibid.*

binding and act as guidelines. Therefore, member states are not made to commit themselves to the adoption of statutory paternity or parental leave. Paternity leave or non-transferable parental leave must be recognised as a mechanism for the promotion of equal sharing of family responsibilities between parents, thereby influencing gender equality in the workplace.<sup>309</sup> The *ILO Resolution on Gender Equality at the Heart of Decent Work* establishes that while there has been progress on the issue of gender equality in the workplace, greater progress needs to be made specifically on the issue of work–care reconciliation.<sup>310</sup> The *Resolution on Gender Equality at the Heart of Decent Work* draws attention to the low number of ratifications of the *Maternity Protection Convention, 2000*, and calls for flexible work arrangements to be implemented to promote gender equality.<sup>311</sup>

The issue with ILO minimum standards of maternity and paternity protection arises in their effective implementation. The supervisory procedures of the ILO are effective only if member states agree to comply and make the necessary adjustments to meet the standards. However, enforcement procedures become more difficult should the member states fail to comply with the standards of the ILO.<sup>312</sup> Statistically, the ILO report has indicated that workplace inequality may be improving. Nevertheless, a failure to provide adequate maternity protection is still a global issue.<sup>313</sup>

## 2.8 Conclusion

The strengths of the ILO go as far as member states are willing to adopt their standards.<sup>314</sup> The failure to ratify conventions means that the standards of the convention will not have a strong impact on the legal terms and conditions of employment within the domestic laws of that member state.<sup>315</sup> Upon ratification, the ILO conventions are influential on national laws. Recommendations may be made in Parliament to propose changes to national laws which are inconsistent with ILO standards. However, the efficacy of ILO conventions is related to the

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<sup>309</sup> ILO Maternity & Paternity at Work (note 57 above).

<sup>310</sup> Resolution on Gender Equality at the heart of Decent Work (note 50 above).

<sup>311</sup> Ibid.

<sup>312</sup> Korda & Pennings (note 20 above) 151.

<sup>313</sup> Rickard (note 53 above) 1504.

<sup>314</sup> Ibid 1505–1508.

<sup>315</sup> Korda & Pennings (note 20 above) 151.

extent of ratifications by member states.<sup>316</sup> For instance, the *Maternity Protection Convention, 2000* is commended for its dedication in its entirety to the international maternity protection of women, both during and after pregnancy.<sup>317</sup> However, the convention has been ratified by only 30 member states, whereas the *Maternity Protection Convention, 1952* has been ratified by 41 member states.<sup>318</sup> A further weakness of the ILO maternity protection conventions is that the conventions consist of minimum standards which may already exist in domestic laws of both ratifying and non-ratifying countries.<sup>319</sup>

International labour standards also leave space for national governments to develop according to the diversity of their economy, social security systems, and individual legal approaches. This is in line with the ILC ‘principle of progressivity’.<sup>320</sup> The principle of progressivity forms part of the UN human rights framework. The ICESCR sets out the principle of progressive realisation as a core provision.<sup>321</sup> The ICESCR provides that State Parties must undertake measures to ensure the progressive realisation of the rights recognised by the ICESCR through ‘all appropriate means, including particularly the adoption of legislative measures’.<sup>322</sup> It goes on to call for international assistance regarding the effective and progressive implementation of the *Covenant*.<sup>323</sup> The principle of progressivity appeals firstly for progressivity through greater implementation of the social protections aimed at maximising benefits afforded, and the persons covered. Second, it allows for the development towards higher levels of protection by increasing the ranges of circumstances and benefits that are included in the protection as well as the scope of persons covered by the protection.<sup>324</sup>

However, it must be noted that while South Africa has signed the ICESCR, it has not yet been ratified.<sup>325</sup> The effect of signing the ICESCR without ratifying it still has significant implications. The signature compels South Africa to refrain from adopting measures which

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<sup>316</sup> *Ibid.*

<sup>317</sup> Rickard (note 53 above) 1504.

<sup>318</sup> *Ibid.*

<sup>319</sup> *Ibid.*

<sup>320</sup> Addati (note 47 above) 73.

<sup>321</sup> Jansen van Rensburg & Olivier (note 5 above) 643.

<sup>322</sup> ICESCR (note 293 above) art 2.

<sup>323</sup> ICESCR (note 293 above) art 22; Kulke & Saint-Pierre Guilbault (note 130 above) 101.

<sup>324</sup> *Ibid* 100.

<sup>325</sup> Jansen van Rensburg & Olivier (note 5 above) 635.



would defeat its objectives, and to undertake a review of all applicable national laws and policies to ensure compliance with the ICESCR upon ratification.<sup>326</sup> Despite the call for progressive implementation, neither the ICESCR nor any other human rights instrument set out guidelines as to how the progressive realisation of social security may be implemented, until the adoption of the *Social Protection Floors Recommendation, 2012*.<sup>327</sup>

The *Social Protection Floors Recommendation, 2012* makes provision for the principle of progressivity and states that member states should implement strategies aimed at extending social security so that higher levels of social security may be ensured in an attempt to widen the range of employees.<sup>328</sup> It also states that members should apply the principle of ‘progressive realisation’ by setting targets and timeframes for the implementation of social security measures.<sup>329</sup> Progressivity acknowledges that the different challenges within the national frameworks of each member state may lead to limitations. Nevertheless, movement must be made towards the objective of universal social security protection. Therefore, the *Social Protection Floors Recommendation, 2012* makes the progressive realisation of universal coverage of social security a priority in terms of the international human rights framework.<sup>330</sup>

Globally, standards effecting the reconciliation of work and care with specific focus on maternity protection have gradually developed over the years.<sup>331</sup> The ILO has been recognised for introducing many influential policies, programmes and initiatives aimed towards the reconciliation of work and care.<sup>332</sup> According to the Constitution, the consideration of international standards is mandatory in the interpretation of constitutional rights. International standards indicate a benchmark for the minimum standards that must be provided to employees with family responsibilities.<sup>333</sup> Despite national undertakings to consider international laws, the initiatives of international organisations cannot achieve their objectives without the support and

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<sup>326</sup> Jansen van Rensburg & Olivier (note 5 above) 635–636.

<sup>327</sup> Kulke & Saint-Pierre Guilbault (note 130 above) 101.

<sup>328</sup> Social Protection Floors Recommendation, 2012 (note 66 above) par 1(b).

<sup>329</sup> Social Protection Floors Recommendation, 2012 (note 66 above) par 3(g), 14(e), 19.

<sup>330</sup> Kulke & Saint-Pierre Guilbault (note 130 above) 101.

<sup>331</sup> ILO Maternity & Paternity at Work (note 57 above) 115.

<sup>332</sup> Cohen (note 1 above) 31; Dancaster & Cohen (note 1 above) 2477.

<sup>333</sup> Jansen van Rensburg & Olivier (note 5 above) 649.

commitment of national governments to adopt and effectively implement minimum standards through their domestic laws, policies, or collective agreements.<sup>334</sup>

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<sup>334</sup> Cohen (note 1 above) 34; C McGlynn 'Work, family and parenthood: The European Union agenda' in J Conaghan & K Rittich (eds) *Labour Law, Work and Family* (2007) 217, 236.

## CHAPTER THREE

### REGIONAL LABOUR STANDARDS GOVERNING THE RECONCILIATION BETWEEN WORK AND CARE

#### 3.1 Introduction

Regional labour standards set out minimum standards for governmental responses to a particular region in the form of policy and legislation.<sup>1</sup> They provide authority and assist in recognising national specificities which are relevant when considering the socio-economic and political factors which influence law and policy.<sup>2</sup> The regional organisations which are relevant to this thesis are the AU, the SADC, and the EU. South Africa is a member state of the AU which aims for political and social-economic integration across Africa.<sup>3</sup> As a member state of the SADC, South Africa undertakes to adopt measures which give effect to the objectives of the SADC.<sup>4</sup> The SADC is described as an inter-governmental organisation which aims to adopt reasonable measures consistent with the objectives of the ILO on discrimination and equality, to the effect that men and women may reconcile their work and care obligations.<sup>5</sup>

The EU has been a key-role player in the development, adoption and implementation of minimum standards which promote the reconciliation of work and care throughout Europe.<sup>6</sup> The commitment of the EU towards work–care reconciliation is relevant to the extent that it formed the basis upon which the UK developed its numerous policy initiatives and legal reforms aimed

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<sup>1</sup> R Smit 'Family-related policies in Southern African countries: Are working parents reaping any benefits?' (2011) 42(1) *Journal of Comparative Family Studies* 15; D Woolfrey 'Harmonization of Southern Africa's labour laws in context of regional integration' (1991) 12(4) *ILJ* 703, 704.

<sup>2</sup> Smit (note 1 above) 20; M Olivier 'Gender discrimination in Labour Law and social security: Perspectives from the SADC' in O Dupper & C Garbers (eds) *Equality in the Workplace: Reflections from South Africa and Beyond* (2009) 227, 250.

<sup>3</sup> African Union *AU in a Nutshell* <https://www.au.int/web/en/au-nutshell>, accessed on 26 June 2016.

<sup>4</sup> Smit (note 1 above) 15; A Saurome 'The role of SADC institutions in implementing SADC treaty provisions dealing with regional integration' (2012) 15(2) *PER/PELJ* 454, 457; MP Olivier & ER Kalula 'Regional Social Security' in MP Olivier, N Smit, ER Kalula *Social Security: A Legal Analysis* (2003) 656–678; M Nyenti & LG Mpedi 'The impact of the SADC social protection instruments on the setting up of a minimum social protection floor in Southern African countries' (2012) 15(1) *PER/PELJ* 243, 249; L Dancaster & T Cohen 'Leave for working fathers in the SADC region' (2015) 36 *ILJ* 2474,

<sup>5</sup> Smit (note 1 above) 15.

<sup>6</sup> R Guerrina 'Mothering Europe: Feminist critique of European policies on motherhood and employment' (2002) 9(1) *European Journal of Women Studies* 49.

at the reconciliation of work and care responsibilities prior to its exit from EU membership.<sup>7</sup> This chapter sets out the minimum standards of regional employment protection which include maternity protection consisting of antenatal and postnatal leave, benefits, employment security, non-discrimination, and health and childcare arrangements; and paternity, parental and adoption leave and benefits.

### 3.2 Standards of the African Union

The AU is an international regional organisation which establishes minimum standards of human rights throughout Africa.<sup>8</sup> The AU comprises of 53 African states.<sup>9</sup> According to the AU Constitutive Act, one of the objectives of the AU is ‘to promote and protect human and peoples’ rights in accordance with the African Charter on Human and Peoples’ Rights and other relevant human rights instruments’.<sup>10</sup> The *African Charter on Human and Peoples’ Rights* (African Charter) is a binding treaty which protects basic human rights and freedoms.<sup>11</sup> The relevant human rights instruments to which the AU are committed, and which accord with the support of work–care reconciliation, are the *Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa* (Women’s Protocol); the *African Charter*, the *African Charter on the Rights and Welfare of the Child* (ACRWC); and the *Solemn Declaration on Gender Equality in Africa* (Gender Declaration).

Article 1 of the African Charter places an obligation on member states to recognise the rights, duties and freedoms enshrined in the Charter, and to adopt legislative or other measures to give

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<sup>7</sup> O Golyner ‘Family-friendly reform of employment law in the UK: An overstretched flexibility’ (2015) 37(3) *Journal of Social Welfare and Family Law* 378, 391; E Caracciolo di Torella ‘New labour, new dads – The Impact of family friendly legislation on fathers’ (2007) 36 *Industrial Law Journal* 318, 320; G James ‘The Work and Families Act 2006: Legislation to improve choice and flexibility?’ (2006) 35(3) *Industrial Law Journal* 272, 273; M Leon ‘Parental, maternity and paternity leave: European legal constructions of unpaid care giving’ (2007) 58(3) *Northern Ireland Legal Quarterly* 353, 355.

<sup>8</sup> M Forere & L Stone ‘The SADC Protocol on Gender and Development: Duplication or Complementarity of the African Union Protocol on Women’s Rights’ (2009) 9 *African Human Rights Law Journal* 434, 436.

<sup>9</sup> M Samb ‘Fundamental issues and practical challenges of human rights in the context of the African Union’ (2009) 15 *Annual Survey of International and Comparative Law* 61, 62.

<sup>10</sup> The Constitutive Act of the African Union (adopted 1 July 2000, entered into force 26 May 2001) OAU Doc, art 3(h).

<sup>11</sup> African Charter on Human and Peoples’ Rights (adopted 27 June 1981, entered into force 21 October 1986) OAU Doc (1982) 21 ILM 58 (African Charter).

effect to them.<sup>12</sup> Articles 15 to 18 of the African Charter address socio-economic rights; however, these provisions are limited.<sup>13</sup> The only provision directly relevant to the reconciliation of work and care is article 18, which recognises family as the natural unit and basis of society to which member states are obliged to take care of its physical health and moral needs.<sup>14</sup> Article 18(3) encompasses an umbrella provision by stating that ‘the State shall ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions’.<sup>15</sup>

The Women’s Protocol is a binding treaty which was adopted in response to the exclusion of African women’s rights in the CEDAW.<sup>16</sup> Article 2 of the Women’s Protocol provides that state parties should take measures to prevent all forms of discrimination against women through appropriate legislative measures.<sup>17</sup> This provision also demands that state parties should take steps to modify the social and cultural patterns of conduct attributed to women and men so as to achieve the elimination of harmful cultural and traditional practices based on gendered stereotypes.<sup>18</sup> Through an interpretation of this provision it may be said that it intends to ‘bring an end to the condemnation of women to an existence of subordination on the African continent’.<sup>19</sup> Article 13 provides that state parties should adopt and enforce legislative measures to guarantee women equal opportunities at work, take necessary measures to recognise the economic value of the work women do in the home, and recognise that both parents share the primary responsibility for the upbringing and development of the children.<sup>20</sup> These provisions recognise that women’s work in Africa is undervalued, resulting in the low economic status of

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<sup>12</sup> Ibid, L Jansen van Rensburg & MP Olivier ‘International Law and Supra-national Law’ in MP Olivier et al (eds) *Introduction to Social Security* (2004) 619, 632.

<sup>13</sup> Jansen van Rensburg & Olivier (note 12 above) 633; Samb (note 9 above) 73.

<sup>14</sup> The African Charter (note 11 above) art 18(1).

<sup>15</sup> Ibid art 18(3).

<sup>16</sup> Forere & Stone (note 8 above) 439.

<sup>17</sup> Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa (adopted 10 June 1998, entered into force on 25 January 2004) OAU Doc (AU Women’s Protocol); K Stefiszyn ‘The African Union and opportunities for women’ (2005) 5 *African Human Rights Law Journal* 358, 367.

<sup>18</sup> AU Women’s Protocol (note 17 above) art 2.

<sup>19</sup> Forere & Stone (note 8 above) 446.

<sup>20</sup> The African Charter (note 11 above) art 13, 13(h) and 13(l).

African women.<sup>21</sup> The provision also acknowledges the need to promote fatherhood in African countries where there is a high number of absent living fathers.<sup>22</sup>

The ACRWC is aimed at protecting the needs of the African child.<sup>23</sup> On the topic of parental responsibilities, article 20(1) of the ACRWC provides that parents or other persons responsible for the child have the primary responsibility for the upbringing and development of the child. Furthermore, the parents have a duty to ensure that the best interests of their child are their basic concern at all times.<sup>24</sup> This regional standard reinforces the importance of the inclusion of both parents in the care of children. Article 20(2)(c) of the ACRWC provides that state parties should, in accordance with their means and national conditions, ensure that the children of working parents are provided with care services and facilities.<sup>25</sup>

In terms of the Gender Declaration, heads of state must report annually on progress made in the promotion of gender equality.<sup>26</sup> The Gender Declaration is non-binding.<sup>27</sup> It calls for particular attention to the disproportionate burden placed on women to care for and support those infected with and affected by HIV/Aids. Member states agree to promote gender-specific economic, social, and legal measures aimed at combating the HIV/Aids pandemic. In addition, member states agree to provide more responsive social services available to women at the local level to attend to the care needs of families, and to increase the budgetary allocations in these sectors to alleviate the burden of care placed on women.<sup>28</sup> The Gender Declaration acknowledges women in employment by stating its aim to strengthen initiatives to reduce the workload placed on women and expand the employment opportunities of women.<sup>29</sup>

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<sup>21</sup> Stefiszyn (note 17 above) 359.

<sup>22</sup> Dancaster & Cohen (note 4 above) 2475.

<sup>23</sup> African Charter on the Rights and Welfare of the Child (adopted 1 July 1990, entered into force 29 November 1999) OAU Doc (ACRWC).

<sup>24</sup> Ibid art 20(1)(a); A Behari 'Daddy's home: The promotion of paternity leave and family responsibilities in the South African workplace' (2016) 37(2) *Obiter* 346, 359.

<sup>25</sup> Behari (note 23 above) 359.

<sup>26</sup> Solemn Declaration on Gender Equality in Africa (adopted July 2004) OUA Doc (AU Gender Declaration); L Dancaster & M Baird 'Workers with care responsibilities: Is work-family integration adequately addressed in South African labour law?' (2008) 29 *ILJ* 22, 26; T Cohen 'The efficacy of international standards in countering gender inequality in the workplace' (2012) 33 *ILJ* 19, 21.

<sup>27</sup> Samb (note 9 above) 62.

<sup>28</sup> AU Gender Declaration (note 26 above) art 1.

<sup>29</sup> Ibid art 10.

The Gender Declaration also acknowledges the burden of care placed on women with care-giving responsibilities to HIV/Aids infected family members.<sup>30</sup> Together with the provisions of the Women's Protocol, the provisions of the Gender Declaration recognise the need to ease the burden of care placed on working women and accommodate women with regard to care-giving responsibilities in the workplace. Despite these provisions, the AU, and in particular the African Charter, is lacking substantial provisions which could provide minimum standards of protection to working women with care-giving responsibilities, and promote the reconciliation of work and care.<sup>31</sup> It is hoped that the AU's commitment to gender equality will develop towards the adoption of greater socio-economic measures, with emphasis on the rights and protections of pregnant women in the workplace.

### 3.3 Standards of the SADC

The SADC is described as an international regional organisation, which aims to reduce poverty and enhance the standards and quality of life for the Southern African people.<sup>32</sup> The SADC consists of fifteen member states in the Southern African region.<sup>33</sup> It has adopted policy instruments and guidelines relating to employment and labour.<sup>34</sup> Those relevant to work-care reconciliation are the *Declaration and Treaty of the SADC* (SADC Treaty); the *Charter on Fundamental Social Rights in the SADC* (Charter); the *Code on Social Security* (Code) and the *Protocol on Gender and Development* (Protocol). While the SADC Treaty, the Charter and the Protocol are binding on member states, the Code is a guideline.<sup>35</sup>

In terms of the SADC Treaty, the member states undertake to adopt adequate measures to promote the achievement of the objectives of the SADC.<sup>36</sup> These objectives involve the

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<sup>30</sup> Dancaster & Baird (note 26 above) 27.

<sup>31</sup> Samb (note 9 above) 74.

<sup>32</sup> Saurome (note 4 above) 457; Olivier & Kalula (note 4 above) 656–678; Nyenti & Mpedi (note 4 above) 249; Smit (note 1 above) 15; Dancaster & Cohen (note 4 above) 2474.

<sup>33</sup> These are Angola, Botswana, the Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, the Seychelles, South Africa, Swaziland, Tanzania, Zambia, and Zimbabwe.

<sup>34</sup> M Olivier 'Gender Discrimination in Labour Law and Social Security: Perspectives from the SADC' in O Dupper & C Garbers (eds) *Equality in the Workplace: Reflections from South Africa and Beyond* (2009) 227, 228.

<sup>35</sup> Nyenti & Mpedi (note 4 above) 249.

<sup>36</sup> Declaration and Treaty of the Southern African Development Community (adopted 17 August 1992, entered into force 5 October 1992) 32 ILM 116, 5 AJICL 418 (SADC Treaty) art 6.

promotion of socio-economic development and regional integration.<sup>37</sup> The Protocol is an instrument of implementation of the Treaty. As such, it is binding on member states.<sup>38</sup> The Protocol provides that member states should adopt policy measures to ‘ease the burden on the multiple roles played by women’.<sup>39</sup> This is an innovative provision and stands alone under the heading ‘multiple roles of women’. The provision also placed an obligation on member states to conduct time-use studies by 2015. The Protocol does not elaborate on this obligation. Maternity Protection is afforded under Article 19 of the Protocol.<sup>40</sup> It provides that member states should ‘enact and enforce legislative measures prohibiting the dismissal or denial of recruitment on the grounds of pregnancy or maternity leave’. It also states that benefits and protection must be provided for women and men during maternity and paternity leave.<sup>41</sup>

The Charter promotes social and security schemes, and establishes regulations relating to health and safety at workplaces across the region.<sup>42</sup> Article 6 provides that member states should create an enabling environment consistent with ILO conventions on discrimination and equality. This measure aims to ensure gender equality, and equal treatment and opportunities for men and women. Furthermore, article 6 states that reasonable measures are to be developed to enable men and women to reconcile their occupation and family obligations.<sup>43</sup> This is the only reference made in the Charter to the promotion of work–family integration. No further guidelines have been adopted to advance the objective of reconciling work and care responsibilities. The SADC has not implemented any assessment to determine whether or not member states have taken steps to meet the objective of reconciling work and care.<sup>44</sup>

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<sup>37</sup> Olivier & Kalula (note 4 above) 657.

<sup>38</sup> Ibid.

<sup>39</sup> SADC Protocol on Gender and Development (adopted on 17 August 2008, entered into force 22 February 2013) (SADC Protocol) art 16; Cohen (note 26 above) 21; Forere & Stone (note 8 above) 444.

<sup>40</sup> Cohen (note 26 above) 27.

<sup>41</sup> SADC Protocol (note 39 above) art 19(3) and (4); Lancaster & Cohen (note 4 above) 2479.

<sup>42</sup> Olivier & Kalula (note 4 above) 664; M Olivier ‘Extension of Labour Law and Social Security Protection to the Informal Sector: Developing Country Perspectives, with Specific Reference to Southern Africa’ in R Blanpain (ed.) *The Modernization of Labour Law and Industrial Relations in a Comparative Perspective* (2009) 241, 266; E Fourie ‘The Informal Economy, Social Security and Legislative Attempts to Extend Social Security Protection’ in R Blanpain (ed.) *The Modernization of Labour Law and Industrial Relations in a Comparative Perspective* (2009) 272, 281.

<sup>43</sup> SADC Charter of Fundamental Social Rights (2003) (SADC Charter) art 6(a) and (c); Smit (note 1 above) 16; Lancaster & Cohen (note 4 above) 2478.

<sup>44</sup> Smit (note 1 above) 16; Nyenti & Mpedi (note 4 above) 252–255; P Smit ‘Transitional labour relations: A dream or possibility in the SADC?’ (2014) 22(3) *African Journal of International & Comparative Law* 448, 456.



The Code provides minimum standards of social protection and a framework for monitoring the standards at a national and regional level.<sup>45</sup> It states that ‘everyone in the SADC has the right to social security’.<sup>46</sup> ‘Social security’ refers to ‘public and private, or to mixed public and private measures’, which are designed to protect individuals and families against income insecurity caused by maternity, among other aspects.<sup>47</sup> Every member is guided to establish and maintain a social security system at a level at least equal to that required for the ratification of the ILO *Social Security (Minimum Standards) Convention, 1952 (No. 102)*.<sup>48</sup>

Article 8 of the Code is devoted to ‘maternity and paternity’.<sup>49</sup> It provides that member states should ensure that women are not discriminated against or dismissed on grounds of maternity.<sup>50</sup> Member states should ensure that women enjoy the protection provided for in the ILO *Maternity Protection Convention, 2000 (No. 183)*.<sup>51</sup> Member states should also ‘ensure that working conditions and environments are appropriate for and conducive to pregnant and nursing mothers’. Furthermore, the Code prescribes paid maternity leave of at least fourteen weeks and states that a woman on maternity leave is entitled to cash benefits to the amount of 66 per cent of her previous earnings.<sup>52</sup>

With regard to paternity, the Code states that paternity leave should be provided in order to ensure that child-rearing is a shared responsibility between father and mother.<sup>53</sup> This provision is a response to the high number of absent living fathers within the SADC region.<sup>54</sup> Article 13 addresses ‘gender’ and provides that ‘Member states should adopt and promote policies that ensure that workers, particularly female workers, are able to balance occupational and family

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<sup>45</sup> Code on Social Security in the SADC (2008) (SADC Code) art 3; Nyenti & Mpedi (note 4 above) 255; Olivier (note 42 above) 267.

<sup>46</sup> SADC Code (note 45 above) art 4.1; Nyenti & Mpedi (note 4 above) 256; Dancaster & Cohen (note 4 above) 2478.

<sup>47</sup> SADC Code (note 45 above) art 1.5.

<sup>48</sup> Ibid art 8; International Labour Conference (35th Session) Convention concerning Minimum Standards of Social Security (Geneva, adopted 28 June 1952, entry into force 27 April 1955) (Social Security (Minimum Standards) Convention, 1952)

<sup>49</sup> Olivier (note 42 above) 267.

<sup>50</sup> SADC Code (note 45 above) art 8.

<sup>51</sup> Ibid art 8.1.

<sup>52</sup> Ibid art 8.3; Olivier (note 2 above) 240; O Dupper & A Govindjee ‘Redesigning the South African Unemployment Insurance Fund: Selected key policy and legal perspectives’ (2011) 22 *Stell LR* 396, 406.

<sup>53</sup> SADC Code (note 45 above) art 8.1 to 8.4.

<sup>54</sup> Dancaster & Cohen (note 4 above) 2475.

obligations'.<sup>55</sup> While the Code significantly makes provisions for maternity leave, cash benefits, safe working conditions, and even paternity leave and work–family balance, it is not binding on member states.

All member states of the SADC offer some form of maternity protection to employees. The duration of maternity leave in SADC regions is between eight to sixteen weeks. The least amount of leave is eight weeks offered by Malawi, while South Africa offers the most with sixteen weeks of maternity leave. In most regions, the average duration of maternity leave is twelve to thirteen weeks.<sup>56</sup> Therefore, most regions do not meet the minimum standard of fourteen weeks' paid maternity leave set out in the *Maternity Protection Convention, 2000*. Thirteen of the fifteen member states of the SADC offer paid maternity leave either through employer liability or social security systems. Eleven member states provide employment security during pregnancy and maternity leave.<sup>57</sup> While six out of the fifteen member states of the SADC provide some type of leave mechanism to fathers for the birth of a child; such as the three days of family responsibility leave in South Africa, only three of the countries provide paternity leave.<sup>58</sup> None of the countries within the SADC region provide parental leave, and therefore the countries do not comply with the provision of the Code, which encourages the shared responsibility of childcare between father and mother.<sup>59</sup>

The SADC's concerns against gendered leave provisions and discriminatory dismissals are replaced by concerns for the protection against reproductive risks and vulnerabilities of mothers and children.<sup>60</sup> Owing to the priority of addressing various other fundamental issues concerning social development, SADC regions often fail to comply with international standards relating to parental and paternity leave.<sup>61</sup> None of the countries in the SADC regions provides parental leave and only three of the fifteen member states offer some form of paternity leave.<sup>62</sup>

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<sup>55</sup> SADC Code (note 45 above) art 13.6; Olivier (note 42 above) 267.

<sup>56</sup> Smit (note 1 above) 22; Olivier (note 42 above) 240.

<sup>57</sup> Smit (note 1 above) 22.

<sup>58</sup> Dancaster & Cohen (note 4 above) 2487.

<sup>59</sup> *Ibid* 2488.

<sup>60</sup> Smit (note 1 above) 22; Olivier (note 2 above) 241; ILO (2014) *Maternity and Paternity at Work: Law and Practice across the World*, International Labour Organization, Geneva 118 <http://www.ilo.org/maternityprotection>, accessed on 20 January 2015.

<sup>61</sup> Smit (note 1 above) 16–18.

<sup>62</sup> *Ibid* 24–25.

Nevertheless, the maternity protection standards adopted by the SADC set up a framework for member states to adopt and implement provisions which provide protection and support for the reconciliation of work and care.

Although the Code is not binding, the Protocol and the Charter attempt to provide maternity protection in line with aspects established in standards of the ILO.<sup>63</sup> The SADC's minimum standards of protection are a good starting point for the development of social security within its target regions.<sup>64</sup> However, further initiatives must be taken to address the demands of work and care on employees within the SADC region.<sup>65</sup> Aspects of maternity protection which are lacking include: the duration of maternity leave; income protection over the maternity leave period; the allowance of antenatal and postnatal care; and the accommodation of pregnant or postnatal employees with care responsibilities in the workplace.<sup>66</sup> Binding minimum standards relating to paternity and parental leave must be adopted in the interests of encouraging the shared responsibility of childcare between father and mother.<sup>67</sup>

### 3.4 Standards of the European Union

The law of the EU is an international regional organisation which protects the rights of workers within the European Community. The EU is committed to the equal treatment of men and women in employment.<sup>68</sup> It is made up of 27 countries that operate in economic partnership.<sup>69</sup> Unlike the conventions of the ILO, EU legislation is binding on member states and enforced by the European Commission and the European Court of Justice (ECJ). Treaties are the primary sources of law of the EU.<sup>70</sup> EU legislation is made up of directives and regulations. Directives must be implemented as part of national law of member states.<sup>71</sup> The *Treaty of Amsterdam 1997* (ToA) gives effect to the rights of women and provides that the European Community should

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<sup>63</sup> Nyenti & Mpedi (note 4 above) 247–248; Olivier (note 2 above) 256.

<sup>64</sup> Nyenti & Mpedi (note 4 above) 261–263; Olivier (note 2 above) 255.

<sup>65</sup> Olivier (note 2 above), 256.

<sup>66</sup> *Ibid.*

<sup>67</sup> *Ibid.*; Dancaster & Cohen (note 4 above) 2488.

<sup>68</sup> TK Hervey *Justifications for Sex Discrimination in Employment* (1993) 39.

<sup>69</sup> EU *About the EU* 'The EU in Brief' [http://europa.eu/about-eu/basic-information/about/index\\_en.htm](http://europa.eu/about-eu/basic-information/about/index_en.htm), accessed on 20 October 2015.

<sup>70</sup> RW Painter & AEM Holmes *Cases and Materials on Employment Law* (2015) 34–38.

<sup>71</sup> *Ibid.* 41; Woolfrey (note 1 above) 715.

aim to eliminate inequalities and promote equality between men and women.<sup>72</sup> Article 137 of the ToA states that the European Community should support efforts of member states to promote equal opportunities for and equal treatment of men and women at work.<sup>73</sup>

The rights protected by the EU have been incorporated into the *Charter to the Fundamental Rights of the European Union* (the EU Charter).<sup>74</sup> The EU Charter became binding in 2008. Article 33 of the EU Charter states that in the interest of reconciling family and professional life, ‘everyone shall have the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child’.<sup>75</sup> Many of the standards of EU law are drawn from the ILO.<sup>76</sup> EU directives and decisions of the ECJ have played a large role in setting global trends for non-discrimination and gender equality in the workplace.<sup>77</sup>

### 3.4.1 Standards relating to maternity leave and protection

Standards calling for the maternity protection of pregnant workers are a recent development of the EU.<sup>78</sup> The 1986 *Equal Treatment in Self-Employment Schemes Directive* (86/613/EEC) (Equal Treatment Directive) was the first Directive to recognise the legal position of pregnant women in the workplace. However, the Equal Treatment Directive was limited as it afforded maternity protection only to self-employed women.<sup>79</sup> The *Protection of Pregnant Workers Directive* (92/85/EEC) (Pregnant Workers Directive) was adopted in 1992. The Directive was the first to formally introduce minimum standards to encourage improvements in workplace

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<sup>72</sup> Leon (note 7 above) 343; EC Landau & Y Beigbeder *From ILO Standards to EU Law: The case of equality between men and women at work* (2008) 46.

<sup>73</sup> R Blanpain *European Labour Law* (2008) 53.

<sup>74</sup> Charter of Fundamental Rights of the European Union [2012] OJ C326/391 (EU Charter); Landau & Beigbeder (note 72 above) 170.

<sup>75</sup> EU Charter (note 74 above) art 33(1) and (2); Leon (note 7 above) 345; C McGlynn ‘Work, Family and Parenthood: The European Union Agenda’ in J Conaghan & K Rittich (eds) *Labour Law, Work and Family* (2007) 217, 228.

<sup>76</sup> Landau & Beigbeder (note 72 above) 33–44; M Korda & F Pennings ‘The legal Character of International Social Security Standards’ (2008) 10(2) *European Journal of Social Security* 131, 135.

<sup>77</sup> Dancaster & Baird (note 26 above) 23.

<sup>78</sup> Guerrina (note 6 above) 55.

<sup>79</sup> Council Directive 86/613/EEC of 11 December 1986 on the Application of the Principle of Equal Treatment between Men and Women Engaged in an Activity, including Agriculture, in a Self-employed Capacity, and on the Protection of Self-employed Women during Pregnancy and Motherhood [1986] OJ L359/56.

safety and health for pregnant workers, or workers who have recently given birth.<sup>80</sup> The Preamble of the Pregnant Workers Directive recognises pregnant women as a ‘specific risk group’ which must be protected against the dangers which specifically affect them.<sup>81</sup> The Pregnant Workers Directive applies to pregnant workers, workers who have recently given birth, and workers who are breastfeeding and have informed their employers of their condition.<sup>82</sup> In terms of the Pregnant Workers Directive, pregnant workers are entitled to a continuous period of maternity leave of at least fourteen weeks before and/or after confinement. This includes a compulsory maternity leave period of two weeks before and/or after confinement.<sup>83</sup>

Pregnant workers are also entitled to time off for antenatal medical examinations, without loss of pay, if such examinations are to take place during working hours.<sup>84</sup> The Pregnant Workers Directive requires member states to maintain a payment and/or an entitlement to an adequate allowance for employees. It guarantees income at least equivalent to that which the employee would otherwise receive as payment in the event of a break in her activities on grounds connected with her state of health, subject to any ceiling laid down under national legislation. It is left to member states to determine any qualifying conditions attached to such benefits.<sup>85</sup>

#### **3.4.1.1 Standards relating to employment protection and non-discrimination**

The EU *Directive on Equal Treatment* (76/207/EEC) (Equal Treatment Directive) was adopted by the EU based on inspiration drawn from the ILO *Discrimination (Employment and Occupation) Convention, 1958 (No. 111)*.<sup>86</sup> The Equal Treatment Directive gives effect to the

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<sup>80</sup> Council Directive 92/85/EEC of 19 October 1992 on the Introduction of Measures to Encourage Improvements in the Safety and Health at Work of Pregnant Workers and Workers who have Recently Given Birth or are Breastfeeding (tenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC) [1992] OJ L348/1 (Pregnant Workers Directive); Landau & Beigbender (note 72 above) 138; Blanpain (note 73 above) 567; O Dupper ‘Maternity protection in South Africa: An international and comparative analysis (Part one)’ (2001) 3 *Stell LR* 421, 423–424.

<sup>81</sup> Blanpain (note 73 above) 567; M Leon ‘Parental, maternity and paternity leave: European legal constructions of unpaid care giving’ (2007) 58(3) *Northern Ireland Legal Quarterly* 343, 347.

<sup>82</sup> Pregnant Workers Directive (note 80 above) art 2; Leon (note 81 above) 349.

<sup>83</sup> Pregnant Workers Directive (note 80 above) art 8; McGlynn (note 75 above) 228.

<sup>84</sup> Pregnant Workers Directive (note 80 above) art 9; Dupper (note 80 above) 424; McGlynn (note 75 above) 228.

<sup>85</sup> Pregnant Workers Directive (note 80 above) art 11.

<sup>86</sup> International Labour Conference (42nd Session) Convention concerning Discrimination in respect of Employment and Occupation (Geneva, adopted 25 June 1958, entry into force 15 June 1960) (Discrimination (Employment & Occupation) Convention, 1958).

principle of equal treatment between men and women of the European Community.<sup>87</sup> Article 2(1) prohibits discrimination by stating that there should be no discrimination whatsoever on the grounds of sex [sic], either directly or indirectly, by reference to marital or family status. Article 2(3) elaborates that the Equal Treatment Directive should operate without prejudice to provisions concerning the protection of women, particularly regarding pregnancy and maternity.<sup>88</sup> These provisions form the basis of the protection of pregnant women against discrimination on the grounds of existing EU law.<sup>89</sup>

Article 5(1) states that the application of the principle of equal treatment with regard to working conditions, including those governing dismissal, means that men and women should be guaranteed the same conditions without discrimination on grounds of sex.<sup>90</sup> Article 5(1), together with article 2(1) and 2(3), set out that the dismissal of an employee as a result of her pregnancy constitutes direct discrimination on the grounds of sex.<sup>91</sup> Further protection against the dismissal of pregnant employees is set out in the Pregnant Workers Directive.<sup>92</sup>

Article 10 of the Pregnant Workers Directive provides a prohibition against the dismissal of employees during the entirety of their pregnancy, being ‘the period from the beginning of their pregnancy to the end of the maternity leave’.<sup>93</sup> However, employees may be dismissed in exceptional circumstances, and the employer must then cite duly substantiated grounds for the dismissal in writing.<sup>94</sup> The entitlement to dismiss a pregnant employee in ‘exceptional circumstances’ minimises the employment protection afforded to pregnant employees in terms of the directive. It is at least commendable that the provision goes on to place an obligation on member states to take appropriate measures to protect workers from unlawful dismissals.<sup>95</sup> This

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<sup>87</sup> Council Directive 76/207/EEC of 9 February 1976 on the Implementation of the Principle of Equal Treatment for Men and Women as regards Access to Employment, Vocational Training and Promotion, and Working Conditions [1976] OJ L039/40 (Equal Treatment Directive); Blanpain (note 73 above) 505–506; Painter & Holmes (note 70 above) 272.

<sup>88</sup> The Equal Treatment Directive (note 87 above) art 2; Blanpain (note 73 above) 505–506.

<sup>89</sup> Painter & Holmes (note 70 above) 273.

<sup>90</sup> Ibid 272–273; Equal Treatment Directive (note 87 above) art 2; Blanpain (note 73 above) 505–506.

<sup>91</sup> Equal Treatment Directive (note 87 above) art 5; Painter & Holmes (note 70 above) 273.

<sup>92</sup> Pregnant Workers Directive (note 80 above) art 10(1); RW Painter & AEM Holmes *Cases and Materials on Employment Law* (2015) 273.

<sup>93</sup> Pregnant Workers Directive (note 80 above) art 10(1).

<sup>94</sup> Ibid.

<sup>95</sup> Ibid 10(3); Blanpain (note 73 above) 567.

may result in member states taking better efforts in the prevention of dismissal for reasons of pregnancy.<sup>96</sup>

The employment protection afforded to pregnant employees, through the provisions of the Pregnant Workers Directive and the Equal Treatment Directive, was relied on in the case of *Handels- og Kontorfunktionærernes Forbund i Danmark, acting on behalf of Birthe Vibeke Hertz v Dansk Arbejdsgiverforening, acting on behalf of Aldi Marked K/S*.<sup>97</sup> The facts involved an employee who resumed her employment from maternity leave in late 1983 with no health problems. From June 1984, the employee was granted sick leave amounting to 100 working days. In June 1985, the employer sent written notice of dismissal to the employee on the basis of her periods of absence from work. The employer and employee agreed that the cause of the illness was related to her pregnancy. The case was taken to the ECJ for determination through a preliminary ruling.<sup>98</sup>

Through the interpretation of the Pregnant Workers Directive, read together with the Equal Treatment Directive, the ECJ found that the Equal Treatment Directive did not provide for the prohibition of dismissals arising from periods of absence as a result of illness from pregnancy.<sup>99</sup> The intention of the Equal Treatment Directive is to guarantee the specific rights of pregnant employees.<sup>100</sup> For instance, the pregnant woman must be afforded the right to maternity leave and as such, should be protected against dismissal because of absence while on maternity leave.<sup>101</sup> However, the court found that in instances where an employee is absent because of illness resulting from pregnancy, there is no reason to distinguish illness as a result of pregnancy from any other illness.<sup>102</sup> Therefore, while the dismissal of an employee on the basis of pregnancy constituted direct discrimination, the directives did not prohibit dismissals arising from periods of absence resulting from illness from pregnancy.<sup>103</sup>

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<sup>96</sup> Ibid.

<sup>97</sup> Case C-179-88 *Handels-og Kontorfunktionærernes Forbund i Danmark, acting on behalf of Birthe Vibeke Hertz v Dansk Arbejdsgiverforening, acting on behalf of Aldi Marked K/S* [1990] ECR I-3979.

<sup>98</sup> Ibid at par [2-4].

<sup>99</sup> Ibid at par [15].

<sup>100</sup> Ibid.

<sup>101</sup> Ibid.

<sup>102</sup> Ibid at par [16].

<sup>103</sup> Landau & Beigbeder (note 72 above) 144-145; Blanpain (note 73 above) 62.

The case of *Dekker v Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus*<sup>104</sup> dealt with the interpretation of the principle of equal treatment in the Equal Treatment Directive. The case involved a candidate who applied for a position of employment with full disclosure that she was three months' pregnant. The candidate was found to be the most suitable person for the position. However, she was refused the appointment. The reason for the refusal was that since the employee was pregnant and would require maternity leave, the employer would face adverse financial consequences by paying the employee benefits over her leave period.<sup>105</sup> The candidate contested the decision to dismiss her application for appointment.

The matter was referred to the ECJ for a preliminary hearing where the court would interpret the principle of equal treatment in the Equal Treatment Directive. The court found that *if the refusal of employment on account of the financial consequences of absence as a result of pregnancy had led to the discrimination, the principle reason for the discrimination was the employee's pregnancy.*<sup>106</sup> It was observed *that only women can be refused employment on grounds of pregnancy. Therefore, such a refusal constitutes direct discrimination on grounds of sex, and discrimination on the grounds of pregnancy amounts to direct discrimination.*<sup>107</sup>

The case of *Webb v EMO Air Cargo (UK) Ltd*<sup>108</sup> confirmed the principles set out in the case of *Dekker* that discrimination on the grounds of pregnancy amounts to direct discrimination.<sup>109</sup> The facts involved an employee who was placed in the position of a replacement for another employee who had gone on maternity leave. Two weeks into her employment as a replacement, the employee herself found she was pregnant. Upon informing her employer of the pregnancy, the employee was dismissed. The case was referred to the ECJ by the House of Lords.<sup>110</sup> With reliance on the Equal Treatment Directive, the ECJ found that pregnancy cannot be compared to

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<sup>104</sup> Case C-177/88 *Dekker v Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus* [1990] ECR I-3941.

<sup>105</sup> *Ibid* at par [2–3].

<sup>106</sup> *Ibid* at par [12].

<sup>107</sup> *Ibid* at par [17]; Landau & Beigbeder (note 72 above) 143–144; Hervey (note 68 above) 163; Painter & Holmes (note 70 above) 272; Leon (note 81 above) 345; OC Dupper 'Maternity' MP Olivier et al (eds) *Introduction to Social Security* (2004) 399, 401.

<sup>108</sup> Case C-32/93 *Webb v EMO Air Cargo (UK) Ltd* [1994] ECR I-3567; Dupper (note 107 above) 409.

<sup>109</sup> *Dekker* (note 104 above) at par [2–3]; 163; Painter & Holmes (note 70 above) 272.

<sup>110</sup> *Webb v EMO Air Cargo (UK) Ltd* [1992] 4 All ER 929.



a pathological condition which could warrant a dismissal in such circumstances. The court stated:

‘There can be no question of comparing the situation of a woman who finds herself incapable, by reason of pregnancy discovered very shortly after the conclusion of the employment contract, of performing the task for which she was recruited with that of a man similarly incapable for medical or other reasons’.<sup>111</sup>

Accordingly, the ECJ held and reaffirmed that the dismissal of the pregnant employee amounted to direct discrimination on the grounds of sex.<sup>112</sup>

The Equal Treatment Directive was amended by the *European Council Directive (2002/73/EC) (2002 Equal Treatment Directive)*,<sup>113</sup> and the subsequent *Directive of the European Parliament and of the Council (2006/54/EC) (2006 Equal Treatment Directive)*.<sup>114</sup> The Preamble gives recognition to the practice of the ECJ to acknowledge, in terms of the principle of equal treatment, the legitimate need of protecting a woman’s biological condition during and after pregnancy.<sup>115</sup> It notes that the ECJ has consistently ruled against any unfavourable treatment of women related to pregnancy or maternity as direct sex discrimination and has promoted the protection of the employment rights of women.<sup>116</sup> Article 7 of the 2002 Equal Treatment Directive provides that a woman on maternity leave should be entitled, after the end of her period of maternity leave, to return to her job or to an equivalent post, on terms and conditions which are no less favourable to her. The woman is entitled to benefit from any improvement in working conditions to which she would have been entitled during her absence.<sup>117</sup>

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<sup>111</sup> *Webb* 1994 (note 108 above) at par [24].

<sup>112</sup> Landau & Beigbeder (note 72 above) 145–148; Dupper (note 107 above) 409; Hervey (note 68 above) 161; Painter & Holmes (note 70 above) 270–271.

<sup>113</sup> Directive 2002/73/EC of the European Parliament and of the Council of 23 September 2002 amending Council Directive 76/207/EEC on the Implementation of the Principle of Equal Treatment for Men and Women as regards Access to Employment, Vocational Training and Promotion, and Working Condition [2002] OJ L269/15 (2002 Equal Treatment Directive).

<sup>114</sup> Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the Implementation of the Principle of Equal Opportunities and Equal Treatment of Men and Women in Matters of Employment and Occupation (recast) OJ L204/23 (2006 Equal Treatment Directive); Landau & Beigbeder (note 72 above) 138–140, Blanpain (note 73 above) 475.

<sup>115</sup> Landau & Beigbeder (note 72 above) 140.

<sup>116</sup> 2002 Equal Treatment Directive (note 113 above) par 12 of the Preamble.

<sup>117</sup> *Ibid* art 7.

The 2006 Equal Treatment Directive consolidates the Equal Treatment Directive and the 2002 Equal Treatment Directive.<sup>118</sup> The 2006 Equal Treatment Directive places a prohibition on discrimination and in addition to the previously mentioned provisions, it states that discrimination includes any less favourable treatment of a woman related to pregnancy or maternity leave within the meaning of the Pregnant Workers Directive.<sup>119</sup> The Preamble acknowledges the case law of the ECJ which has decided that the unfavourable treatment of a woman related to pregnancy or maternity constitutes direct discrimination on grounds of sex. The Preamble of the 2006 Equal Treatment Directive states that such treatment is an expressly covered directive.<sup>120</sup> Article 9 provides examples of discrimination and includes ‘suspending the retention or acquisition of rights during periods of maternity leave or leave for family reasons which are granted by law or agreement and are paid by the employer’.<sup>121</sup> Article 15 reiterates article 7 of the 2002 Equal Treatment Directive by stating that ‘a woman on maternity leave should be entitled, after the end of her period of maternity leave, to return to her job or to an equivalent post on terms and conditions which are no less favourable to her and to benefit from any improvement in working conditions to which she would have been entitled during her absence’.<sup>122</sup>

### ***3.4.1.2 Standards relating to maternity and surrogacy agreements***

In two decisions based on the provisions of the Pregnant Workers Directive, the ECJ had to determine whether, in terms of EU law, the intended mother of a child born out of surrogacy is entitled to maternity leave.<sup>123</sup> In the case of *CD v ST*,<sup>124</sup> the employee had entered into a surrogacy agreement in accordance with UK law and was expecting a newborn baby. At no time was the employee herself pregnant. The employer’s maternity leave and pay policy, and adoption leave and pay policy, were a reproduction of the UK statutory provisions. However, neither of

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<sup>118</sup> 2006 Equal Treatment Directive (note 114 above).

<sup>119</sup> Ibid art 2(2)(C); Landau & Beigbender (note 72 above) 141.

<sup>120</sup> 2006 Equal Treatment Directive (note 114 above) par 23.

<sup>121</sup> Ibid art 9(1)(g); Landau & Beigbender (note 72 above) 141.

<sup>122</sup> Landau & Beigbender (note 72 above) 142.

<sup>123</sup> Case 167/12 *CD v ST* [2014] ECR I-000; Case 363/12 *Z v A Government Department* [2014] ECR I-000; S Burri ‘Care in family relations: The case of surrogacy leave’ (2015) 17(2) *European Journal of Law Reform* 271.

<sup>124</sup> *CD v ST* (note 123 above).

the policies provided for leave in the case of surrogacy and at the time, there were no laws in the UK which provided leave from work for an employee expecting a baby through surrogacy.<sup>125</sup>

The employee applied for leave in terms of the employer's adoption policy. The employer informed the employee that the surrogacy arrangement could not fall within the ambit of the adoption policy as it did not meet the qualifying conditions attached to adoption.<sup>126</sup> The employee then made a formal request to the employer for surrogacy leave equivalent to the provision of adoption leave, excepting the requirement of an adoption certificate since she was not carrying out adoption proceedings.<sup>127</sup> The employer denied the request on the basis that the employee had no right to paid leave for surrogacy.<sup>128</sup>

The employee took the matter to the Employment Tribunal on the basis of discrimination, which was then referred to the ECJ for a preliminary hearing. The ECJ found, on an interpretation of the Pregnant Workers Directive and the 2006 Equal Treatment Directive,<sup>129</sup> that the provision of paid maternity leave will depend on whether the employee is breastfeeding or not.<sup>130</sup> This interpretation was based on the overall purpose of the Pregnant Workers Directive to protect the safety and health of pregnant workers and workers who had recently given birth or were breastfeeding.<sup>131</sup> It was found that the Pregnant Workers Directive presupposes that the worker entitled to such leave has been pregnant and has given birth to the child.<sup>132</sup>

It followed that in terms of the Pregnant Workers Directive, member states of the EU are not required to provide maternity leave to an employee who is to be the intended parent of a child born out of surrogacy.<sup>133</sup> However, provisions to address such instances of surrogacy may be adopted.<sup>134</sup> The court found further that an employer's refusal to provide maternity leave to a mother receiving a baby born out of surrogacy cannot amount to sex discrimination in terms of

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<sup>125</sup> *Ibid* at par [17–22].

<sup>126</sup> *Ibid* at par [21].

<sup>127</sup> *Ibid*.

<sup>128</sup> *Ibid*.

<sup>129</sup> Pregnant Workers Directive (note 80 above); 2006 Equal Treatment Directive (note 114 above).

<sup>130</sup> *CD v ST* (note 123 above) at par [3].

<sup>131</sup> *Ibid* at par [29].

<sup>132</sup> *Ibid* at par [27]; *Burri* (note 123 above) 277.

<sup>133</sup> *CD v ST* (note 123 above) at par [43].

<sup>134</sup> *Burri* (note 123 above) 277.

the 2006 Equal Treatment Directive. The mother has not been pregnant with the baby and therefore cannot be subjected to less favourable treatment related to pregnancy.<sup>135</sup>

Similarly, in the case of *Z v A Government Department*,<sup>136</sup> the employee decided to have a baby through surrogacy as she had no uterus and could not carry a baby herself.<sup>137</sup> The terms and conditions of the employee's employment included the right to maternity leave and adoption leave.<sup>138</sup> However, there was no express provision of leave for an employee following the birth of a child born out of surrogacy.<sup>139</sup> The employee was denied her application for adoption leave on the basis that she did not meet the qualifying conditions but was granted unpaid leave together with parental leave.<sup>140</sup> The employee claimed that she had been subjected to discrimination on the basis of gender, family status and disability.

A preliminary ruling of the ECJ was requested by the Irish Equality Tribunal in order to determine whether, in terms of the 2006 Equal Treatment Directive, the refusal to provide paid leave equivalent to maternity leave or adoption leave to a female employee who is to be the intended parent of a baby born by surrogacy constitutes discrimination on the grounds of sex.<sup>141</sup> The court found that neither direct nor indirect discrimination could be established since the female employee receiving the child was not placed at a disadvantage in comparison to a male employee.<sup>142</sup> Furthermore, it could not be established that there had been less favourable treatment of a woman related to pregnancy or maternity leave in terms of the Pregnant Workers Directive because the intended parent of the surrogate baby had not been pregnant with the baby.<sup>143</sup>

The court held that the refusal to provide the intended parent with paid leave equivalent to maternity leave does not constitute discrimination in terms of the 2006 Equal Treatment Directive. It was held that the decision to refuse adoption leave for the intended parent falls

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<sup>135</sup> *CD v ST* (note 123 above) at par [52–55].

<sup>136</sup> *Z v A Government Department* (note 123 above).

<sup>137</sup> *Ibid* at par [34–37].

<sup>138</sup> *Ibid* at par [38].

<sup>139</sup> *Ibid* at par [40].

<sup>140</sup> *Ibid* at par [41–43].

<sup>141</sup> *Ibid* at par [46].

<sup>142</sup> *Ibid* at par [52–54].

<sup>143</sup> *Ibid* at par [56–57].

outside the scope of the 2006 Equal Treatment Directive.<sup>144</sup> Member states are entitled to implement adoption leave provisions at their discretion.<sup>145</sup> Finally, the court held that there was no discrimination against the employee on the grounds of inability to have a child as the employee was still capable of having access to, participating in, or advancing in employment.<sup>146</sup>

In both instances, the ECJ held that under EU law, the intended mother of a child born out of surrogacy is entitled to maternity leave or adoption leave. The decisions of the ECJ have been criticised for failing to account for surrogacy in EU law.<sup>147</sup> The effect of the decisions is that the intended parent is denied maternity leave that is otherwise afforded to the biological or gestational mother of the child. This applies irrespective of whether or not the employee has legal responsibilities for the care of the child by virtue of a parental order.<sup>148</sup> By relying on the purpose of the Pregnant Workers Directive, to protect the health and safety of pregnant women as the reason for maternity leave, the court missed the opportunity to address the interests of childcare and family responsibilities that arise out of surrogacy agreements.<sup>149</sup> The court made no mention of the legal recognition of childcare attached to the intended parent once the surrogacy agreement was complete and the child was born.<sup>150</sup> There have been developments in the laws of the UK to the effect that an employee who has become a new parent through surrogacy is entitled to adoption leave and pay, provided that they have been granted a parental order or an adoption order after the birth of the child.<sup>151</sup> However, the laws of the EU continue to apply as set out in the cases of *CD v ST*<sup>152</sup> and *Z v A Government Department*.<sup>153</sup>

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<sup>144</sup> Ibid at par [63]; Burri (note 123 above) 278.

<sup>145</sup> *Z v A Government Department* (note 123 above) at par [63]; Burri (note 123 above) 278.

<sup>146</sup> *Z v A Government Department* (note 123 above) at par [81–82]; Burri (note 123 above) 278.

<sup>147</sup> Burri (note 123 above) 271; E Caracciolo di Torella & P Foubert 'Surrogacy, pregnancy and maternity rights: A missed opportunity for a more coherent regime of parental rights in the EU, University of Leicester School of Law Research Paper No. 15–20' (2015) *University of Leicester School of Law Research Paper Series 1*.

<sup>148</sup> Burri (note 123 above) 278; Caracciolo di Torella & Foubert (note 147 above) 2.

<sup>149</sup> Burri (note 123 above) 279; Caracciolo di Torella & Foubert (note 147 above) 11.

<sup>150</sup> Burri (note 123 above) 278.

<sup>151</sup> Children and Families Act 2014, c. 6 (U.K.), section 122; GOV.UK *Rights for Surrogate Mothers* <https://www.gov.uk/rights-for-surrogate-mothers>, accessed on 4 October 2016; Acas *Surrogacy – rights for intended parents* <http://www.acas.org.uk/surrogacy>, accessed on 4 October 2016.

<sup>152</sup> *CD v ST* (note 123 above).

<sup>153</sup> *Z v A Government Department* (note 123 above).

### 3.5 Standards relating to paternity, parental, and adoption leave

The EU *1996 Parental Leave Directive* (96/34/EC) (1996 Parental Leave Directive), established a Framework Agreement on parental leave rights.<sup>154</sup> The directive set out minimum requirements on parental leave.<sup>155</sup> The 1996 Parental Leave Directive was repealed by the Council Directive (2010/18/EU) (Parental Leave Directive), which implements the revised Framework Agreement on parental leave, entered into with European social partners.<sup>156</sup> The Parental Leave Directive retains the objective of the 1996 Parental Leave Directive which was aimed at reconciling work and time; and by recognising parental leave as a right distinct from maternity leave, it encourages men to assume an equal share of family responsibilities.<sup>157</sup>

According to the Parental Leave Directive, all workers are entitled to at least a period of four months of parental leave as an individual and non-transferable entitlement on the birth or adoption of a child.<sup>158</sup> The directive applies to all employees, men and women, who have an employment contract or employment relationship as defined by law or collective agreement or practices.<sup>159</sup> The parental leave may be awarded for the birth or adoption of a child, or for the care of a child until any given age up to eight years. The age limitation may be determined by the member state.<sup>160</sup>

Although the right is non-transferable in principle, member states could make the right transferable between parents. However, at least one of the four months should be provided on a non-transferable basis.<sup>161</sup> Consideration must be given to non-transferable rights to parental

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<sup>154</sup> Council Directive 96/34/EC of 3 June 1996 on the Framework Agreement on Parental Leave concluded by UNICE, CEEP and the ETUC [1996] OJ L145/4 (1996 Parental Leave Directive); Blanpain (note 73 above) 613; Painter & Holmes (note 70 above) 39.

<sup>155</sup> Guerrina (note 6 above) 57; Dancaster & Baird (note 26 above) 33; McGlynn (note 75 above) 225; L Dancaster 'State measures towards work-care integration in South Africa' in Z Mokomane *Work-Family Interface in Sub-Saharan Africa: Challenges and Responses* (2014) 177, 187.

<sup>156</sup> Council Directive 2010/18/EU of 8 March 2010 Implementing the Revised Framework Agreement on Parental Leave concluded by BUSINESSEUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC [2010] OJ L68/13 (Parental Leave Directive); O Golyner 'Family-friendly reform of employment law in the UK: An overstretched flexibility' (2015) 37(3) *Journal of Social Welfare and Family Law* 378, 380.

<sup>157</sup> 1996 Parental Leave Directive (note 154 above) art 3; Parental Leave Directive (note 154 above) Part 1, art 11–13; Guerrina (note 6 above) 57; Dancaster & Cohen (note 4 above) 2478.

<sup>158</sup> Parental Leave Directive (note 156 above) art 2.

<sup>159</sup> *Ibid* art 1(2).

<sup>160</sup> *Ibid* art 2(2); Dancaster (note 155 above) 187.

<sup>161</sup> Parental Leave Directive (note 156 above) art 2(2).

leave. Non-transferable rights to parental leave mean that the leave cannot be transferred from one parent to the other. If the father does not use his right to parental leave, it cannot be transferred to the other parent and will be forfeited. This mechanism is significant as it encourages fathers to use their parental leave and assists in achieving a balanced care-giving dynamic between parents.<sup>162</sup>

Certain rules and conditions related to the parental leave are left to the discretion of the laws and/or collective agreements of member states. For instance, the Parental Leave Directive provides that member states may decide whether the parental leave is granted on a full-time or part-time basis, or whether a period of work qualifications and/or length of service qualification is applicable (provided that the qualification does not exceed one year); and may set out the circumstances in which the employer may postpone the award of parental leave, with justifiable reasons for such decision.<sup>163</sup> Member states may also determine the notice period applicable for the leave, and should make provision for any special arrangements related to the parental leave to meet the needs of parents with children of disabilities and long-term mental illness.<sup>164</sup> With regard to adoption leave, article 4(1) provides that member states should assess the need for additional measures to address the specific needs of adoptive parents.<sup>165</sup>

Article 5(1) of the Parental Leave Directive states that the employee is given the right to return to the same job or an equivalent or similar job. Employees must be protected against less favourable treatment or dismissal on the grounds of an application for parental leave.<sup>166</sup> All matters relating to social security and income during parental leave are left for the determination of member states. Member states are encouraged to consider the influence of social security and income continuity in the take up of parental leave.<sup>167</sup>

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<sup>162</sup> Guerrina (note 6 above) 58; O Dupper 'Maternity protection in South Africa: An international and comparative analysis (Part Two)' (2002) *Stell LR* 83, 92; L Haas 'Parental leave and gender equality: Lessons from the European Union' (2003) 20(1) *Review of Policy Research* 89, 93.

<sup>163</sup> Parental Leave Directive (note 156 above) art 3(a)–(d).

<sup>164</sup> *Ibid* art 3(2)–(3).

<sup>165</sup> *Ibid* art 4.

<sup>166</sup> *Ibid* art 5(4).

<sup>167</sup> *Ibid* art 5(5); Dancaster & Cohen (note 4 above) 2478.

### 3.5.1 Paternity and adoption leave

The 2006 Equal Treatment Directive gives recognition to the paternity and adoption leave rights of employees.<sup>168</sup> Article 16 of the directive provides that member states which recognise paternity leave and/or adoption leave should take necessary measures to protect employees against dismissal resulting from the exercise of their rights to paternity and/or adoption leave. Furthermore, member states must ensure that the employees ‘return to their jobs or to an equivalent post on terms and conditions which are no less favourable to them, and to the benefit from any improvement in working conditions to which they would have been entitled during their absence’.<sup>169</sup>

According to article 26, the *Resolution of the Council and of the Ministers of Employment and Social Policy* of 29 June 2000 encouraged member states to consider examining whether their legal systems could be made to incorporate ‘an individual and non-transferable right to paternity leave’, which might be granted to all working men. The same arrangement was made with regard to adoption leave.<sup>170</sup> The 2006 Equal Treatment Directive promotes the adoption of paternity leave measures.<sup>171</sup> It provides that member states may determine whether or not to grant the right to paternity and/or adoption leave, as well as the conditions attached to the leave, other than the prohibition on dismissal and conditions of return to work.<sup>172</sup>

### 3.5.2 Standards relating to the promotion of flexible work

The *Part-time Work Directive* (97/81/EC) (the Part-time Work Directive) was adopted in acknowledgement to part-time workers and the promotion of a flexible labour market.<sup>173</sup> The Part-time Work Directive relates to forms of flexible work, and parties to the agreement agree to

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<sup>168</sup> Dancaster (note 155 above) 181.

<sup>169</sup> 2006 Equal Treatment Directive (note 114 above) art 16.

<sup>170</sup> *Ibid* art 27.

<sup>171</sup> McGlynn (note 75 above) 228.

<sup>172</sup> 2006 Equal Treatment Directive (note 114 above) art 27.

<sup>173</sup> Council Directive 97/81/EC of 15 December 1997 concerning the Framework Agreement on Part-time Work concluded by UNICE, CEEP and the ETUC – Annex : Framework agreement on part-time work [1998] OJ L14/9 (Part Time Workers Directive); Blanpain (note 73 above) 426; L Dancaster & T Cohen ‘Workers with family responsibilities: A comparative analysis to advocate for the legal right to request flexible working arrangements in South Africa’ (2010) 34(1) *SALJ* 34(1) 30, 35.



facilitate measures to reconcile the working and family life of employees.<sup>174</sup> The agreement defines a ‘part-time’ worker as ‘an employee whose normal hours of work, calculated on a weekly basis or on average over a period of employment of up to one year, are less than the normal hours of work of a comparable full-time worker’.<sup>175</sup> The Part-time Work Directive states that the purpose of the agreement is to prevent discrimination against part-time workers and contribute to the flexible organisation of working time so as to account for the needs of employers and workers.<sup>176</sup> In carrying out this purpose, the directive provides that opportunities must be made for workers to request transfers from full-time to part-time work that becomes available in the establishment; or to transfer from part-time to full-time work or to increase their working time if such opportunity becomes available; without the possibility of dismissal.<sup>177</sup> This directive was not intended to address the work–care conflict faced by employees but was adopted to create flexibility in the workplace, which indirectly assists to promote the reconciliation of work and care.<sup>178</sup>

### **3.5.3 Standards relating to health and safety of pregnant, postnatal, or breastfeeding employees**

The EU provides detailed protection for the health and safety of the pregnant or breastfeeding employee and her child.<sup>179</sup> The Pregnant Workers Directive provides minimum requirements for the health and safety of workers within the European Community.<sup>180</sup> The Directive states that sensitive risk groups must be protected against dangers which specifically affect them.<sup>181</sup> It encourages measures to be taken for the health and safety of pregnant workers at work, and specifies that pregnant workers and workers who have recently given birth or who are breastfeeding must be considered a specific risk group.<sup>182</sup>

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<sup>174</sup> Golyner (note 156 above) 380.

<sup>175</sup> Part Time Workers Directive (note 173 above) art 3; Landau & Beigbeder (note 72 above) 181; Blanpain (note 73 above) 427.

<sup>176</sup> Part Time Workers Directive (note 173 above) art 1; Landau & Beigbeder (note 72 above) 181; Blanpain (note 73 above) 426.

<sup>177</sup> Part Time Workers Directive (note 173 above) art 5(3); Dancaster & Cohen (note 173 above) 35.

<sup>178</sup> Dancaster & Cohen (note 173 above) 35; Golyner (note 156 above) 380.

<sup>179</sup> Landau & Beigbeder (note 72 above) 138; Pregnant Workers Directive (note 80 above).

<sup>180</sup> Blanpain (note 73 above) 627; Leon (note 81 above) 346.

<sup>181</sup> Pregnant Workers Directive (note 80 above) art 15.

<sup>182</sup> Blanpain (note 73 above) 567; Leon (note 81 above) 346.

The Pregnant Workers Directive acknowledges that some types of activities may pose a specific risk for pregnant workers, workers who have recently given birth, or workers who are breastfeeding, of exposure to dangerous agents, processes or working conditions.<sup>183</sup> The Pregnant Workers Directive makes provision for these risks to be assessed. If the result of the assessment reveals the existence of a risk to the safety or health of the female worker, provision must be made for such worker to be protected, either by temporarily adjusting the working conditions and/or the working hours of the worker concerned, or taking the necessary measures to move the worker concerned to another job.<sup>184</sup>

#### **3.5.4 Standards relating to breastfeeding at the workplace**

The Pregnant Workers Directive explicitly states that it applies to workers who are breastfeeding.<sup>185</sup> The directive states that ‘a worker who is breastfeeding’ is ‘a worker who is breastfeeding within the meaning of national legislation and/or national practice and who informs her employer of her condition, in accordance with that legislation and/or practice’. Article 5(1) of the Pregnant Workers Directive provides that should there be any risk to the health or safety of the breastfeeding woman, the employer should take the necessary measures to ensure that, by temporarily adjusting the working conditions and/or the working hours of the worker concerned, the exposure of that worker to such risks is avoided.<sup>186</sup> The Pregnant Workers Directive also names the agents and working conditions which would amount to a risk to the health or safety of the breastfeeding woman.<sup>187</sup>

#### **3.5.5 Standards relating to childcare arrangements (including leave for care emergencies)**

According to the Parental Leave Directive, workers may request leave on grounds of *force majeure* to attend to urgent family matters.<sup>188</sup> The leave may be requested in cases of sickness or accident, making the immediate presence of the worker within the family indispensable.<sup>189</sup> This

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<sup>183</sup> Landau & Beigbender (note 72 above) 138.

<sup>184</sup> Pregnant Workers Directive (note 80 above) arts 4, 5.

<sup>185</sup> Landau & Beigbender (note 72 above) 138; Blanpain (note 73 above) 567; Hervey (note 68 above) 166.

<sup>186</sup> Blanpain (note 73 above) 567.

<sup>187</sup> Landau & Beigbender (note 73 above) 139.

<sup>188</sup> Parental Leave Directive (note 156 above).

<sup>189</sup> *Ibid*; Dancaster & Baird (note 26 above) 29.

provision allows workers with care-giving responsibilities to take time off from work for family emergencies.<sup>190</sup> The directive does not set out the duration of the time off which may be granted, and does not specify whether the leave is paid or unpaid.<sup>191</sup>

The *Recommendation on Childcare* (92/241/EEC) (Recommendation on Childcare) was adopted to eliminate the obstacle to women's access to and full participation in the workplace by providing adequate childcare services.<sup>192</sup> The Recommendation on Childcare is non-binding. It states as its objective that 'it is recommended that member states should take and/or progressively encourage initiatives to enable women and men to reconcile their occupational, family and upbringing responsibilities arising from the care of children'.<sup>193</sup> It provides that childcare initiatives involve the provision of child-care services while parents are working, following a course of education or training for employment, or seeking a job or a course of education or training for employment; special leave for employed parents with responsibility for the care and upbringing of children; the environment, structure and organisation of work in order to make them responsive to the needs of workers with children; and the sharing of occupational, family and upbringing responsibilities arising from the care of children between women and men.<sup>194</sup>

### 3.5.6 Analysis of EU standards

The international obligations governing reconciliation of work and care imposed by the EU are broad and inclusive. The Pregnant Workers Directive provides a framework consisting of minimum standards for the provision of maternity protection to employees.<sup>195</sup> The scope of the Pregnant Workers Directive is wide as it applies to all pregnant workers, workers who have recently given birth, and workers who are breastfeeding and have informed their employers of their condition. However, without a standard definition of 'worker' which would apply

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<sup>190</sup> Dancaster & Baird (note 26 above) 29.

<sup>191</sup> *Ibid.*

<sup>192</sup> Council Recommendation 92/241/EEC of 31 March 1992 on Childcare [1992] OJ L123/16 (Recommendation on Childcare); Blanpain (note 73 above) 466.

<sup>193</sup> Recommendation on Childcare (note 192 above) art 2.

<sup>194</sup> *Ibid.*; Blanpain (note 73 above) 466–467.

<sup>195</sup> Leon (note 81 above) 350.

throughout the European Community, the provisions of the Directive, even though adopted within national legislation, may exclude atypical employees.<sup>196</sup>

It is apparent that maternity protection is not the only issue on the EU agenda for the reconciliation of work and care. With existing standards providing parental leave, and the recognition of paternity leave and adoption leave, the EU shows its commitment to shared parental responsibilities and equality in the workplace.<sup>197</sup> The Parental Leave Directive recognises measures that need to be implemented in support of parental leave by presenting a framework of leave which applies to both mothers and fathers.<sup>198</sup> In particular, it expresses concern that while the previous framework agreements have brought about positive change, certain elements had to be adapted or revised to achieve its aims better.<sup>199</sup> The Pregnant Workers Directive also raises recognition for the increasing diversity of family structures.<sup>200</sup>

In addressing the practical implementation of parental leave, the Parental Leave Directive identifies non-transferable rights to parental leave as an incentive for fathers to apply for leave; and the need to account for the special needs of children with disabilities and illnesses; as well as social security and income replacements which would encourage taking parental leave, especially by fathers.<sup>201</sup> However, the Parental Leave Directive prescribes unpaid parental leave.<sup>202</sup> The omission of paid parental leave, together with the omission to prescribe minimum standards of paternity leave, reinforce the gendered assumption that women are the principal carers and thus are entitled to paid maternity leave.<sup>203</sup>

The Directive is limited when compared to its commitment towards maternity protection.<sup>204</sup> The Pregnant Workers Directive sets out binding minimum standards, whereas the Parental Leave Directive sets out measures which may be implemented at the discretion of member states.<sup>205</sup> Because of the gender-specific nature of maternity leave, the failure to commit to obligatory

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<sup>196</sup> Hervey (note 68 above) 166.

<sup>197</sup> Dancaster & Cohen (note 4 above) 2477.

<sup>198</sup> McGlynn (note 75 above) 227.

<sup>199</sup> Parental Leave Directive (note 156 above) art 10.

<sup>200</sup> *Ibid* art 11.

<sup>201</sup> *Ibid* arts 16, 17, 20.

<sup>202</sup> McGlynn (note 75 above) 227.

<sup>203</sup> *Ibid* 228.

<sup>204</sup> Leon (note 81 above) 350.

<sup>205</sup> *Ibid* 351.

parental leave measures may be construed as strengthening the stereotype that women are the primary caregivers, while their capacity as employees is a secondary function.<sup>206</sup> Ultimately, EU legislation has been effective in promoting national policy and legislative developments across its member states. This is due to the binding nature of EU directives.<sup>207</sup>

### 3.6 Analysis of regional labour standards

The Pregnant Workers Directive sets out similar standards to those of the ILO. The Pregnant Workers Directive provides for the same duration of maternity leave, together with a compulsory period of leave.<sup>208</sup> However, a major departure from the ILO standards on maternity protection is that the Pregnant Workers Directive does not prescribe a specified amount of cash benefits which should be paid to the employee over the maternity leave, nor does it set out eligibility requirements for cash benefits during maternity leave.

According to the ILO's *Maternity Protection Convention, 1952* and the *Maternity Protection Convention, 2000*, a woman on maternity leave is entitled to cash benefits in the amount of two-thirds of her previous earnings. This amounts to 66 per cent of her previous earnings. This amount is also prescribed in the SADC's Code.<sup>209</sup> The Pregnant Workers Directive guarantees income at least equivalent to that which the employee concerned would otherwise receive as payment and provides that member states may determine the eligibility of such benefits.<sup>210</sup>

The EU sets out the same standards of employment protection as prescribed by the ILO.<sup>211</sup> However, the provisions of the Pregnant Workers Directive alone are less extensive.<sup>212</sup> Therefore, a claim of unfair dismissal based on pregnancy requires reliance on the 2006 Equal Treatment Directive.<sup>213</sup> The limited inclusion of employment protection standards in the

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<sup>206</sup> *Ibid.*

<sup>207</sup> A Aybars 'Work-life balance in the EU and leave arrangements across welfare regimes' (2007) 38(6) *Industrial Relations Journal* 569, 587.

<sup>208</sup> Pregnant Workers Directive (note 80 above) art 8.

<sup>209</sup> SADC Code (note 45 above) art 8; Olivier, Dupper & Govindjee (note 52 above) 406.

<sup>210</sup> Pregnant Workers Directive (note 80 above) art 11.

<sup>211</sup> 2006 Equal Treatment Directive (note 114 above); Landau & Beigbeder (note 72 above) 141.

<sup>212</sup> Pregnant Workers Directive (note 80 above).

<sup>213</sup> 2006 Equal Treatment Directive (note 114 above).

Pregnant Workers Directive has required reliance on interpretation from the ECJ regarding unfair dismissals on the grounds of pregnancy.<sup>214</sup>

The AU, with its strong commitment towards gender equality throughout Africa, aims for the accomplishment of the elimination of all discriminatory practices against women.<sup>215</sup> Although the SADC Code is not binding, it states that measures must be taken to ensure that women are not discriminated against or dismissed on grounds of maternity.<sup>216</sup> Ultimately, the primary international obligation applicable to the prohibition on discrimination on grounds of pregnancy may be found in the CEDAW.<sup>217</sup> Article 11(2) of the CEDAW specifically states that state parties must take measures to prevent the discrimination against women on the grounds of maternity and to ensure their effective right to work.<sup>218</sup> These measures include the prohibition against dismissals on the grounds of pregnancy or maternity leave.<sup>219</sup>

The ILO and the EU have incorporated standards which govern parental leave.<sup>220</sup> The ILO *Family Responsibilities Recommendation, 1981* and the *Maternity Protection Recommendation, 2000* acknowledge the right to paternity leave as an essential aspect of promoting shared parental responsibilities. Similarly, the right to adoption leave is recognised through the *Maternity Protection Recommendation, 2000*. The *Family Responsibilities Convention, 1981* gave rise to the appreciation of shared parental responsibilities between women and men employees.<sup>221</sup> This appreciation was adopted and developed by the EU in the *1996 Parental Leave Directive* which provides parental leave with employment protection rights attached to the parental leave.<sup>222</sup> In provisions similar to the ILO, the EU recognises the need to provide paternity leave and adoption leave but has not adopted any minimum standards to this effect.<sup>223</sup> Therefore, neither organisation prescribes minimum standards relating to paternity leave.<sup>224</sup>

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<sup>214</sup> *Handels- og* (note 97 above); *Dekker* (note 104 above); *Webb* 1994 (note 108 above).

<sup>215</sup> Samb (note 9 above) 74.

<sup>216</sup> Article 8 of the Code on Social Security in the SADC.

<sup>217</sup> Convention on the Elimination of all Forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW).

<sup>218</sup> *Ibid* art 11(2).

<sup>219</sup> *Ibid* art 11(2)(a).

<sup>220</sup> *Dancaster & Cohen* (note 4 above) 2477.

<sup>221</sup> *Landau & Beigbeder* (note 72 above) 168.

<sup>222</sup> *Ibid* 172.

<sup>223</sup> 2006 Equal Treatment Directive (note 114 above) art 16; *McGlynn* (note 75 above) 228.

<sup>224</sup> *Dancaster & Cohen* (note 4 above) 2477.

The SADC does not make provision for parental leave. This corresponds with the practical coverage of SADC standards which reflects that none of the countries within the SADC region provides parental leave.<sup>225</sup> Parental leave measures would be an effective mechanism for enforcing shared childcare responsibilities within a household.<sup>226</sup> The SADC standards are also silent on issues of duration of leave, and any cash benefits that should be applicable.<sup>227</sup> The provisions of the AU, and particularly the African Charter, do not elaborate on socio-economic rights to the extent of the SADC. The approach of the African Charter in this regard has been described as ‘unique’ because of its emphasis on family and community.<sup>228</sup> Considering that the regions of the SADC and the AU are some of the poorest of regions in the world, these organisations must make a committed effort to providing social security measures.<sup>229</sup>

All international and regional organisations discussed in this thesis are committed to the protection of the health and safety of pregnant and breastfeeding employees. However, the extensive provisions of the ILO and the EU may be contrasted with the limited measures adopted by the AU and the SADC. Although the SADC Code provides that member states should also ensure that working conditions and environments are appropriate for pregnant and breastfeeding mothers, the provision is non-binding.<sup>230</sup> However, as a result of the high prevalence of HIV/Aids within the AU and SADC regions, these organisations have adopted measures for the overall protection of the health of society, and the support of those affected by HIV/Aids.<sup>231</sup>

The ILO’s *Family Responsibilities Convention, 1981* and the EU’s *1996 Parental Leave Directive*, together with the Recommendation on Childcare, place great emphasis on childcare services and facilities for working parents.<sup>232</sup> The Recommendation on Childcare, although non-binding, has been acknowledged as ‘a symbolic achievement’ in the reconciliation of work and

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<sup>225</sup> Ibid 2486.

<sup>226</sup> Ibid 2488; Olivier (note 2 above) 256.

<sup>227</sup> Olivier (note 2 above) 256.

<sup>228</sup> Jansen van Rensburg & Olivier (note 12 above) 633–634.

<sup>229</sup> Olivier & Kalula (note 4 above) 664; Olivier (note 2 above) 239.

<sup>230</sup> SADC Code (note 45 above) art 8; Dupper & Govindjee (note 52 above) 406.

<sup>231</sup> African Charter (note 12 above) art 18(1).

<sup>232</sup> Landau & Beigbeder (note 72 above) 168–169.

care.<sup>233</sup> The consolidation of paid parental leave with subsidised childcare facilitates a change in the gendered assumptions attached to the division of care-giving responsibilities. It shifts the responsibility of care from the mother alone onto both parents, and places a duty on the government and employers to assist parents in this regard.<sup>234</sup>

The AU's Women's Protocol and the SADC's Charter, Protocol and Code aim to promote the shared responsibility of care between parents in the interests of easing the burden of care placed on women as well as the promotion of fatherhood. The AU does place an overall emphasis on family.<sup>235</sup> However, the provisions lack the clear promotion of childcare facilities in the workplace and place no obligations on governments or employers to adopt such services, whereas the UNCRC and the AU's ACRWC place positive duties on member states to adopt childcare services and facilities to provide assistance to working parents with family responsibilities.<sup>236</sup> Flexible work arrangements also appear to be more of a priority for the EU than any other international or regional organisation.<sup>237</sup> The EU acknowledges that providing flexibility in the workplace can increase the labour participation of women and will encourage women workers with family responsibilities to remain in the labour force while providing them with the means to manage their work and care-giving tasks.<sup>238</sup>

### 3.7 Conclusion

The commitment of the EU to the reconciliation of work and care is well reflected through its many directives. The provisions of the directives aim for the gender-neutral regulation of care-giving responsibilities.<sup>239</sup> However, while it attempts to promote gender equality in the workplace, the provisions which address the work–care conflict fail to redress the gendered

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<sup>233</sup> McGlynn (note 75 above) 225.

<sup>234</sup> Haas (note 162 above) 90.

<sup>235</sup> Jansen van Rensburg & Olivier (note 12 above) 633–634.

<sup>236</sup> Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (UNCRC) art 18(3); African Charter (note 12 above) art 20(2)(c); BD Memzur 'The African Children's Charter versus the UN Convention on the Rights of the Child: A zero-sum game?' (2008) 23 *SA Publiekreg/Public Law* 1, 26.

<sup>237</sup> Dancaster & Cohen (note 173 above) 35.

<sup>238</sup> *Ibid.*

<sup>239</sup> McGlynn (note 75 above) 225.



preference of motherhood over fatherhood.<sup>240</sup> The EU commits itself to maternity protection but does not fully engage in a commitment towards paternity leave and parental leave.<sup>241</sup>

The CEDAW and the AU have both adopted limited standards relating to the reconciliation of work and care.<sup>242</sup> The provisions of the CEDAW and the AU are rather directed towards the prevention of discrimination and the equal treatment of men and women in the workplace.<sup>243</sup> As such, these organisations address the reconciliation of work and care through measures which aim for gender equality in the workplace. The provisions of the SADC incorporate essential aspects of work–care reconciliation.<sup>244</sup> However, these provisions are merely a framework and need elaboration.<sup>245</sup> It is clear that the AU and the SADC fall short of the minimum standards adopted by the EU.

In light of the socio-economic and political factors prevalent in AU and SADC regions, the minimum standards must be developed to assist in the reconciliation of work and care for working parents with young children.<sup>246</sup> The conflict between work and family responsibilities remain an obstacle to the fully integrated labour-force participation of women. Measures must be taken to eliminate discrimination against women on the basis of family responsibilities, and to support a work–life balance. Regional standards are effective in identifying governmental trends and patterns for the adoption of laws which promote the reconciliation of work and care.<sup>247</sup> However, the reconciliation of work and care will be achieved only through a clear commitment by the government to improve the rights of working parents with young children.<sup>248</sup>

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<sup>240</sup> Ibid 236.

<sup>241</sup> Ibid.

<sup>242</sup> Dancaster & Cohen (note 4 above) 2478.

<sup>243</sup> Dancaster & Baird (note 26 above) 26; Cohen (note 26 above) 19.

<sup>244</sup> Smit (note 1 above) 21.

<sup>245</sup> Nyenti & Mpedi (note 4 above) 273; M Olivier 'Extension of Labour Law and Social Security Protection to the Informal Sector: Developing Country Perspectives, with Specific Reference to Southern Africa' in R Blanpain (ed.) *The Modernization of Labour Law and Industrial Relations in a Comparative Perspective* (2009) 241, 256.

<sup>246</sup> Olivier (note 245 above) 256; Smit (note 1 above) 32; Cohen (note 26 above) 31.

<sup>247</sup> Smit (note 1 above) 32.

<sup>248</sup> Ibid; Cohen (note 26 above) 34.

## CHAPTER FOUR

### SOUTH AFRICAN LABOUR LAWS GOVERNING THE RECONCILIATION BETWEEN WORK AND CARE

#### 4.1 Introduction

Issues arising out of South Africa's socio-economic and political climate provide justifications for the argument for more effective legislative intervention to regulate the reconciliation of work and care.<sup>1</sup> Since South Africa is a developing country, it is important to enact effective socio-economic policies. Policies should reflect the roles and contributions of 'government, households and individuals, as well as those of the private sector' in meeting social and economic needs.<sup>2</sup> One of the areas to which policy must be targeted is the advancement of gender equality in the link between care-giving responsibilities and equality in the workplace, known as the reconciliation of work and care.<sup>3</sup> Policy in South Africa should provide enough social support so as to ensure the subsidisation of childbirth and childcare needs of employees in both formal and informal employment.<sup>4</sup>

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<sup>1</sup> L Dancaaster & M Baird 'Workers with care responsibilities: Is work-family integration adequately addressed in South African labour law?' (2008) 29 *ILJ* 25; L Dancaaster & T Cohen 'Workers with family responsibilities: a comparative analysis to advocate for the legal right to request flexible working arrangements in South Africa' (2010) 34(1) *SALJ* 30, 31–32.

<sup>2</sup> GCZ Mhone 'The Socio-economic Context and Aspects of Social Security Policy in South Africa' in MP Olivier et al (eds) *Introduction to Social Security* (2004), 1, 8–9; J Fudge 'A New Gender Contract? Work/life Balance and Working-time Flexibility' in J Conaghan & K Rittich (eds) *Labour Law, Work and Family* (2007) 261, 264–265; CD Field, JJ Bagraim & A Rycroft 'Parental leave rights: Have fathers been forgotten and does it matter?' (2012) 36(2) *SALR* 30, 30; E Strydom 'Introduction to Social Security Law' in EML Strydom et al (eds) *Essential Social Security Law* (2006) 1, 4–6; LG Mpedi 'The Evolving Relationship between Labour Law and Social Security' (2012) *Acta Juridica : Reinventing Labour Law: Reflecting on the First 15 Years of the Labour Relations Act and Future Challenges* 270, 270–271.

<sup>3</sup> ILO (2014) *Maternity and Paternity at Work: Law and Practice across the World*, International Labour Organisation, Geneva 52 <http://www.ilo.org/maternityprotection>, accessed on 20 January 2015; E Huysamen 'Women and Maternity: Is there Truly Equality in the Workplace between Men and Women, and between Women Themselves?' in K Malherbe & J Sloth-Nielsen (eds) *Labour Law into the Future: Essays in honour of D'Arcy du Toit* (2012) 46, 48; R Rapoport et al Pruitt *Beyond Work-family Balance: Advancing Gender Equity and Workplace Performance* (2002) 25–29; KL Adams 'The Family Responsibilities Convention reconsidered: The work-family intersection in international law thirty years on' (2013–2014) 22 *Cardozo Journal of International & Comparative Law* 201, 204, 208; B Clarke & B Goldblatt 'Gender and Family Law' in E Bonthuys & C Albertyn (eds) *Gender, Law & Justice* (2007) 195, 202; J Conaghan 'Work, Family and the Discipline of Labour Law' in J Conaghan & K Rittich (eds) *Labour Law, Work and Family* (2007) 19, 30.

<sup>4</sup> Mhone (note 2 above) 8–9.

Apart from the provisions of the Constitution, the labour law statutes of South Africa which promote work–family integration in South Africa are the BCEA, and the Codes of Good Practice; the LRA; and the EEA. The UIA (as amended by the *Unemployment Insurance Amendment Act* 10 of 2016), is also a key statute according to which maternity is a form of social protection.<sup>5</sup>

The Constitution does not expressly mention maternity protection but it does make provision for the protection against inequality resulting from pregnancy. Section 9 provides for the right to equal protection and benefit of the law.<sup>6</sup> Section 9(3) prohibits the state from unfairly discriminating, directly or indirectly, against anyone on one or more grounds, ‘including race, gender, sex, *pregnancy*, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth’.

The right to bodily integrity set out in section 12(2) of the Constitution extends to the right to make decisions concerning reproduction.<sup>7</sup> This protects the decisions of women to start or expand their family through reproduction. According to section 23(1) of the Constitution, everyone has the right to fair labour practices.<sup>8</sup> In recognition of the importance of childcare, section 28(1)(b) states that every child has the right to family care or parental care, or to appropriate alternative care when removed from the family environment.

Both the BCEA and the LRA state that their purpose is to give effect to the right to fair labour practices set out in section 23 of the Constitution, as well as South Africa’s obligations as a member of the ILO.<sup>9</sup> The BCEA was enacted in South Africa with the aim of advancing

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<sup>5</sup> A Behari ‘Daddy’s home: The promotion of paternity leave and family responsibilities in the South African workplace’ (2016) 37(2) *Obiter* 346, 348.

<sup>6</sup> Huysamen (note 3 above) 57; O Dupper ‘Maternity protection in South Africa: An international and comparative analysis (Part Two)’ (2002) *Stell LR* 83, 84.

<sup>7</sup> Section 12(2)(a) of the Constitution of the Republic of South Africa 1996 (Constitution).

<sup>8</sup> R Boswell & B Boswell ‘Motherhood deterred: Access to maternity benefits in South Africa’ (2009) 23(82) *Agenda* 76, 81; Grogan *Workplace Law* (2009) 5; J Barnard ‘Broadening the rights of women in the workplace: Automatically unfair dismissals and pregnancy – De Beer v SA Export Connection t/a Global Paws 2008 (29) ILJ 347 (LC)’ (2009) 72 *THRHR* 511, 511.

<sup>9</sup> Section 1(a) and (b) of the Labour Relations Act 66 of 1995 (LRA); s 2(a) and (b) of the the Basic Conditions of Employment Act 75 of 1997 (BCEA); s 233 of the Constitution; N Rubin ‘International Labour law and the law of the new South Africa’ (1998) 115 *SALJ* 685, 695; T Cohen ‘The efficacy of international standards in countering gender

economic development and social justice.<sup>10</sup> It sets out the minimum terms and conditions of employment, and regulates maternity. Therefore, the BCEA should address every element necessary for the achievement of the reconciliation of work and care.<sup>11</sup>

Despite the protection offered by the BCEA, issues surrounding work–care reconciliation in South African law involve poor coverage of maternity protection; unpaid maternity leave; insufficient employment security for pregnant employees; and inadequate leave provisions for fathers of newborn children.<sup>12</sup> This chapter examines the scope and coverage of South African labour laws which provide employment rights and protections to working parents who require time off to attend to their care-giving responsibilities. The identified employment rights and protections will be analysed within their South African legal framework.

## 4.2 The scope and coverage of leave entitlements

South African legislation provides maternity protection to employees within the definition of ‘employee’ in each applicable labour law statute. Certain groups of workers may be excluded from the rights to maternity protection if they do not fall within the definition of ‘employee’.<sup>13</sup> For instance, the BCEA provides for maternity leave and family responsibility leave to all ‘employees’ with the exception of those employees who work less than 24 hours a month for an employer.<sup>14</sup> The BCEA and the LRA both define an ‘employee’ as ‘any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and any other person who in any manner assists in carrying

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inequalities in the workplace’ (2012) 33 *ILJ* 19; L Jansen van Rensburg & MP Olivier ‘International Law and Supranational Law’ in MP Olivier et al (eds) *Introduction to Social Security* (2004) 619, 621.

<sup>10</sup> Section 2 of the BCEA.

<sup>11</sup> MI Van Jaarsveld ‘Parental leave: For the sake of employees and their children: A comparative study’ (2002) 14 *SA Merc LJ* 399, 400.

<sup>12</sup> E Bonthuys ‘Gender and Work’ in E Bonthuys & C Albertyn (eds) *Gender, Law & Justice* (2007) 256, 272; Dancaster & Cohen (note 1 above) 33, 34; Huysamen (note 3 above) 46–75; Dancaster & Baird (note 1 above) 42; Field, Bagraim & Rycroft (note 2 above) 35; Boswell & Boswell (note 8 above) 78; O Dupper ‘Maternity Protection’ in EML Strydom et al (eds) *Essential Social Security Law* (2006) 155, 157; M Olivier, O Dupper & A Govindjee ‘Redesigning the South African Unemployment Insurance Fund: Selected key policy and legal perspectives’ (2011) 22 *Stell LR* 396, 406; O Dupper, M Olivier & A Govindjee ‘Extending coverage of the Unemployment Insurance-system in South Africa’ (2010) 21 *Stell LR* 438, 447; O Dupper ‘Maternity’ in MP Olivier, N Smit, ER Kalula *Social Security: A Legal Analysis* (2003) 409.

<sup>13</sup> ET van Kerken & MP Olivier ‘Unemployment Insurance’ in MP Olivier et al in *Introduction to Social Security* 2004 415, 436.

<sup>14</sup> Section 19(1) of the BCEA.

on or conducting the business of an employer'.<sup>15</sup> The protection of the LRA also extends to all 'employees'.<sup>16</sup> Therefore, every employee who is afforded maternity leave in the BCEA is also afforded employment protection against dismissal through the LRA. The definition of 'employee' in the LRA and BCEA is wider than previously legislated definitions of 'employee', and includes casual, part-time, temporary, and seasonal employees.<sup>17</sup>

South Africa provides no statutory right to paternity leave or parental leave.<sup>18</sup> The BCEA provides three days of family responsibility leave which can be used by both women and men employees.<sup>19</sup> This means that fathers of newborn babies must rely on the provision of three days of family responsibility leave if they wish to take time off from work after the birth of a new baby.<sup>20</sup> Alternatively, fathers will have to resort to applying for annual leave upon the birth of a newborn.<sup>21</sup> The exclusion of the legislative right of fathers to take leave to care for their babies reinforces the stereotype that women are the primary caregivers within a household and fails to recognise the responsibilities of men as fathers.<sup>22</sup> The LRA and the EEA protect employees against discrimination on the basis of family responsibilities.<sup>23</sup> However, these provisions are poorly implemented and rarely relied upon, leading to the ineffective protection against discrimination on the basis of family responsibilities.<sup>24</sup> As such, family responsibility leave is a poor response to the needs of employees with family responsibilities.<sup>25</sup>

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<sup>15</sup> Ibid s 1(a) and (b); s 213 of the LRA. Van Kerken & Olivier (note 13 above) 436.

<sup>16</sup> Grogan (note 8 above) 16.

<sup>17</sup> Bonthuys (note 12 above) 255, 271; MP Olivier & ER Kalula 'Scope of Coverage' in MP Olivier et al (eds) *Introduction to Social Security* (2004) 123, 132.

<sup>18</sup> Behari (note 5 above) 348.

<sup>19</sup> Grogan *Workplace Law* (2014) 66; Field, Bagraim & Rycroft (note 2 above) 31.

<sup>20</sup> Dancaster & Cohen (note 1 above) 33; Behari (note 5 above) 349.

<sup>21</sup> Huysamen (note 3 above) 73.

<sup>22</sup> Field, Bagraim & Rycroft (note 2 above) 35; Rapoport et al (note 3 above) 25–29; Adams (note 3 above) 208; Conaghan (note 3 above) 30; Behari (note 5 above) 348; B Clarke & B Goldblatt 'Gender and Family Law' in E Bonthuys & C Albertyn (eds.) *Gender, Law & Justice* (2007) 195, 202.

<sup>23</sup> Section 187(1)(f) of the LRA and s 6(1) of the Employment Equity Act 55 of 1998 (EEA).

<sup>24</sup> L Dancaster & T Cohen 'Family responsibility discrimination litigation -a non-starter?' (2009) 2 *Stell LR* 221, 238.

<sup>25</sup> Ibid 239.

### 4.3 Maternity leave

South Africa provides the longest duration of maternity leave in Africa.<sup>26</sup> According to South African labour law, a pregnant employee is entitled to four consecutive months' unpaid maternity leave, afforded by section 25 of the BCEA.<sup>27</sup> The leave can commence at any time from four weeks before the expected date of delivery or from a date certified by a medical practitioner or midwife.<sup>28</sup> The employee is prohibited from working for six weeks after the birth of the child unless a medical practitioner or midwife certifies that it is safe for her to do so.<sup>29</sup> This provision applies irrespective of whether or not the child is born alive.<sup>30</sup> The employee, if literate, must inform the employer in writing of the dates on which she intends to begin her maternity leave and return to work after her maternity leave.<sup>31</sup> The notifications of the intention to begin maternity leave and return to work must be given within four weeks of the date that the employee intends to commence maternity leave or, if it is not reasonably practicable to do so, as soon as is reasonably practicable.<sup>32</sup>

According to section 49(1) of the BCEA, no collective agreement may reduce an employee's right to maternity leave.<sup>33</sup> This ensures that employers adhere to the maternity leave provisions of the BCEA and prevents instances of discrimination on the basis of maternity despite legislated leave provisions. Collective agreements often offer the same terms as the BCEA or more beneficial terms of maternity protection.<sup>34</sup> While trade unions may offer generous terms on

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<sup>26</sup> ILO Maternity & Paternity at Work (note 3 above) 10.

<sup>27</sup> Section 25(1) of the BCEA. Four months of maternity leave is equivalent to 16 weeks. The previous Basic Condition of Employment Act 3 of 1983 provided 12 weeks of maternity leave – four weeks of prenatal leave and eight weeks of postnatal leave. See Grogan (note 19 above) 70; Bonthuys (note 12 above) 271; Dancaster & Cohen (note 1 above) 33; Huysamen (note 3 above) 53; L Dancaster 'State Measures towards Work-care Integration in South Africa' in Z Mokomane *Work-Family Interface in Sub-Saharan Africa: Challenges and Responses* (2014) 177, 179.

<sup>28</sup> Section 25(2)(a) and (b) of the BCEA.

<sup>29</sup> Section 25(3) of the BCEA.

<sup>30</sup> Section 25(4) of the BCEA provides that '[a]n employee who has a miscarriage during the third trimester of pregnancy or bears a stillborn child is entitled to maternity leave for six weeks after the miscarriage or stillbirth, whether or not the employee had commenced maternity leave at the time of the miscarriage or stillbirth'.

<sup>31</sup> Section 25(5)(a) and (b) of the BCEA.

<sup>32</sup> Section 25(6)(a) and (b) of the BCEA; OC Dupper 'Maternity' in MP Olivier et al (eds) *Introduction to Social Security* (2004) 399, 402; Grogan (note 8 above) 65; Huysamen (note 3 above) 59; O Dupper 'Maternity protection in South Africa: An international and comparative analysis (Part One)' (2001) 3 *Stell LR* 421, 424.

<sup>33</sup> Bonthuys (note 12 above) 272.

<sup>34</sup> Dupper 2004 (note 32 above) 425.

maternity benefits, certain workplaces may not be unionised or unions may not be able to reach uniform standards around the issues of maternity benefits.<sup>35</sup> Therefore, employees have to rely on the statutory rights afforded by the BCEA for maternity leave and the UIA for maternity benefits.<sup>36</sup>

For example, in the case of *De Beer v SA Export Connection CC t/a Global Paws*,<sup>37</sup> an employee had fallen pregnant and entered into an agreement with her employer to return to work a month after she had given birth. However, upon requesting further leave because of the illness of her newborn twins, the employee was dismissed. In finding the dismissal automatically unfair, the Labour Court stated that the agreement with her employer was ‘unlawful’.<sup>38</sup>

#### 4.3.1 Maternity cash benefits and coverage

South African labour laws provide maternity benefits and employment security to pregnant employees, but the weaknesses in maternity protection lie in the lack of guaranteed cash benefits during maternity leave.<sup>39</sup> Although the BCEA affords a compulsory six weeks of maternity leave, it does not provide a statutory right to paid maternity leave.<sup>40</sup> This means that the employer does not have a statutory duty to pay the employee during this period.<sup>41</sup> Without a salary during this period, many employees may be unable to take the full duration of four months’ maternity leave awarded to them.<sup>42</sup>

An employer may arrange to provide employees with paid leave and additional maternity benefits based on company policies. While such arrangements may be made by collective

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<sup>35</sup> Ibid; O Dupper et al ‘The case for increased reform in South African family and maternity benefits’ (2001) 4 *Journal of Law, Democracy & Development* 27, 33; Matthais ‘Achieving effective maternity rights in a post-apartheid South Africa: Is the Constitution adequate?’ (1995) 28(2) *The Comparative and International Journal of Southern Africa* 247, 251–252.

<sup>36</sup> Dupper 2001 (note 32 above) 158; Dupper 2003 (note 12 above) 403; Huysamen (note 3 above) 53.

<sup>37</sup> *De Beer v SA Export Connection t/a Global Paws* (2008) 29 *ILJ* 347 (LC). See also *Collins v Volkskas Bank (Westonaria Branch), a Division of ABSA Bank Ltd* (1994) 15 *ILJ* 1398 (IC) regarding unfair provisions of a collective agreement relating to maternity leave.

<sup>38</sup> *De Beer* (note 37 above) 350 at par [7], 355 at par [23].

<sup>39</sup> Dupper 2004 (note 32 above) 408.

<sup>40</sup> Huysamen (note 3 above) 61.

<sup>41</sup> Dancaster (note 27 above) 182.

<sup>42</sup> Bonthuys (note 12 above) 271.

agreement or any contract of employment, many pregnant employees remain excluded from maternity benefits because either their employment contracts do not grant them such benefits, or trade unions have not been able to negotiate satisfactory maternity benefits on their behalf.<sup>43</sup>

#### **4.3.1.1 *The Unemployment Insurance Act 63 of 2001, as amended by the Unemployment Insurance Amendment Act 10 of 2016***

The UIA is social security legislation which provides benefits to contributing employees.<sup>44</sup> The UIA states that a female employee may apply for maternity benefits provided that she falls pregnant while contributing to the Unemployment Insurance Fund (the Fund).<sup>45</sup> Additionally, any parent who is adopting a child and contributes to the Fund, whether male or female, may claim adoption benefits.<sup>46</sup> The UIA applies to all employees and employers unless specifically excluded.<sup>47</sup> The UIA was recently amended by the *Unemployment Insurance Amendment Act 10 of 2016* (UIAA), which amends maternity benefits offered by the UIA.<sup>48</sup>

According to section 24 of the UIA, a pregnant contributor is entitled to maternity benefits for any period of pregnancy or delivery and the period thereafter, provided that the application complies with prescribed requirements and provisions of the Act.<sup>49</sup> The UIAA sets out a qualifying period for the entitlement to maternity benefits.<sup>50</sup> It states that a contributor is not entitled to benefits unless she has been in employment for at least thirteen weeks prior to the date of the application for maternity benefits.<sup>51</sup> The qualifying period is anomalous as there are no

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<sup>43</sup> Ibid 272; Huysamen (note 3 above) 61; Dupper 2004 (note 32 above) 408.

<sup>44</sup> Section 12 of the Unemployment Insurance Act 63 of 2001 (UIA) states that a contributor or a dependant is entitled to the following benefits: unemployment benefits (Chapter 3: Part B); illness benefits (Chapter 3: Part C); maternity benefits (Chapter 3: Part D); adoption benefits (Chapter 3: Part E) and dependants benefits (Chapter 3: Part F).

<sup>45</sup> Bonthuys (note 12 above) 65; Huysamen (note 3 above) 61.

<sup>46</sup> Chapter 3: Part D and Part E of the UIA.

<sup>47</sup> Section 3 of the UIA. Section 1 of the UIA defines an 'employee' as 'any natural person who receives remuneration or to whom remuneration accrues in respect of services rendered or to be rendered by that person, but excludes any independent contractor'.

<sup>48</sup> Unemployment Insurance Amendment Act 10 of 2016 (GG 40557 of 19 January 2016) (UIAA).

<sup>49</sup> Section 24(1) of the UIA. The Act defines a 'contributor' as 'a natural person— (a) who is or was employed; (b) to whom this Act, in terms of s 3, applies; and (c) who can satisfy the Commissioner that he or she has made contributions for the purposes of this Act'. Dancaster (note 27 above) 183.

<sup>50</sup> MP Olivier & A Govindjee 'A critique of the Unemployment Insurance Amendment Bill, 2015' (2015) 18(7) *PER/PELJ* 2739, 2747.

<sup>51</sup> Section 9 of the UIAA.



qualifying requirements for any other category of benefits in the UIA.<sup>52</sup> In terms of the UIA, a pregnant contributor is entitled to maternity benefits for the maximum period of 17.32 weeks.<sup>53</sup> This corresponds with the employee's right to claim four months' maternity leave under section 25 of the BCEA.

The UIAA also amends section 24(5) of the UIA, which states that 'a contributor who has a miscarriage during the third trimester or bears a still-born child is entitled to a maximum maternity benefit of six weeks after the miscarriage or stillbirth'.<sup>54</sup> The UIAA extends the amount of maternity benefits which may be claimed in instances of miscarriages or stillbirths.<sup>55</sup> It states that a contributor who has had a miscarriage during the third trimester or bears a still-born child is entitled to full maternity benefits of 17.32 weeks after the miscarriage or stillbirth.<sup>56</sup>

The UIAA sets out certain amendments to the procedure for the application of maternity benefits. Prior to the amendment, the UIA stated that the application for maternity benefits must be made at least eight weeks prior to childbirth.<sup>57</sup> The UIAA now provides that the application for maternity benefits must be made in the prescribed form at an employment office at any time before or after childbirth, provided that the application is made within twelve months after the date of childbirth.<sup>58</sup> A claims officer will be appointed to investigate the application and upon a finding of compliance, the claims officer must approve the application, determine the amount of benefits due to the applicant, and stipulate how the benefit will be paid.<sup>59</sup> Section 26 of the UIA states that the contributor must be paid at the employment office at which the application was made or any other employment office determined by the applicant at the time of application.<sup>60</sup>

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<sup>52</sup> Olivier & Govindjee (note 50 above) 2747.

<sup>53</sup> Section 24(4) of the UIA; Field, Bagraim & Rycroft (note 2 above) 34; Huysamen (note 3 above) 61; Dancaster (note 27 above) 183.

<sup>54</sup> Section 24(5) of the UIA.

<sup>55</sup> Section 9 of the UIAA; Olivier & Govindjee (note 50 above) 2762.

<sup>56</sup> Ibid; as explained by Olivier & Govindjee, s 9 of the UIAA incorrectly states '17 to 32 weeks' rather than '17.32 weeks'.

<sup>57</sup> Section 25(1) of the UIA.

<sup>58</sup> Section 10 UIAA.

<sup>59</sup> Ibid s 25(3) and (4).

<sup>60</sup> Ibid s 26.

The UIAA states that payment of maternity benefits may not affect the payment of unemployment benefits.<sup>61</sup> This provision is aimed at ensuring that the number of days of benefits to which a contributor is entitled will not be reduced by accounting for the claimed maternity benefits.<sup>62</sup> According to the provision, any other benefits which a contributor may wish to claim will accrue as indicated by the Act, and the maternity benefit will accrue separately and without deduction.<sup>63</sup> This separation of maternity benefits from any other benefit in the UIA allows pregnant contributors to rely fully on the financial support of the Act without discrimination.<sup>64</sup>

However, this aspect of the UIAA requires clarification.<sup>65</sup> The provision that the payment of maternity benefits may not affect the payment of unemployment insurance benefits fails to account expressly for situations where employees have exhausted their unemployment insurance benefits other than maternity benefits and subsequently claim maternity benefits.<sup>66</sup> The provision of the UIAA should expressly state that payment of unemployment, illness, and adoption benefits will not reduce the payment of maternity benefits.<sup>67</sup>

In addition, the UIA states that if maternity benefits have been paid to the contributor in terms of any other law, collective agreement, or contract of employment, the maternity benefit due in terms of the UIA may not be more than the remuneration she would have received had she not been on maternity leave.<sup>68</sup> This means that the amount of benefits payable in such an instance cannot exceed the employee's ordinary remuneration which she would have received had she not needed to take maternity leave.<sup>69</sup>

The UIA also provides benefits to employees who have lost their employment as a result of pregnancy or circumstances beyond their control. Section 16(1)(ii) states that an unemployed contributor is entitled to unemployment benefits for any period of unemployment lasting more

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<sup>61</sup> Section 5 of the UIAA; MP Olivier & Govindjee (note 50 above) 2761.

<sup>62</sup> Section 13(5) of the UIA.

<sup>63</sup> The contributor may wish to claim for unemployment benefits, illness benefits, adoption benefits or dependant's benefits in addition to the maternity benefits. Huysamen (note 3 above) 62–63.

<sup>64</sup> Ibid 63.

<sup>65</sup> Olivier & Govindjee (note 50 above) 2762

<sup>66</sup> Ibid 2761; s 5 of the UIAA.

<sup>67</sup> Ibid.

<sup>68</sup> Section 24(4) of the UIA; Van Kerken & Olivier (note 13 above) 451.

<sup>69</sup> Dancaster (note 27 above) 184.

than fourteen days, if the reason for the unemployment is the dismissal of the contributor in terms of section 186 of the LRA.<sup>70</sup> Section 186(1)(c) of the LRA states that a dismissal includes the refusal to allow an employee to resume work upon her return from maternity leave granted under any law, collective agreement, or contract of employment. This section of the LRA seeks to prevent the automatic termination of employment on the basis of absence for reasons related to childbirth. However, these benefits afforded in terms of section 16(1)(ii) will be due only in the instance where the employee was previously employed and is seeking new employment, or is unable to work as a result of pregnancy and has been employed for at least thirteen weeks during the year preceding confinement.<sup>71</sup>

#### **4.3.1.2 Funding maternity cash benefits**

The UIA establishes the Fund, which may be used for the payment of benefits.<sup>72</sup> The Fund is financed through contributions made by employers and employees. All employees, as defined by the UIA, are obliged to contribute to the Fund the amount prescribed in the *Unemployment Insurance Contributions Act 4 of 2002 (UICA)*, with the exception of those employees excluded from the application of the UIA.<sup>73</sup> The UICA regulates the Fund and states that ‘every employer and every employee to whom this Act applies must, on a monthly basis, contribute to the Unemployment Insurance Fund’.<sup>74</sup>

#### **4.3.1.3 Methods of calculating maternity benefits**

The UIA sets out a graduated scale of a contributor’s entitlement to benefits.<sup>75</sup> This scale of benefits to which a contributor is entitled varies between lower and higher income contributors, and is based on the remuneration earned prior to the period for which the benefits are being claimed.<sup>76</sup> The UIA previously provided that the maximum rate of remuneration for a contributor who earns a lower income is set at 60 per cent, and the rate of remuneration then decreases for

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<sup>70</sup> Section 16(1)(ii) of the UIA.

<sup>71</sup> Grogan (note 19 above) 8.

<sup>72</sup> Dupper 2004 (note 32 above) 403.

<sup>73</sup> Section 3(1)(a)–(e) sets out those employees that are excluded from the application of the UIA.

<sup>74</sup> Section 5(1) of the UICA.

<sup>75</sup> Schedule 3 of the UIA; Huysamen (note 3 above) 62; Dupper 2006 (note 12 above) 157; as Dupper explains, the graduated scale benefits of Schedule 3 of the UIA ‘range from 30,78% of previous earnings for contributors earning R10 000 or more per month, to 58,64% of previous earnings for contributors earning R150 or less per month’.

<sup>76</sup> Section 13 of the UIA; Huysamen (note 3 above) 62.

contributors who earn higher incomes.<sup>77</sup> However, the UIAA amended this provision to provide that the maximum rate of maternity benefits claimable is a fixed rate of 66 per cent of any contributor's remuneration earned, subject to the maximum income threshold for the first 238 days, and the remainder of the days will be paid at a flat rate of twenty per cent.<sup>78</sup> This means that the maximum amount of benefits which are payable is 66 per cent of a contributor's remuneration earned prior to the period for which the benefits are being claimed.<sup>79</sup>

A contributor is entitled to receive maternity benefits for a maximum period of 17.32 weeks of maternity leave.<sup>80</sup> Since the period of 17.32 weeks is a maximum period, the employee will have to accrue the actual amount of maternity benefits.<sup>81</sup> As such, the benefits accrue at a daily rate according to the number of days of remuneration earned by the contributor in employment.<sup>82</sup> The UIAA states that the contributor's entitlement will accrue at a rate of one day's benefit for every completed five days of employment as a contributor.<sup>83</sup> The benefit is subject to a maximum accrual of 365 days' benefits in a four-year period immediately preceding the day after the date of ending of the period of employment.<sup>84</sup>

Although the UIA financially safeguards the employee, the benefits provided are limited.<sup>85</sup> The limitations are primarily due to the restriction on the amount of benefits payable (a maximum of 66 per cent of income) and the period for which the benefits are payable in accordance with the rate of accrual (17.32 weeks per confinement for maternity leave).<sup>86</sup> The limitation in benefits

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<sup>77</sup> Section 12(3)(b) of the UIA.

<sup>78</sup> Section 4 of the UIAA; Olivier & Govindjee (note 50 above) 2744; Prior to this amendment, s 13 of the UIA provided that a contributor was entitled to one day's benefit for every completed six days of employment as a contributor. The maximum period for which benefits were claimable were 238 days in a four-year period immediately preceding the date of the application for benefits, minus any days of benefits received by the contributor during this period.

<sup>79</sup> Ibid, Dupper 2004 (note 32 above) 404; Huysamen (note 3 above) 62.

<sup>80</sup> Section 13(5) of the UIA; Van Kerken & Olivier (note 13 above) 451; Dupper 2004 (note 32 above) 403; Huysamen (note 3 above) 62; Dancaster (note 27 above) 183.

<sup>81</sup> Olivier & Govindjee (note 50 above) 2744.

<sup>82</sup> Dancaster (note 27 above) 183.

<sup>83</sup> Section 5 of the UIAA; s 13(3) of the UIA previously stated that the contributor's entitlement shall accrue at a rate of one day's benefit for every completed six days of employment as a contributor.

<sup>84</sup> Ibid; Olivier & Govindjee (note 50 above) 2757.

<sup>85</sup> Dancaster (note 27 above) 184.

<sup>86</sup> UIAA; Huysamen (note 3 above) 65; Dupper 2003 (note 12 above) 404; Olivier & Govindjee (note 50 above) 2744.

results in a limitation in protection for employees. Considering the lack of statutory duty on an employer to provide paid maternity leave, in the event of claiming unpaid maternity leave, the only income available to the employee during maternity leave is that which is claimable from the UIA.<sup>87</sup> The maximum amount of benefits claimable is 66 per cent of the employee's income for the first 238 days, and thereafter at a flat rate of twenty per cent.<sup>88</sup> The flat rate of twenty per cent is too low. Furthermore, the UIA and the UIAA fail to provide a minimum period for which maternity benefits may be claimed.<sup>89</sup> These factors may force the employee on maternity leave to return to work prematurely in order to earn her full salary, before she is physically and emotionally prepared to leave her baby and return to her workplace responsibilities.<sup>90</sup>

#### **4.4 Eligibility for and exclusions from maternity leave and cash benefits**

Many women who are employed part-time will be excluded from the right to maternity leave in the BCEA through the exclusion of employees who work less than 24 hours a month for an employer.<sup>91</sup> The exclusion means that a female employee must work for a minimum of 24 hours a month for her employer to be eligible to be granted maternity leave.<sup>92</sup> The inclusion of atypical workers in the definition of 'employee' in the BCEA and the LRA is significant because within the South African labour force, more women than men are found in atypical forms of employment.<sup>93</sup>

The UIA defines an 'employee' as 'any natural person who receives remuneration or to whom remuneration accrues in respect of services rendered or to be rendered by that person, but excludes any independent contractor'. This definition is criticised for being far narrower than the definition of 'employee' in the other labour legislation. Among the employees expressly

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<sup>87</sup> Dancaster (note 27 above) 184.

<sup>88</sup> Section 4 of the UIAA; Olivier & Govindjee (note 50 above) 2744; Prior to this amendment, s 13 of the UIA provided that a contributor was entitled to one day's benefit for every completed six days of employment as a contributor. The maximum period for which benefits were claimable were 238 days in a four-year period immediately preceding the date of the application for benefits, minus any days of benefits received by the contributor during this period.

<sup>89</sup> Olivier & Govindjee (note 50 above) 2742.

<sup>90</sup> Dupper 2004 (note 32 above) 408; Dancaster (note 27 above) 185.

<sup>91</sup> Van Kerken & Olivier (note 13 above) 436, 443; Grogan (note 8 above) 26; Huysamen (note 3 above) 61–62.

<sup>92</sup> ILO Maternity & Paternity at Work (note 3 above) 43.

<sup>93</sup> Bonthuys (note 12 above) 253; Olivier & Kalula (note 17 above) 132.

excluded from the application of the UIA are employees who are employed for less than 24 hours a month with a particular employer.<sup>94</sup>

It therefore excludes those within the informal sector of employment, as well as atypical workers.<sup>95</sup> This means that although atypical workers have the right to maternity leave in terms of the BCEA, they are excluded from claiming maternity benefits under the UIA. The exclusion of employees employed for less than 24 hours a month with a particular employer is significant because it may result in numerous women employees who will not be able to claim maternity benefits through the UIA.<sup>96</sup> Many atypical workers may work for a number of different employers for short periods per month.<sup>97</sup> Therefore, even though the worker may be fully employed, he or she is excluded from the protection of the UIA. The reason for the exclusion is the prevention of administration costs which would result from the regulation of the contributions from those employees who are employed for less than 24 hours a month with a particular employer.<sup>98</sup>

All pregnant employees should be entitled to maternity benefits.<sup>99</sup> Employees who resign or suspend their employment are also excluded from claiming benefits under the UIA.<sup>100</sup> This means that an employee who has been a contributor to the Fund and who would qualify for maternity benefits under the UIA will be excluded from benefiting if she resigns or suspends her employment for the purpose of caring for her children or to carry out other family care responsibilities.<sup>101</sup> The UIAA extends the benefits to previously excluded categories of employees, including public servants.<sup>102</sup> Although this is commendable, the UIAA still does not

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<sup>94</sup> Section 3 of the UIA; Van Kerken & Olivier (note 13 above) 435–444.

<sup>95</sup> Olivier & Govindjee (note 12 above) 448; Van Kerken & Olivier (note 13 above) 436; Dancaster (note 27 above) 184.

<sup>96</sup> Huysamen (note 3 above) 66; Dupper, Olivier & Govindjee (note 12 above) 453; and Dupper 2006 (note 12 above) 161, where it is explained that the exclusion of employees in the national and provincial spheres of government who are officers or employees is based on the assumption that public servants have a lower risk or no risk of unemployment.

<sup>97</sup> Van Kerken & MP Olivier (note 13 above) 443; Dancaster (note 27 above) 184.

<sup>98</sup> Van Kerken & Olivier (note 13 above) 443; Dupper, Olivier & Govindjee (note 12 above) 452.

<sup>99</sup> Dupper 2006 (note 13 above) 161.

<sup>100</sup> Van Kerken & Olivier (note 13 above) 445.

<sup>101</sup> Section 16(1) of the UIA. Dupper; Olivier & Govindjee (note 12 above) 446; Huysamen (note 3 above) 65.

<sup>102</sup> Section 3 of the UIA; s 1 of the UIAA; Van Kerken & Olivier (note 13 above) 435–444.

include amendments to ensure the inclusion of employees in atypical forms of employment, or self-employed women, in the coverage of maternity cash benefits.<sup>103</sup>

It must be recognised that women are often given the most precarious and poorly-paid work within the informal sector.<sup>104</sup> They are often more likely to be employed as part-time employees.<sup>105</sup> Atypical employment offers women the opportunity to work part-time or as contract workers in order to minimise the time pressure on their lives created by the work–care conflict.<sup>106</sup> Atypical work assists women in fulfilling their social roles as mothers and homemakers. These dual responsibilities cannot be fulfilled in full-time employment because of the failures of workplace policies, or the failures of the labour law system, to structure working environments according to women’s needs. Therefore, it is often women in atypical forms of employment who remain vulnerable as workers.<sup>107</sup> As a consequence of the exclusion of atypical employees from the UIA, an atypical employee may claim unpaid maternity leave in terms of the BCEA but will not be able to claim cash benefits over the leave period. Nevertheless, atypical employees may be completely excluded from maternity protection because of a lack of knowledge about their rights or ineffective enforcement mechanisms.<sup>108</sup> Considering the vulnerabilities of South African women and the financial stresses faced by pregnant women such as medical bills and unguaranteed income during maternity leave, the UIA should aim to cover as wide a scope of employees as possible.<sup>109</sup>

#### 4.4.1 Maternity and surrogacy agreements

The anomalous decision of *MIA v State Information Technology Agency (Pty) Ltd* saw the Labour Court award ‘maternity’ leave to a male employee as a result of the absence of available leave entitlements for the birth of a baby born out of a surrogacy agreement.<sup>110</sup> The employee was a partner to a civil union in accordance with the *Civil Union Act 17 of 2006* (Civil Union

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<sup>103</sup> Dancaster (note 27 above) 184.

<sup>104</sup> Bonthuys (note 12 above) 272.

<sup>105</sup> *Ibid* 255.

<sup>106</sup> *Ibid* 272.

<sup>107</sup> Olivier & Kalula (note 17 above) 133.

<sup>108</sup> Bonthuys (note 12 above) 255.

<sup>109</sup> Dancaster (note 27 above) 185.

<sup>110</sup> *MIA v State Information Technology Agency (Pty) Ltd* (2015) 6 SA 250 (LC); L Dancaster & T Cohen ‘Leave for working fathers in the SADC region’ (2015) 36 *ILJ* 2474, 2490; Behari (note 5 above) 353.

Act). The couple were expecting a baby through surrogacy. The surrogacy agreement had been concluded in terms of the *Children's Act* 38 of 2005 (Children's Act) and confirmed by court order. In terms of the agreement the surrogate would hand over the child to the commissioning parents at birth, who would from that time onwards be deemed to be the parents of the child and responsible for the child.

The employer's employment policies offered paid maternity leave for a period of four months to the biological mother, and paid maternity leave of two months to a permanent employee who was the adoptive mother of a child below the age of 24 months.<sup>111</sup> In order to secure time off from work to care for his newborn baby, the employee had applied to his employer for paid 'maternity' leave from the date of confinement for a period of four months. The employer refused the application on the grounds that the maternity leave offered in the policy applied exclusively to female employees.<sup>112</sup>

The employment policy failed to provide leave to parents expecting a baby through surrogacy. While the employer initially offered the employee 'family responsibility leave' or special unpaid leave, he subsequently granted the employee two months of paid adoption leave and two months' unpaid leave. The employee applied to the CCMA to be granted paid maternity leave on the basis of unfair discrimination. He claimed that the employer refused the leave application on the basis that he was not the biological 'mother' of his child, which effectively constituted unfair discrimination on the grounds of sex, family responsibility and sexual orientation, in terms of section 6(1) of the EEA.

The employer contended that the maternity leave policy was not discriminatory. The argument was based on the word 'maternity' which indicated that the leave was for the exclusive use of female employees with the specific objective of providing leave to employees who gave birth 'based on an understanding that pregnancy and childbirth create an undeniable physiological effect that prevents biological mothers from working during portions of the pregnancy and

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<sup>111</sup> *MIA* (note 110 above) at par [10–11].

<sup>112</sup> *Ibid* at par [2].



during the post-partum period'.<sup>113</sup> The relief sought by the employee was the prevention of future discrimination against those in similar positions, and damages and payment for the unpaid leave he had resorted to accepting, in order to take care of his child. The dispute was referred to the Labour Court for determination.

It is of particular significance in this case that the employee did not challenge the leave provisions of the BCEA – since the contention was based on the employer's maternity leave policy. However, the court did mention that an adequate consideration of the issue would warrant instituting amendments to legislation, particularly to the BCEA.<sup>114</sup> The decision turned on the interpretation of the right to maternity leave as set out in the BCEA. The right to maternity leave provided for in section 25 of the BCEA is applicable only to pregnant women and not women who adopt a child or same-sex partners who conceive through a surrogacy agreement. Section 25 makes specific references to the 'date of birth', from which compulsory postnatal maternity leave will begin, and provides for incidents of miscarriage, thus indicating natural birth, and not birth through surrogacy.<sup>115</sup>

Despite the exclusive wording of the section, the court did not accept the employer's interpretation of the purpose of maternity leave for the protection of the health of the mother. It found that the current objective of maternity leave, set out in the BCEA, is intended not only to protect the welfare and health of the employee who gave birth, but also to account for the child's best interests.<sup>116</sup> The court found that the right to maternity leave must be interpreted in light of the Bill of Rights in the Constitution and the Children's Act. Section 28 of the Constitution states that every child has the right to 'family care or parental care', while section 9 of the Children's Act states that the child's best interest is of paramount importance in considering the care, protection and wellbeing of a child. Accordingly, these provisions command that, in matters concerning the wellbeing of a child, measures must be taken in the best interests of the child.

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<sup>113</sup> Ibid at par [12].

<sup>114</sup> Ibid at par [19]; A Bauling 'Maternity, paternity and parental leave and the best interests of the child: *MIA v State Information Technology Agency (Pty) Ltd* [2015] JOL 33060 (LC)' (2016) 37(1) *Obiter* 158, 161.

<sup>115</sup> Huysamen (note 3 above) 60; Behari (note 5 above) 353.

<sup>116</sup> *MIA* (note 110 above) at par [14]; *Dancaster & Cohen* (note 110 above) 2491.

Thus, the right to maternity leave must be interpreted so as to account for the best interests of the child.<sup>117</sup>

The court noted that since surrogacy agreements are regulated by the Children's Act, the determination of the best interests of the child in this instance depended on the terms of the surrogacy agreement.<sup>118</sup> The surrogacy agreement specifically stated that the newborn was to be handed to the commissioning parents at birth and the surrogate would have no further contact with the child thereafter. For this reason, the employee intended to perform the role usually performed by the birth-mother in taking immediate responsibility of the child. This required the right to maternity leave.<sup>119</sup> As such, the court found no reason why the employee should not be entitled to maternity leave.

It stated further that there is no reason why the maternity leave should not be of the same duration as a natural mother would be awarded.<sup>120</sup> It was held that by virtue of the Civil Union Act, the laws of South Africa must recognise the rights of couples in same-sex marriages who have entered into surrogacy agreements. Therefore, workplace policies must do the same, and in this instance, the policies of the employer should also reflect such recognition of rights.<sup>121</sup> The employee was awarded the maternity leave on the basis that it was in the best interests of the child. The court declared that the employer's maternity leave policy constituted unfair discrimination and ordered the employer to pay the employee an amount equivalent to two months' salary.

In basing its decision on section 28 of the Constitution and the Children's Act, it appears that the Labour Court was looking to support the social childcare needs of families.<sup>122</sup> This means that labour legislation should reflect such objectives.<sup>123</sup> As such, the three days of leave from work to care for a newborn child cannot represent the best interests of a child. The statutory rights of

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<sup>117</sup> *MIA* (note 110 above) at par [13–15]; Behari (note 5 above) 353.

<sup>118</sup> *MIA* (note 110 above) at par [15–16].

<sup>119</sup> *Ibid* at par [16].

<sup>120</sup> *Ibid* at par [17].

<sup>121</sup> *Ibid* at par [18].

<sup>122</sup> Behari (note 5 above) 356.

<sup>123</sup> *Ibid*.

employees in the BCEA should be extended to reflect a diverse family structure by accounting for the birth of a child through a surrogacy agreement and fathers as caregivers. South African legislation provides no exclusive statutory right to fathers for the birth of their babies, and is silent on leave from employment for the birth of a baby through surrogacy. Therefore, the same-sex male couple expecting a baby born by surrogacy was unable to rely on any form of paternity leave or surrogacy leave. This resulted in the award of ‘maternity leave’ to the male parent.<sup>124</sup>

The case progressively accounted for the child’s right to ‘family care or parental care’ irrespective of gender by giving effect to the best interests of the child within the family structure of same-sex partners conceiving through surrogacy.<sup>125</sup> In doing so, the case exhibited the gap in South African labour law resulting from the failure to provide a statutory right to leave from work for the care of a child born from surrogacy.<sup>126</sup> This judgment has been welcomed as a step in the right direction for workplace equality.<sup>127</sup> It appears to break down the stereotype of women as the primary family carer; it supports a non-traditional family structure of same-sex unions; and it reflects the needs of newborn children for the care of both parents. However, the case does give rise to uncertainties and questions of practicality.<sup>128</sup>

The judgment did not provide any analysis of the nature of the discrimination. Such discrimination would arise from the exclusion of surrogacy leave or paternity leave from labour legislation that provides maternity leave to pregnant women.<sup>129</sup> Rather than evaluating the argument of discrimination according to the principles of the EEA, the court based its findings on the best interests of the child.<sup>130</sup> As such, the Labour Court missed the opportunity to discuss whether or not the exclusion of adequate leave provisions for fathers and surrogate parents to care for newborn children constitutes unfair discrimination. Nor did the court provide any

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<sup>124</sup> Ibid 354.

<sup>125</sup> Ibid 355; Bauling (note 114 above) 163.

<sup>126</sup> Behari (note 5 above) 355.

<sup>127</sup> N Motsiri & O Timothy: ‘Sir, your maternity leave has been granted...’ (2015) 06 *HR Future* 44–46.

<sup>128</sup> Behari (note 5 above) 355.

<sup>129</sup> Ibid.

<sup>130</sup> Ibid.

guidelines to assist future courts or employers with leave provisions which facilitate the integration of fathers to the care of newborn children.<sup>131</sup>

This decision may be compared to the case of *President of the Republic of South Africa v Hugo*<sup>132</sup> (hereafter *Hugo*) to the extent that both cases raise issues of discrimination regarding the roles of mothers and fathers in the upbringing of children. In *Hugo*, the President and the Executive Deputy President signed a document called the 'Presidential Act', which provided a special remission of sentence to certain groups of prisoners. The remission of sentence applied to all mothers with minor children under the age of twelve years. Hugo was a prisoner and a single father who alleged that the Presidential Act discriminated against fathers of children under the age of twelve years. Hugo sought an order declaring the Presidential Act unconstitutional on the grounds that it discriminated unfairly against him on the basis of gender. His argument was based on section 8(2) of the interim Constitution,<sup>133</sup> which stated that no person should be unfairly discriminated against on the grounds of sex.

The President chose to grant the remissions to mothers with minor children on the basis that this would be in the best interests of the children. The President was motivated by the historically and socially imposed role of mothers as primary caregivers.<sup>134</sup> The court noted that South African women are expected to carry heavy burdens of care within the labour market circumstances of limited skill and financial resources. Women are less likely to compete successfully in the labour market. Essentially, the burden of care placed on women is a source of many gender inequalities.<sup>135</sup>

The court in the *Hugo* case found that the president relied on a generalisation of women's roles as primary child-carers and held that discrimination on the basis of sex did exist. However, the majority in the Constitutional Court found that although Hugo had been discriminated against on

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<sup>131</sup> M Finn 'Fathers still to go: Paternity leave and the Labour Court's judgment in MIA v SITA' Posted: 06/04/2015 African Legal Centre <http://africanlegalcentre.org/2015/04/06/farther-still-to-go-paternity-leave-and-the-labour-courts-judgment-in-mia-v-sita/>, accessed on 16 February 2016.

<sup>132</sup> *President of the Republic of South Africa v Hugo* 1997(4) SA 1 (CC); 1997 (6) BCLR 708 (CC).

<sup>133</sup> Constitution of the Republic of South Africa, Act 200 of 1993 (interim Constitution).

<sup>134</sup> *Hugo* (note 132 above) 739 at par [70].

<sup>135</sup> *Ibid* 727 at par [38], 728 at par [38], 754 at par [110].

the grounds of sex, the discrimination was not unfair in the circumstances. The finding that the discrimination was not unfair was based on public policy, as well as on the facts that male prisoners vastly outnumbered female prisoners; that the prisoners' rights and obligations as fathers were not limited in any respect by the decision; and that the prisoners had no legal entitlement to an early release.

Both the *MIA*<sup>136</sup> and *Hugo cases* have emphasised the interests of the child in examining the burden of care within a family. However, while *Hugo* exposed the gender stereotypes in South Africa by linking the interest of the child with the primary care of a mother, *MIA*<sup>137</sup> accounted for the child's right to 'family care or parental care' irrespective of gender. In basing its decision on section 28 of the Constitution and the Children's Act, it appears that the Labour Court in the *MIA*<sup>138</sup> case was looking to support the social childcare needs of families.<sup>139</sup> This means that labour legislation should reflect such objectives. As such, the three days of leave from work to care for a new-born child cannot represent the best interests of a child. The statutory rights of employees in BCEA should be extended to reflect a diverse family structure by accounting for the birth of a child through a surrogacy agreement and fathers as caregivers.

Apart from the protection of the best interests of the child, the judgment in *MIA* appears to be aimed at specifically protecting same-sex partners who have become parents through surrogacy agreements from workplace discrimination.<sup>140</sup> This is reflected in the employee's claim for relief against the discrimination of himself and 'other similarly placed applicants', as well as the order made by the court which included that the employer must 'recognise the status of parties to a Civil Union' and 'not discriminate against the rights of commissioning parents who have entered into a surrogacy agreement'.<sup>141</sup> However, the court did not expressly state that the order was only applicable to same-sex partners who have become parents through surrogacy agreements.

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<sup>136</sup> *MIA* (note 110 above).

<sup>137</sup> *Ibid.*

<sup>138</sup> *Ibid.*

<sup>139</sup> Bauling (note 114 above) 163.

<sup>140</sup> *MIA* (note 110 above).

<sup>141</sup> *Ibid* at pars [1] & [24].

Nor did the judgment clarify whether both parents, being partners to the same-sex marriage, would be entitled to maternity leave for the care of their baby born out of surrogacy.<sup>142</sup> The nature of the leave may be similar to that of parental leave. Because of the nature of a same-sex relationship, the leave would be gender-neutral.<sup>143</sup> The objective of parental leave is to promote the wellbeing of the child during the early stages of development.<sup>144</sup> This objective overlaps with the Labour Court's interpretation that the objective of maternity leave is to account for the wellbeing of the child.<sup>145</sup> The practical terms of parental leave involve either transferable or non-transferable parental leave rights. It is possible that the maternity leave granted to surrogate same-sex parents could operate in the same or a similar manner.<sup>146</sup>

The practical application of maternity leave for same-sex partners who have become parents through surrogacy agreements needs to be set out in clearer form. There is no doubt that this could be done through the adoption of legislative provisions to this effect. The question of whether surrogate parents are entitled to maternity leave has been gaining momentum in international law.<sup>147</sup> These questions of law arise from the medical advancements in reproductive technologies such as birth through surrogacy.<sup>148</sup> According to international law mechanisms, surrogacy leave may be incorporated into the national legal framework by adding it to adoption leave provisions or through the enactment of parental leave.<sup>149</sup>

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<sup>142</sup> Motsiri & Timothy (note 127 above) 44–46.

<sup>143</sup> Field, Bagraim & Rycroft (note 2 above) 37; Dancaster & Cohen (note 110 above) 2476; L Haas 'Parental leave and gender equality: Lessons from the European Union' (2003) 20(1) *Review of Policy Research* 89, 91.

<sup>144</sup> *Ibid.*

<sup>145</sup> *MIA* (note 110 above) at par [13–15].

<sup>146</sup> Dancaster & Cohen (note 110 above) 2492.

<sup>147</sup> Case 162/12 *CD v ST*; Case 363/12 *Z v A Government Department* [2014] ECR I-000; S Burri 'Care in family relations – The case of surrogacy leave' (2015) 17(2) *European Journal of Law Reform* 271; G De Baere 'Shall I be mother? The prohibition on sex discrimination, the UN Disability Convention, and the right to surrogacy leave under EU law' (2015) 74(1) *The Cambridge Journal* 44–48; M Fink & B Kas 'Surrogacy leave as a matter of EU LAW: CD and Z' (2015) 52(1) *Common Market Law Review* 281–298; S Burri 'Parents who want to reconcile work & care: Which equality under EU Law?' (2016) 38 *Equality & Human Rights: nothing but trouble? Liber amicorum Titia Loenen* 272 <http://dspace.library.uu.nl/handle/1874/314841>, accessed on 22 June 2016; M Cousins 'Surrogacy leave & EU Law: Case C 162/12, C.D. v S. T. and case C363/12, Z. v A Government Department, Judgments (Grand Chamber) of 18 March 2014' (2014) 21(3) *Maastricht Journal of European & Comparative Law* [http://works.bepress.com/mel\\_cousins/79/](http://works.bepress.com/mel_cousins/79/), accessed on 22 June 2016.

<sup>148</sup> Burri (note 144 above) 272.

<sup>149</sup> *Ibid* 281.

#### 4.4.2 Employment protection and non-discrimination

Apart from section 9 of the Constitution, which prohibits any direct and indirect unfair discrimination on the grounds of pregnancy, employment protection is offered to pregnant employees through the LRA and the EEA.<sup>150</sup> The LRA prohibits the dismissal of employees on the grounds of pregnancy and states that dismissal on account of pregnancy constitutes an automatically unfair dismissal.<sup>151</sup> The EEA prohibits policies and practices which discriminate against pregnant employees.<sup>152</sup> The LRA would apply in cases of alleged unfair dismissal. The EEA would apply where the employee alleges that she was discriminated against on account of her pregnancy, through instances such as the denial of promotion, forced unpaid leave, or being made to work in conditions which risk the health of herself and her unborn baby.<sup>153</sup> These provisions are essential to the promotion of the reconciliation of work and care.<sup>154</sup>

##### 4.4.2.1 The prohibition against dismissals

The prohibition against the dismissal of an employee on the grounds of pregnancy ensures that women are not disadvantaged by their biological ability to bear children.<sup>155</sup> During pregnancy, women employees are more vulnerable because if dismissed, they are unlikely to find appropriate alternative re-employment.<sup>156</sup> Section 186(1)(c) of the LRA guarantees pregnant employees that they will not be dismissed due to the absence from work for maternity leave.<sup>157</sup> It states that an act of dismissal includes the refusal to allow an employee to resume work upon her return from maternity leave granted under any law, collective agreement or contract of employment.<sup>158</sup> This section seeks to prevent the dismissal from employment on the basis of the

<sup>150</sup> Dupper 2004 (note 32 above) 408–409; Huysamen (note 3 above) 58–59.

<sup>151</sup> Grogan (note 8 above) 189; Huysamen (note 3 above) 58.

<sup>152</sup> Dancaaster & Cohen (note 1 above) 33; Huysamen (note 3 above) 59.

<sup>153</sup> Grogan Dismissal, Discrimination and Unfair Labour Practice (2007) 136.

<sup>154</sup> Dupper 2002 (note 6 above) 83.

<sup>155</sup> *Ibid*, *Mashava v Cuzen & Woods Attorneys* (2000) 21 ILJ 402 (LC) 405 at par [14]; Dupper 2004 (note 32 above) 412; ILO Maternity & Paternity at Work (note 3 above) 73.

<sup>156</sup> *Botha v A Import Export International CC* (1999) 20 ILJ 2580 (LC), 2586 at par [30].

<sup>157</sup> Dupper (note 6 above) 83; Dupper 2004 (note 32 above) 412–413.

<sup>158</sup> Section 187(1)(c) of the LRA states that ‘ “[d]ismissal” means... an employer refused to allow an employee to resume work after she-

(i) took maternity leave in terms of any law, collective agreement or her contract of employment; or

(ii) was absent from work for up to four weeks before the expected date, and up to eight weeks after the actual date, of the birth of her child’.

absence from work for reasons related to childbirth. Therefore, section 186(1)(c) envisions the situation where an employer refuses to allow an employee to return to work from maternity leave.<sup>159</sup>

#### 4.4.2.2 *Automatically unfair dismissals*

Section 187(1)(e) of the LRA extends the employment protection provided by section 186(1)(c).<sup>160</sup> It provides that a dismissal is automatically unfair if the reason for the dismissal is the employee's 'pregnancy, intended pregnancy, or any reason related to pregnancy'.<sup>161</sup> In doing so, section 187(1)(e) aims to promote gender equality by placing women on 'an equal footing' with men at the workplace.<sup>162</sup> The section must be recognised for its social and legal endeavour to support the equal status of women in the workplace by ensuring that women are not disadvantaged in their current employment or any employment prospects due to their childbearing capacity.<sup>163</sup>

An allegation of any unfair dismissal involves a two-stage inquiry. The first question that is asked is whether there was a dismissal. Second, it must be determined whether the dismissal was unfair. With regard to the first inquiry, the onus falls on the employee to prove that she was dismissed. Once the dismissal is proved, the employer must prove that the dismissal was fair.<sup>164</sup>

This section is wide. In particular, the inclusion of the words 'any reason related to pregnancy', adds significant protection to pregnant employees.<sup>165</sup> This phrase was considered in the case of *De Beer v SA Export Connection CC t/a Global Paws*.<sup>166</sup> The case is recognised for expanding the scope of section 187(1)(e) through the court's interpretation of the term 'any reason related to

Section 190(1) determines the date of dismissal. It reads: 'The date of dismissal is the earlier of-  
(a) the date on which the contract of employment terminated; or  
(b) the date on which the employee left the service of the employer.'

<sup>159</sup> Grogan (note 153 above) 193; Dupper 2004 (note 32 above) 412–413.

<sup>160</sup> Dupper (note 6 above) 84.

<sup>161</sup> Section 187(1)(e) of the LRA. Bonthuys (note 12 above) 271; Huysamen (note 3 above) 58; Barnard (note 8 above) 511.

<sup>162</sup> *Brown v Stockton-on-Tees Borough Council* [1988] IRLR 263; *Botha* (note 156 above) 2584 at par [20]; *Mashava* (note 155 above) 405 at par [14].

<sup>163</sup> *Botha* (note 156 above) 2584 at par [21].

<sup>164</sup> Section 192(2) of the LRA; Grogan (note 153 above) 179.

<sup>165</sup> Grogan (note 19 above) 132–133; Huysamen (note 3 above) 58.

<sup>166</sup> *De Beer* (note 37 above); Barnard (note 8 above) 511.



pregnancy'. It is clear that the prohibition on the dismissal of an employee for reasons related to her *intended* pregnancy covers an expansive range of situations.<sup>167</sup> It is particularly aimed at preventing an employer from dismissing an employee upon learning of her intention to begin or expand her family.<sup>168</sup>

In proving a claim of automatically unfair dismissal, it must be shown that the pregnancy, intended pregnancy, or reason related to the employee's pregnancy is causally linked to the dismissal.<sup>169</sup> The test for causation involves two inquiries. Firstly, factual causation must be established by asking whether the employee would have been dismissed had she not been pregnant. If the answer is yes, then the dismissal was not automatically unfair. If the answer is no, then legal causation must be tested by asking whether the pregnancy, intended pregnancy, or reason related to the employee's pregnancy was the dominant or main cause of the dismissal.<sup>170</sup> Therefore, the pregnancy must be the most probable cause of the dismissal, or should at least be shown to have 'played a significant role' in bringing about the dismissal.<sup>171</sup>

The remedy for an automatically unfair dismissal is reinstatement, reemployment or compensation.<sup>172</sup> The Labour Court also has the power to make any other order which is appropriate in the circumstances.<sup>173</sup> The EEA provides that in a successful claim of unfair discrimination, the Labour Court may make any appropriate order, which may include the payment of compensation and damages.<sup>174</sup>

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<sup>167</sup> Grogan (note 153 above) 190.

<sup>168</sup> Grogan *Dismissal* (2014) 135; Grogan (note 8 above) 190; Barnard (note 8 above) 512.

<sup>169</sup> Grogan (note 168 above); B Grant, N Whitear-Nel & A Behari 'Protecting the unwed woman against automatically unfair dismissals for reasons relating to pregnancy: A discussion of *Memela & another v Ekhamanzi Springs (Pty) Ltd* (2012) 33 ILJ 2911 (LC); (2015) 36 ILJ 106, 111.

<sup>170</sup> *SA Chemical Workers Union & others v Afrox Ltd* (1999) 20 ILJ 1718 (LAC), 1726; *Wardlaw v Supreme Mouldings (Pty) Ltd* (2004) 25 ILJ 1094 (LC), 1100 at par [10.7].

<sup>171</sup> *SA Chemical Workers Union & others v Afrox Ltd* (1999) 20 ILJ 1718 (LAC), 1726; *Kroukram v SA Airlink (Pty) Ltd* (2005) 26 ILJ 2153 (LAC), at par [103]; Grant, Whitear-Nel & Behari (note 169 above) 111.

<sup>172</sup> Section 193(1) of the LRA.

<sup>173</sup> *Ibid* s 193(3). However, s 194(3) of the LRA limits the amount of compensation payable for a claim of unfair dismissal. Section 194(3) states that '[t]he compensation awarded to an employee whose dismissal is automatically unfair must be just and equitable in all the circumstances, but not more than the equivalent of 24 months' remuneration calculated at the employee's rate of remuneration on the date of dismissal'.

<sup>174</sup> Section 50(2) of the EEA; Whitear-Nel, Grant & Behari (note 169 above) 111.

#### 4.4.2.3 *Claims of unfair dismissal*

It appears from case law that section 187(1)(e) is effective in prohibiting the dismissal of an employee simply because she is pregnant.<sup>175</sup> For example, in *Hunt v ICC Car Import Services Company (Pty) Ltd*,<sup>176</sup> the employee was dismissed for the reason that her maternity leave and the circumstances which followed from the premature birth of her child were an ‘inconvenience’ to her employer.<sup>177</sup> The dismissal was automatically unfair in terms of section 187(1)(e).

The case of *De Beer* dealt with the dismissal of an employee who had taken maternity leave and subsequently requested further leave because of the ill health of her newborn twins. The employee had agreed to one month of maternity leave granted to her by the employer. The employee’s newborn twins suffered from colic, prompting her to request a further month of maternity leave. The employer was prepared to grant the employee only a further two weeks of leave. The employee refused on the basis that an additional two weeks of leave was unacceptable, and was later dismissed.<sup>178</sup> She applied to the Labour Court claiming that her dismissal was automatically unfair in terms of section 187(1)(e) of the LRA. She contended that she had been dismissed for reasons relating to her pregnancy.<sup>179</sup>

The court stated that the phrase ‘any reason related to pregnancy’ includes dismissals resulting from pregnancy, any reason related to the pregnancy, as well as reasons connected with the exercise of the employee’s rights to maternity leave.<sup>180</sup> The court subsequently found that the phrase ‘any reason related to pregnancy’ must include pregnancy-related health problems, such as babies suffering from illnesses and needing maternal care.<sup>181</sup> In the interpretation of the term ‘any reason relating to her pregnancy’, the court noted that the phrase requires careful consideration and will depend on the facts of the case, but the inevitable outcome of pregnancy is

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<sup>175</sup> Grogan (note 19 above) 218.

<sup>176</sup> *Hunt v ICC Car Import Services Company (Pty) Ltd* (1999) 20 ILJ 364 (LC).

<sup>177</sup> *Ibid* 364 at par [5].

<sup>178</sup> *De Beer* (note 37 above); Barnard (note 8 above) 511.

<sup>179</sup> *De Beer* (note 37 above) 350 at par [7].

<sup>180</sup> *Ibid* 351 at par [12].

<sup>181</sup> *Ibid* 355 at par [23].

giving birth, and the words ‘any reason’ envisage instances where babies are ill and need maternal care. This must be protected by section 187(1)(e).<sup>182</sup>

The court proceeded to find that the employee had been unfairly dismissed in terms of section 187(1)(e), and awarded compensation equivalent to 24 months’ remuneration.<sup>183</sup> The court made a point of emphasising that section 187(1)(e) must be recognised as an aspect of social legislation aimed at creating equality between men and women. Such interpretations of legislative provisions promote the social and legal acceptance of women in the workplace.<sup>184</sup> Therefore, the judgment’s express recognition of section 187(1)(e) as an aspect of social legislation and its link to gender equality must be applauded.<sup>185</sup>

The scope of section 187(1)(e) requires that employers ensure the protection of pregnant employees against dismissals.<sup>186</sup> As stated in the case of *De Beer*:

‘It is often a considerable burden to an employer to have to make the necessary arrangements to keep a women’s job open for her while she is absent from work to have a baby, but this is a price that has to be paid as part of the social and legal recognition of the equal status of women in the workplace’.<sup>187</sup>

Therefore, the protection of pregnant employees against dismissal must be a priority for an employer.<sup>188</sup> Furthermore, the employer has the responsibility to make appropriate arrangements to ensure such protection.<sup>189</sup>

An employer may not dismiss a pregnant employee at the insistence of a third party, as seen in the case of *Ekhamanzi Springs (Pty) Ltd v Mnomiya*.<sup>190</sup> The facts involved an unwed pregnant employee who was denied access to her workplace situated on the premises of a church mission, on the grounds that the mission’s code of conduct required that unmarried women who worked

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<sup>182</sup> Ibid 354 at par [23]; Barnard (note 8 above) 512.

<sup>183</sup> Barnard (note 8 above) 512.

<sup>184</sup> Whitear-Nel, Grant & Behari (note 153 above) 117.

<sup>185</sup> *De Beer* (note 37 above) 351 at par [10].

<sup>186</sup> Field, Bagraim and Rycroft (note 2 above) 33–34.

<sup>187</sup> *De Beer* (note 37 above) 351 at par [10].

<sup>188</sup> Whitear-Nel, Grant & Behari (note 153 above) 117.

<sup>189</sup> Ibid.

<sup>190</sup> *Ekhamanzi Springs (Pty) Ltd v Mnomiya* (2014) 35 ILJ 2388 (LAC).

and resided on the premises were not allowed to fall pregnant. Although the employee was denied access to her workplace by the mission, her employer refused to intervene on her behalf. The Labour Court held that the employee had been denied access to the workplace for reasons related to her pregnancy, which amounted to an unfair dismissal in terms of section 187(1)(e).<sup>191</sup> In the Labour Appeal Court, the decision was upheld. The court stated that sections 187(1)(e) and (f) of the LRA reflect the constitutional right to equality. These sections apply to all female employees, irrespective of their marital status.<sup>192</sup>

Although a claim for unfair dismissal in terms of section 187(1)(e) must show a causal link between the pregnancy, intended pregnancy, or reason related to the employee's pregnancy, in certain instances the employer may disclose the reason for the dismissal, or the reason may be so obvious that the link between the dismissal and the pregnancy need not be an issue.<sup>193</sup> For example, in the case of *Mnguni v Gumbi*,<sup>194</sup> a claim of unfair dismissal was made by an employee who was dismissed at a time when she was eight months pregnant and due to begin maternity leave. The dismissal occurred when the employee complained of feeling tired from working long hours.<sup>195</sup> The evidence presented to the Labour Court indicated an obvious link between the dismissal and the employee's pregnancy.<sup>196</sup>

In certain instances, the causal link may be more difficult to prove, and the protection afforded to pregnant employees in section 187(1)(e) may fail. In *Wardlaw v Supreme Mouldings (Pty) Ltd*,<sup>197</sup> the employee returned from five months of maternity leave and was dismissed following a disciplinary hearing on charges of gross negligence and dereliction of duties for her failure to produce and maintain proper company records. The employee claimed that her dismissal was automatically unfair. The issue before the court was whether the employee was unfairly dismissed because of her pregnancy or 'any reason related to her pregnancy'. However, in proving that the dismissal was fair, the employer claimed that the employee's negligence had

<sup>191</sup> *Memela and Another v Ekhamanzi Springs (Pty) Ltd* (2012) 33 ILJ 2911 (LC).

<sup>192</sup> *Ekhamanzi Springs* (note 190 above).

<sup>193</sup> Grogan (note 19 above) 133.

<sup>194</sup> *Mnguni v Gumbi* (2004) 25 ILJ 715 (LC).

<sup>195</sup> *Ibid* at par [4].

<sup>196</sup> *Ibid* at par [20]; M O'Sullivan & C Murray 'Brooms sweeping oceans? Women's rights in South Africa's first decade of democracy' (2005) 1 *Acta Juridica* 1, 25.

<sup>197</sup> *Wardlaw* (note 170 above).

become apparent only once she had departed for maternity leave.<sup>198</sup> Because of the detailed allegations of negligence made by the employer, the Court found that the employee had failed to demonstrate that the reason for the dismissal was related to her pregnancy. The employee had been dismissed for misconduct.

Similarly, in *Vorster v Rednave Enterprises CC t/a Cash Converters Queenswood*,<sup>199</sup> an employee alleged unfair dismissal in terms of section 187(1)(e) when her employer failed to renew her employment following the end of a three-month probationary period. In deciding whether the dismissal was automatically unfair, the court asked the following:

‘Does the evidence show that the principle reason for the dismissal of the Applicant was her pregnancy? Put differently, does the evidence lead to one justifiable inference, namely that the Applicant’s dismissal was as a result of her pregnancy?’<sup>200</sup>

The court found that the employer had been aware of the pregnancy for some time before the dismissal, and although the employer might have taken the pregnancy into account when the decision to dismiss the employee was taken, the pregnancy had not been the principal reason for the dismissal.<sup>201</sup>

The case of *Uys v Imperial Car Rental (Pty) Ltd*<sup>202</sup> was based on facts similar to the case of *Wardlaw* and *Vorster*.<sup>203</sup> In *Uys*, the employer was aware of the employee’s pregnancy at the time that she was dismissed on the basis of misconduct. The employee had been awarded a promotion and had not disclosed her pregnancy. Although evidence indicated that the employee’s manager had become angry upon hearing of the pregnancy, the court found that the anger was due to the employee’s failure to disclose her pregnancy upon receiving the promotion.<sup>204</sup> The court held that the dismissal was not associated with or possibly based on the pregnancy. The dismissal was not automatically unfair in terms of section 187(1)(e).

<sup>198</sup> Ibid 1100; Grogan (note 168 above) 133–134.

<sup>199</sup> *Vorster v Rednave Enterprises CC t/a Cash Converters of Queenswood* (2009) 30 ILJ 407 (LC).

<sup>200</sup> Ibid at par [28].

<sup>201</sup> Ibid.

<sup>202</sup> *Uys v Imperial Car Rental (Pty) Ltd* (2006) 27 ILJ 2701 (LC); Dupper 2004 (note 32 above) 411.

<sup>203</sup> *Wardlaw* (note 170 above); *Vorster* (note 199 above).

<sup>204</sup> *Uys* (note 202 above) at par [73]-[74].

In the recent case of *Ismail v B & B t/a Harvey World Travel Northcliffe*,<sup>205</sup> the employee was employed on a three-month probationary period. She was subsequently dismissed on the same day that she had disclosed her pregnancy to her employer. The employee relied on section 187(1)(e) on the basis that the timing of the dismissal was suspiciously close to her disclosure of the pregnancy. However, the court found that at the time that the decision had been taken to dismiss the employee, the employer had not been aware of her pregnancy. The court held that ‘mere suspicion on its own cannot lead to a conclusion that the issue of her pregnancy was the dominant or more likely reason for the termination of the employment relationship’.<sup>206</sup> Therefore, the dismissal was not automatically unfair.

On the issue of the disclosure of pregnancy to an employer, the case of *Mashava v Cuzen & Woods Attorneys*<sup>207</sup> held that an employee has no legal duty to disclose her pregnancy. The facts showed that the employee was employed for a probationary period which, if successful, would have led to a position as a candidate attorney with the employer firm. The employee was dismissed once her employer discovered that she was pregnant. The employer contended that the reason for the dismissal was primarily based on the ground that the employee was deceitful in not disclosing her pregnancy. It was found that the reason for the dismissal could not be the employee’s deceit because she had had no legal duty to disclose her pregnancy. The true reason for the dismissal was the employee’s pregnancy or reasons related to her pregnancy. The employee was awarded remuneration.<sup>208</sup>

The above cases have shown that the Labour Court has placed emphasis on the causal link between the pregnancy and the dismissal. Such approach may assist in ensuring that the wide protection afforded to pregnant employees in the LRA is not abused.<sup>209</sup> Accordingly, if the

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<sup>205</sup> *Ismail v B & B t/a Harvey World Travel Northcliffe* (2014) 35 ILJ 696 (LC).

<sup>206</sup> *Ibid* 708 at par [39].

<sup>207</sup> *Mashava* (note 155 above).

<sup>208</sup> Dupper 2004 (note 32 above) 411; Barnard (note 8 above) 513; Dupper 2002 (note 6 above) 85.

<sup>209</sup> J Gobind & WI Ukpere ‘Labour pains: Lessons from South Africa for Women employees and their employers’ (2012) 6(46) *African Journal of Business Management* 11459, 11552 <http://www.academicjournals.org/AJBM>, accessed on 3 February 2016.

employee was found to have committed serious misconduct during her pregnancy, or before or after her maternity leave, she may still be dismissed for that misconduct.<sup>210</sup>

#### **4.4.2.4 Non-discrimination**

Apart from the provision of the Constitution which states that no person may unfairly discriminate directly or indirectly against anyone on the grounds of pregnancy, the protection against discrimination on the basis of pregnancy is included in the LRA and the EEA.<sup>211</sup> Section 6(1) of the EEA provides that no person may unfairly discriminate, directly or indirectly, against any employee in any employment policy or practice, on any one or more grounds listed therein. These grounds include gender, sex, pregnancy and family responsibility.<sup>212</sup> This provision protects not only employees but applicants for employment as well.<sup>213</sup> Laws which prohibit discrimination on the grounds of pregnancy and family responsibilities are vital because they ensure that employees who request or take time off to care for their families are secure and protected in their employment.<sup>214</sup>

When an employee is dismissed for reasons based on pregnancy in terms of section 187(1)(e) of the LRA, not only is the dismissal automatically unfair, but the dismissal for pregnancy constitutes direct unfair discrimination on the ground of sex or gender or family responsibilities.<sup>215</sup> Therefore, the dismissal will be considered unfair discrimination in terms of section 187(1)(f) of the LRA.<sup>216</sup> Section 187(1)(f) sets out specific grounds in terms of which an employee may claim that a dismissal was discriminatory. It states that a dismissal is

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<sup>210</sup> Grogan (note 153 above) 193.

<sup>211</sup> Dupper (note 6 above) 84.

<sup>212</sup> Section 6(1) of the EEA states: 'No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth or on any other arbitrary ground.' Dancaster & Cohen (note 23 above) 223; O'Sullivan & Murray (note 196 above) 25.

<sup>213</sup> Section 9 of the EEA. Grogan (note 153 above) at 104 explains that the meaning of 'applicant for employment' set out in s 9 of the EEA has not yet been judicially interpreted; Huysamen (note 3 above) 59.

<sup>214</sup> Dancaster & Baird (note 1 above) 28.

<sup>215</sup> Dancaster & Cohen (note 23 above) 223.

<sup>216</sup> *Botha* (note 156 above) 2581 at par [3].

automatically unfair if an employer *unfairly* discriminates against an employee on grounds which include gender, sex, or family responsibility.<sup>217</sup>

Section 187(1)(f) does not explicitly set out ‘pregnancy’ as grounds for unfair discrimination upon dismissal. It may be presumed that pregnancy is excluded as a result of the wide protection against unfair dismissals afforded in section 187(1)(e), which includes protection against gender discrimination.<sup>218</sup> However, it may be inferred from the wording of section 187(1)(f) that further ‘arbitrary’ grounds of unfair discrimination could exist depending on the circumstances of the case. Therefore, pregnancy may be considered as an implied ground of unfair discrimination in terms of section 187(1)(f).<sup>219</sup> Accordingly, the Constitution, the LRA and the EEA together extend the protection against discrimination to employees, applicants for employment, and employees unfairly dismissed for reasons of pregnancy, intended pregnancy, and reasons related to pregnancy.<sup>220</sup>

According to the EEA, there is a distinction between direct and indirect discrimination. Direct discrimination occurs where a person is treated unequally and differently based on one of the grounds listed in section 6 of the EEA. Direct discrimination involves intentional differential treatment.<sup>221</sup> Indirect discrimination occurs where workplace policies appear to be neutral but actually excludes a small minority. Indirect discrimination may be intentional or unintentional.<sup>222</sup>

Where there is an allegation of unfair discrimination, it must firstly be determined whether or not the employee was discriminated against. Secondly, it must be determined whether or not the discrimination was unfair.<sup>223</sup> The discrimination is unfair if the conduct of the discriminatory act

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<sup>217</sup> Section 187(1)(f) reads: ‘A *dismissal* is automatically unfair if the employer, in dismissing the *employee*, acts contrary to s 5 or, if the reason for the *dismissal* is—  
(f) that the employer unfairly discriminated against an *employee*, directly or indirectly, on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility.’

<sup>218</sup> *De Beer* (note 37 above) 354 at par [23].

<sup>219</sup> *Botha* (note 156 above) 2586 at par [29]; Dupper (note 6 above) 84.

<sup>220</sup> Dupper (note 6 above) 85.

<sup>221</sup> *Grogan* (note 153 above) 92.

<sup>222</sup> *Ibid.*

<sup>223</sup> *Ibid.*



cannot be objectively justified. The employer has the onus of proving that the discrimination was fair.

In doing so the employer may rely on either of two justifications. These are affirmative action and inherent job requirements, both of which are set out in the EEA.<sup>224</sup> Section 6(2)(a) of the EEA allows employers to use affirmative action measures to give preferential treatment to previously disadvantaged groups of employees. This provision aims to create an equitable representation of women in the workplace.<sup>225</sup> Affirmative action affects pregnant employees to the extent that it places obligations on employers to ‘make reasonable accommodation’ for women in the workplace.<sup>226</sup> As such, affirmative action may be used as a mechanism against discrimination by placing obligations on the employer for the appointment and promotion of women.<sup>227</sup> Section 6(2)(b) states that the discrimination would be fair if it was aimed at distinguishing, excluding or preferring any person by virtue of an inherent requirement of the job.<sup>228</sup>

Similarly, the LRA provides inherent job requirements as a specific defence to the allegation of a discriminatory dismissal.<sup>229</sup> Section 187(2)(a) states that despite the provisions of section 187(1)(f), ‘a *dismissal* may be fair if the reason for *dismissal* is based on an inherent requirement of the particular job’. In the decision of *Woolworths (Pty) Ltd v Whitehead*,<sup>230</sup> the Labour Appeal Court considered whether an inherent job requirement of job continuity justified discrimination against the appointment of a woman who could not fulfil the inherent requirement of job continuity for twelve months without protracted leave for reason of her pregnancy. The facts involved a female employee who applied for a permanent position of appointment for which she was qualified, but which had the additional inherent job requirement that the employee must remain in the position for an uninterrupted period of at least one year. During her interview for the position, the employee disclosed her pregnancy, which would require her to claim maternity

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<sup>224</sup> Bonthuys (note 12 above) 258.

<sup>225</sup> Dancaster & Cohen (note 1 above) 34.

<sup>226</sup> *Ibid* 263.

<sup>227</sup> Bonthuys (note 12 above) 263; Dancaster & Cohen (note 1 above) 34.

<sup>228</sup> Grogan (note 153 above) 99–111.

<sup>229</sup> Section 187(2)(a) of the LRA.

<sup>230</sup> *Woolworths (Pty) Ltd v Whitehead* 2000 (12) BCLR 1340 (LAC).

leave within five months of her appointment. According to the evidence, there had been no negative reaction by the employer regarding the pregnancy.

Following a telephonic message from the employer the next day, the employee believed that her application for the position had been successful. However, the employee later discovered that the other candidate who had interviewed for the position was appointed. The employer subsequently offered the employee a fixed-term contract of five months. The employee contended that she had been unfairly discriminated against on the basis of her pregnancy. While the employer admitted that the pregnancy was a factor that was taken into account, he argued that there had been another applicant for the job who had been found to be more qualified for the position and could meet the requirement of job continuity. The employer argued further that the requirement of job continuity justified the refusal to appoint the employee.

The Labour Court did not accept this justification and held that the actions of the employer had amounted to unfair labour practice.<sup>231</sup> The Labour Court found that there is never a guarantee that an employee will remain in continued employment of one year, even if the employee is not pregnant. However, on appeal, the Court disagreed. The decision of the Labour Appeal Court (LAC) was based on the majority judgment of Wills JA and Zondo AJP who both found in favour of the employee, but with different reasons. The LAC found that the withdrawal of the appointment had not been discriminatory.<sup>232</sup> It was held that the employer had not acted arbitrarily in considering the employee's pregnancy when making the decision to withdraw the appointment. The decision had been based on the conclusion derived from evidence. Zondo AJP found that the employee had failed to prove that she would have been appointed to the permanent position had she not been pregnant.<sup>233</sup> He found that an inability to meet the requirement of job continuity had not been the only factor which had been responsible for the refusal to appoint the employee.<sup>234</sup> Essentially, the employee's pregnancy had not been the sole reason for which the employee had been unsuccessful in the appointment.<sup>235</sup>

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<sup>231</sup> *Whitehead v Woolworths (Pty) Ltd* (1999) 20 ILJ 2133 (LC).

<sup>232</sup> Dupper (note 6 above) 85; O'Sullivan & Murray (note 196 above) 25.

<sup>233</sup> *Woolworths* (note 230 above) at par [19].

<sup>234</sup> *Ibid* at par [26].

<sup>235</sup> B Grant 'Beyond Beijing: Women's rights in the workplace' (2005) 64 *Agenda* 90, 92.

Willis JA found that the employer had not acted unreasonably or irrationally but had acted in accordance with the exercise of commercial rationality in not appointing an employee who would require maternity leave.<sup>236</sup> In his judgment, Willis JA emphasised economic prosperity over the gender inequalities faced by pregnant employees. It was stated that ‘to hold that an employer cannot take into account a prospective employee’s pregnancy would be widely regarded as being so economically irrational as to be fundamentally harmful to our society’.<sup>237</sup> He reasoned that while it is possible to accommodate pregnant women in ‘numerous lowly paid, dreary and routine jobs’, employers should not be burdened with accommodating pregnant employees in executive positions.<sup>238</sup> Furthermore, a finding to the effect that no employer can consider an employee’s pregnancy when deciding whether or not to offer her employment would be unfair to employers and other prospective employees.<sup>239</sup>

It must be noted that the case of *Woolworths (Pty) Ltd v Whitehead* has been largely criticised and is considered flawed among legal academics for the judgment of Willis JA.<sup>240</sup> The judgment reinforces stereotypes against pregnant employees. The attitude of Willis JA suggests that women are unable to balance motherhood with a successful career, and an attempt to do so will be damaging to the economy. Apart from the discussion of economic impacts of pregnant employees, Willis JA dismissed any possibilities regarding flexible or alternate working arrangements for pregnant employees to work from home while on maternity leave. He found it inappropriate for women with newborn babies to work from home on the basis that women should be encouraged to spend the first few weeks of their child’s life at home without

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<sup>236</sup> *Woolworths* (note 230 above) at par [55].

<sup>237</sup> *Ibid* at par [136].

<sup>238</sup> *Ibid* at par [146].

<sup>239</sup> *Ibid* at par [149].

<sup>240</sup> Murray & O’Sullivan (note 196 above) 24; Dupper 2003 (note 12 above) 409; Grogan (note 153 above) 256; Grant (note 235 above) 92–93; Bonthuys (note 12 above) 271; N Whitear-Nel ‘To employ or not to employ a pregnant woman... that was the question: A discussion of *Woolworths (Pty) Ltd v Whitehead*’ (2000) 8(2) *Juta’s Business Law* 95; JC Mubangizi ‘Too pregnant to work – The dilemma of economic rationality versus equality: *Woolworths (Pty) Ltd v Whitehead*’ (2000) 16 *SAJHR* 690; A Martabano & M O’Sullivan ‘Three steps forward, two steps back – Legal activism for women’s rights in South Africa’ (2004) 60 *Agenda* 55, 56; C Wyllie ‘Legal eye: The judiciary fails working mothers’ (2000) 44 *Agenda* 90; S Samuel. ‘Achieving equality: How far have women come?’ (2001) 47 *Agenda* 21.

distractions.<sup>241</sup> Therefore, the judgment of Willis failed to account for the reality that many women are not in the financial position to leave employment to be full-time mothers.<sup>242</sup>

The case highlights the consequences of the exclusion of pregnancy as an arbitrary ground constituting unfair discrimination in the LRA.<sup>243</sup> As mentioned previously, it may be inferred from the wording of section 187(1)(f) that further ‘arbitrary’ grounds of unfair discrimination could include pregnancy. Therefore, if the non-discrimination provisions of the Constitution, the EEA and the LRA are read together, the exclusion of the term ‘pregnancy’ from the LRA should not be considered a significant legislative gap. However, in *Woolworths (Pty) Ltd v Whitehead*,<sup>244</sup> the judges were not prepared to interpret the legislation to the effect of providing meaningful protection to pregnant employees.<sup>245</sup> Therefore, the case may set a precedent for employers, upon dismissing pregnant employees, to rely on the justification of inherent job requirements.<sup>246</sup>

In the subsequent decision of *Wallace v Du Toit*,<sup>247</sup> the Labour Court found that the employee had been both unfairly dismissed and unfairly discriminated against. The employee was an au pair who had been expressly told by her employer in her initial interview that she could not fall pregnant and have children of her own while in the position as it would affect her devotion to her job. The employee fell pregnant a couple of years later, which led to the termination of her employment contract. She claimed that her dismissal was for reasons related to her pregnancy and was automatically unfair in terms of section 187(1)(e). The employer argued that there was no dismissal but that the employment contract was terminated with mutual consent.<sup>248</sup>

The basis for his argument was that the employment contract included terms for the termination of employment upon the employee falling pregnant. However, such terms are *contra bonos*

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<sup>241</sup> *Woolworths* (note 230 above) at par [137]; *Whitear-Nel* (note 240 above) 97; *O’Sullivan & Murray* (note 196 above) 25.

<sup>242</sup> *Whitear-Nel* (note 240 above) 97; *Murray & O’Sullivan* (note 196 above) 25; *Dancaster & Cohen* (note 23 above) 229.

<sup>243</sup> *Woolworths* (note 230 above) at paras [92]-[118].

<sup>244</sup> *Woolworths* (note 196 above).

<sup>245</sup> *Mubangizi* (note 240 above) 701; *Dancaster & Cohen* (note 1 above) 229.

<sup>246</sup> *Bonthuys* (note 12 above) 271.

<sup>247</sup> *Wallace v Du Toit* (2006) 8 BLLR 757 (LC).

<sup>248</sup> *Barnard* (note 8 above) 514.

*mores* and unconstitutional.<sup>249</sup> The court found that the employee had in fact been dismissed because although she had accepted the dismissal, she would have preferred to remain in employment. This does not change the act from dismissal to consensual termination.<sup>250</sup> The court held that the dismissal had been automatically unfair for reasons relating to pregnancy in terms of section 187(1)(e) of the LRA.<sup>251</sup>

The dismissal was held to constitute unfair discrimination in terms of section 6(1) of the EEA. The court stated that a term in the employment contract that an employee cannot fall pregnant cannot be an inherent job requirement.<sup>252</sup> The provision in the employee's contract to the effect that the au pair must not be pregnant or must not be a parent 'is the kind of generalisation or stereotyping that evidences the unfairness of the discrimination'.<sup>253</sup> The employee was awarded compensation and damages under the EEA for the impairment of her dignity and self-esteem following discrimination on the grounds of her pregnancy.<sup>254</sup>

Statistics have shown that despite the protection of the EEA, the advancement of women in the workplace has been slow.<sup>255</sup> The object of the EEA is to achieve equality by requiring designated employers to implement affirmative action measures aimed at creating an equitable representation of women in the workplace.<sup>256</sup> However, women still represent a very small percentage of the executive and directorial positions in the workplace. One reason for this may be that women are unable to consolidate their obligations as child-carers, elder-carers and homemakers with their financial pressures of contributing to household expenses through secured employment.<sup>257</sup>

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<sup>249</sup> *Wallace* (note 247 above) at par [15].

<sup>250</sup> *Ibid* at par [16].

<sup>251</sup> *Ibid* at par [17].

<sup>252</sup> *Ibid* at par [19].

<sup>253</sup> *Ibid*.

<sup>254</sup> *Ibid* at par [21].

<sup>255</sup> *Dancaster & Baird* (note 1 above) 27–28.

<sup>256</sup> *Grogan* (note 153 above) 92–93.

<sup>257</sup> *Bonthuys* (note 12 above) 254; *Cohen* (note 9 above) 21; *Boswell & Boswell* (note 8 above) 78.

With such responsibilities, women cannot devote themselves to building a successful career.<sup>258</sup> Many women are found in part-time or precarious jobs because their dual role as worker and caregiver creates time constraints on their lives.<sup>259</sup> It appears that the objectives of affirmative action as anticipated by the EEA cannot be achieved unless there are further legislative initiatives aimed at encouraging the reconciliation of workplace obligations with those of care-giving responsibilities.<sup>260</sup> As seen from the case law discussed above, much of the South African law surrounding pregnant employees exists from decisions made through individual litigation. It would be beneficial for South Africa to adopt legislative provisions which are more consistent, clear and certain, with the objectives of the reconciliation of work and care.<sup>261</sup>

#### 4.5 Family responsibility leave

Section 27 of the BCEA provides for family responsibility leave. In terms of this section, employees are entitled to three days' paid leave each year as family responsibility leave. It applies to employees who have been employed for longer than four months and who work for that employer for at least four days a week.<sup>262</sup> Section 27(2) provides that an employer must grant an employee, during each annual leave cycle, three days of paid leave, at the request of the employee. The employee is entitled to this leave when the employee's child is born; when the employee's child is sick; or in the event of the death of the employee's spouse or life partner, or parent, adoptive parent, grandparent, child, adopted child, grandchild, or sibling.<sup>263</sup>

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<sup>258</sup> Olivier & A Govindjee (note 12 above) 447; Huysamen (note 3 above) 65; see *Masondo v Crossway* (1998) 19 ILJ 180 (LC), 181C; E Strydom 'Introduction to social security law' in EML Strydom et al (eds) *Essential Social Security Law* (2006) 1, 9.

<sup>259</sup> Dancaster & Baird (note 1 above) 27–28; Cohen (note 9 above) 27; Field, Bagraim and Rycroft (note 2 above) 39; S Fredman 'Engendering Social and Economic Rights' in B Goldblatt & K McLean (eds) *Women's Social and Economic Rights: Developments in South Africa* (2011) 4.

<sup>260</sup> Dancaster & Baird (note 1 above) 28.

<sup>261</sup> Dancaster & Cohen (note 1 above) 32.

<sup>262</sup> Section 27(1)(a) and (b) of the BCEA; Grogan (note 19 above) 66; Dancaster & Cohen (note 110 above) 2489; Behari (note 5 above) 348.

<sup>263</sup> Section 27(2)(a), (b) and (c) of the BCEA; Grogan (note 19 above) 66; Dancaster (note 27 above) 185; Behari (note 5 above) 348.

Therefore, ‘family responsibility leave’ as provided in the BCEA is not a form of paternity or parental leave.<sup>264</sup> Nor is it exclusive to the birth or the adoption of a child. It covers situations ranging from when a child is born or becomes sick, to the death of a family member.<sup>265</sup> Employees are entitled to be paid their ordinary wages for work for the days of leave, and payment must be made on the usual payday.<sup>266</sup> The leave may be taken for part of the workday or an entire workday. The employer may require reasonable proof of the event for which the leave was required. Unused family responsibility leave lapses at the end of the annual leave cycle in which it accrues.<sup>267</sup> The BCEA does make provision for the variation of the number of days and the circumstances under which leave is to be granted. These variations may be made by collective agreement.<sup>268</sup>

Section 7(d) of the BCEA provides that every employer must regulate the working time of each employee with due regard to the family responsibilities of employees. The Codes of Good Practice provide additional support to employees with family responsibilities.<sup>269</sup> The Code of Good Practice on the Arrangement of Working Time aims to provide information and guidelines to employers and employees concerning the arrangement of working time and the impact of working time on the health, safety, and family responsibilities of employees.<sup>270</sup> It provides that the design of shift rosters must account for their impact on ‘employees and their families’.<sup>271</sup> The information which is provided to the employer for the design of shift rosters must include ‘childcare needs of employees’.<sup>272</sup>

The Code of Good Practice on the Arrangement of Working Time goes on to state that consideration must be had to the arrangement of shift times to accommodate the special needs of

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<sup>264</sup> Dupper (note 6 above) 89–92; Van Jaarsveld (note 11 above) 401; Dancaaster (note 27 above) 185; Behari (note 5 above) 348.

<sup>265</sup> Grogan (note 153 above) 92–93.

<sup>266</sup> Section 27(3)(a) and (b) of the BCEA.

<sup>267</sup> *Ibid* s 27(4)–(6).

<sup>268</sup> Section 27(7) of the BCEA states that ‘[a] collective agreement may vary the number of days and the circumstances under which leave is to be granted in terms of this section’.

<sup>269</sup> GN 1440 in GG 19453 of 1998-11-13. Item 1 of the Code of Good Practice; Behari (note 5 above) 348.

<sup>270</sup> GN 1440 in GG 19453 of 1998-11-13. Item 1 of the Code of Good Practice.

<sup>271</sup> Item 4.1 of the Code of Good Practice.

<sup>272</sup> Item 4.2.6 of the Code of Good Practice.

pregnant and breastfeeding workers, and workers with family responsibilities.<sup>273</sup> Furthermore, the Code of Good Practice on the Integration of Employment Equity into Human Resource Policies and Practices states that with regard to workplace policies and practices, employers should provide ‘an accessible, supportive and flexible environment for employees with family responsibilities’.<sup>274</sup> Such an environment includes the consideration of flexible working hours and the granting of sufficient family responsibility leave for both parents.<sup>275</sup>

Although these provisions oblige the employer to make accommodations for the family responsibilities of employees, Codes of Good Practice are not binding, and act as guidelines for employers.<sup>276</sup>

#### **4.5.1 Family responsibilities and non-discrimination**

Section 187(1)(f) of the LRA states that a dismissal is automatically unfair if an employer unfairly discriminates against an employee on grounds which include family responsibility. The only instance in which the dismissal of an employee was found to be automatically unfair as a result of unfair discrimination against the employee on the grounds of family responsibilities was in the CCMA award of *Masondo v Crossway*.<sup>277</sup> The case involved an employee who, on her return from maternity leave, was instructed by her employer to work night shifts. The employee subsequently resigned from employment due to her inability to reconcile the night shift with her responsibilities of childcare. She claimed that other employees without young children could have been chosen to work the night shift. The commissioner accepted that the employee had a ‘societal obligation’ to take care of her newborn child to the best of her ability and this obligation was prevented by her employer’s requirement to work night shifts.<sup>278</sup> The employee succeeded in her case of unfair discrimination on the basis of family responsibility and was awarded compensation.<sup>279</sup>

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<sup>273</sup> Item 5.6 of the Code of Good Practice.

<sup>274</sup> GN 1358 in GG 27866 of 2005-08-04

<sup>275</sup> Item 11.3.4.

<sup>276</sup> *Dancaster & Cohen* (note 23 above) 237; *Dancaster & Cohen* (note 1 above) 41.

<sup>277</sup> *Masondo* (note 258 above); *Grogan* (note 19 above) 219; *Dancaster & Cohen* (note 23 above) 232.

<sup>278</sup> *Masondo* (note 258 above) 181C.

<sup>279</sup> *Dancaster & Cohen* (note 23 above) 232.



Section 6(1) of the EEA provides that no person may unfairly discriminate, directly or indirectly, against any employee in any employment policy or practice, on grounds which include family responsibility.<sup>280</sup> The EEA states further that designated employers must implement affirmative action measures so that employees with family responsibilities may be accommodated. This provision aims to create an equitable representation of women in the workplace.<sup>281</sup> The EEA defines ‘family responsibilities’ as the ‘responsibility of employees in relation to their spouse, partner, dependent children, or members of their immediate family that [*sic*] need their care or support’.<sup>282</sup>

An employee would face direct discrimination on the grounds of family responsibilities if the employee was dismissed or faced other prejudicial treatment by the employer as a result of that employee’s family responsibilities; or if the employee is not promoted on the basis of an assumption that her family responsibilities will inhibit her job performance.<sup>283</sup> Indirect discrimination on the grounds of family responsibilities may occur where an employer practises differential treatment between employees who request flexible working hours as a result of family responsibilities, as opposed to those employees who work inflexible hours and overtime.<sup>284</sup>

In the case of *Co-operative Workers Association v Petroleum Oil and Gas Co-operative SA*,<sup>285</sup> a group of employees claimed that their employer had discriminated against them on the basis of family responsibilities by affording them a smaller contribution of medical aid benefits from the employer than those employees with more dependants.<sup>286</sup> The group of employees who brought the matter before the Labour Court claimed, on the principle of equal work for equal pay, that they were differentiated from other employees and afforded fewer benefits from the employer’s

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<sup>280</sup> Ibid 223.

<sup>281</sup> Dancaster & Cohen (note 1 above) 34.

<sup>282</sup> Section 1 of the EEA; Dancaster & Cohen (note 23 above) 223.

<sup>283</sup> Dancaster & Cohen (note 23 above) 223.

<sup>284</sup> Ibid.

<sup>285</sup> *Co-operative Workers Association v Petroleum Oil & Gas Co-operative of SA* (2007) 28 ILJ 627 (LC).

<sup>286</sup> Ibid.

contribution because of their absence of family responsibilities. Their claim rested on unfair discrimination in terms of section 6(1) of the EEA.<sup>287</sup>

The court held that the wording of section 6(1) indicated that only employees with dependants could rely on the provision. The court relied on international standards to indicate the significance of recognising ‘workers with family responsibilities as a vulnerable category of people deserving special treatment’.<sup>288</sup> In particular, it mentioned the *United Nations Declaration of Human Rights*;<sup>289</sup> the *European Social Charter, 1996*;<sup>290</sup> the *Discrimination (Employment and Occupation) Convention, 1958 (No. 111)*;<sup>291</sup> the *Convention on Workers with Family Responsibilities, Convention, 1981 (No 156)*; and the *Recommendation concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities, 1981 (No. 165)*.<sup>292</sup> The court also mentioned various cases heard by the Constitutional Court which emphasised the importance of family.<sup>293</sup>

Within the context of the case, the Labour Court found, with reliance on the abovementioned sources, that the special measures which are applied to employees with family responsibilities are a justified adjustment for the hardships of having family responsibilities. Without such

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<sup>287</sup> Behari (note 5 above) 352.

<sup>288</sup> Co-operative Worker Association (note 285 above) at par [42].

<sup>289</sup> Ibid [37–39]. The United Nations Declaration of Human Rights provides the ‘right to found a family’ and states in art 16(1) and (3) that: ‘[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State’. Art 23(3) states that everyone has the right to ‘just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection’.

<sup>290</sup> Ibid at par [40]. Art 16 of the European Social Charter provides that ‘[w]ith a view to ensuring the necessary conditions for the full development of the family, which is a fundamental unit of society, the Parties undertake to promote the economic, legal and social protection of family life by such means as social and family benefits, fiscal arrangements, provision of family housing, benefits for the newly married and other appropriate means’.

<sup>291</sup> Ibid at par [45]. Art 5(1) of the ILO Discrimination (Employment and Occupation) Convention, 1958 recognises that ‘special measures of protection or assistance provided for in other Conventions or Recommendations adopted by the International Labour Conference shall not be deemed to be discrimination’.

<sup>292</sup> Ibid at par [43–44]. The ILO Family Responsibilities Convention, 1981 provides that workers with family responsibilities may be targeted for special treatment to those without family responsibilities.

<sup>293</sup> Ibid at par [41]. These cases were *Dawood & Another v Minister of Home Affairs & Others*, *Shalabi & Another v Minister of Home Affairs & Others*, *Thomas & Another v Minister of Home Affairs & Others* 2000 (1) SA 997 (CC); *Daniels v Campbell NO & Others* 2004 (5) SA 331 (CC); *Minister of Home Affairs v Fourie (Doctors for Life International and Others, Amici Curiae)*; *Lesbian and Gay Equality Project and Others v Minister of Home Affairs* [2005] ZACC 19; [2006 \(1\) SA 524](#) (CC); *National Coalition For Gay & Lesbian Equality & Others v Minister of Justice & Others* 1999(1) SA 6 (CC).

adjustment, equality in the workplace cannot be attained.<sup>294</sup> It was held that the differential treatment based on the number of dependants of the employee was justified because employees with greater family responsibilities require greater means of meeting their responsibilities.<sup>295</sup> The claim was dismissed.

The provisions of the EEA and LRA provide employees with significant protection against prejudice or the termination of employment based on pregnancy or family responsibilities.<sup>296</sup> Since the prohibition against discrimination in the EEA extends the grounds of discrimination to family responsibilities, it not only provides maternity protection but appears to encourage work–care reconciliation.<sup>297</sup> The effect of the prohibitions against discrimination from the LRA and EEA is that an employer cannot prevent a pregnant woman from becoming employed, prejudice her during her employment, or terminate her employment as a result of her pregnancy or family responsibilities.<sup>298</sup>

Significantly, since the enactment of the EEA, no cases on family responsibility discrimination have been heard by the labour courts.<sup>299</sup> The case of *Co-operative Workers Association v Petroleum Oil and Gas Co-operative SA* was based on the differentiation of employees with family responsibilities from those without family responsibilities, and for this reason, the right not to be discriminated against on the ground of family responsibilities was considered.<sup>300</sup> The provisions of the EEA are not being used for their purposes of preventing discrimination on the ground of family responsibility and are therefore ineffective in promoting the reconciliation of work and care.<sup>301</sup> A reason for the absences of cases based on family responsibility discrimination in the labour courts may be that any employee wishing to rely on such a claim

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<sup>294</sup> *Co-operative Worker Association* (note 285 above) at par [50].

<sup>295</sup> Grogan (note 19 above) 219.

<sup>296</sup> Behari (note 5 above) 351.

<sup>297</sup> *Dancaster & Cohen* (note 23 above) 238.

<sup>298</sup> Huysamen (note 8 above) 59.

<sup>299</sup> *Dancaster & Cohen* (note 23 above) 227; *Dancaster & Cohen* (note 1 above) 34; Behari (note 5 above) 352.

<sup>300</sup> *Co-operative Worker Association* (note 285 above) at paras [20], [28], [30], [36] and [52]; Grogan (note 19 above) 219; *Dancaster & Cohen* (note 23 above) 227.

<sup>301</sup> Behari (note 5 above) 352.

would have to initiate and fund the litigation against the employer in an individual capacity and would then have the evidentiary burden of proving the discrimination in court.<sup>302</sup>

Ultimately, the family responsibility leave offered in the BCEA, the Codes of Good Practice, and the anti-discrimination laws in the LRA and EEA are inadequate in supporting employees with family responsibilities.<sup>303</sup> The duration of family responsibility leave should be increased. The eligibility for the leave should be extended. The restriction of the leave to employees other than those who work at least four days a week and who have been employed for more than four months limits the coverage of the section by excluding numerous employees. The current labour legislation places women in the role of primary caregivers and fails to recognise the responsibilities of men as fathers.<sup>304</sup> Labour legislation should at least provide a mechanism for flexible work arrangements so that mothers and fathers may effectively co-parent while maintaining employment.<sup>305</sup>

#### **4.6 Adoption leave and benefits**

South African law makes no statutory provision for adoption leave.<sup>306</sup> The right to maternity leave provided in the BCEA is applicable only to pregnant women and not women who adopt a child.<sup>307</sup> Section 25 makes specific references to the ‘date of birth’, from which compulsory postnatal maternity leave will begin, and makes provision for incidents of miscarriage, all indicating natural birth.<sup>308</sup> Therefore, adopting parents have to rely on the provision for family responsibility leave in the BCEA.<sup>309</sup> This means that an adopting parent will be entitled to only three days of leave during an annual cycle, provided that the employee meets the qualifying requirements.<sup>310</sup> Essentially, three days of family responsibility leave to bond with a new child;

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<sup>302</sup> Ibid; *Dancaster & Cohen* (note 23 above) 238; *Dancaster & Cohen* (note 1 above) 34.

<sup>303</sup> *Behari* (note 5 above) 360.

<sup>304</sup> Ibid.

<sup>305</sup> *Dancaster & Cohen* (note 1 above) 32–34.

<sup>306</sup> *Dancaster* (note 27 above), 180.

<sup>307</sup> *Dupper* (note 6 above) 93; *Dancaster* (note 27 above) 180.

<sup>308</sup> *Huysamen* (note 8 above) 60.

<sup>309</sup> Ibid 66.

<sup>310</sup> Ibid 67.

settle the child into a new family and environment; and adapt to new care responsibilities cannot be considered sufficient or reasonable.<sup>311</sup>

Although the BCEA makes no provision for adoption leave, the UIA provides a statutory right to adoption benefits, which are available to qualifying adoptive parents.<sup>312</sup> According to section 27 of the UIA, only one contributor of the adopting parties is entitled to the adoption benefits in respect of each adopted child, provided that the requirements set out in the section are met.<sup>313</sup> These requirements are that the child must have been adopted in terms of the *Child Care Act 74* of 1983 (Child Care Act); the period for which the contributor is not working must be spent caring for the child; the adopted child must be below the age of two; and the application must be made in accordance with the provisions of the UIA.<sup>314</sup> The contributor is entitled to the adoption benefits once the order for adoption is granted by a competent court in terms of the Child Care Act.<sup>315</sup> The provision states further that if any leave has been paid to the contributor in terms of any law or collective agreement or contract of employment, the benefit awarded in terms of the UIA may not be more than the remuneration the contributor would have received as an employee, had he or she been at work.<sup>316</sup>

The procedure for the application of the adoption benefits is set out in section 28 of the UIA. It states that an application must be made in the prescribed form at an employment office within six months after the date of the order for adoption. An application made after the six-month period may be accepted on good cause shown.<sup>317</sup> If the application complies with the provisions, the claims officer must approve the application, determine the benefits that are due, and stipulate how the benefits will be paid.<sup>318</sup> Accordingly, the benefits to which the contributor is entitled will be determined in terms of section 13(3) and (4) of the UIA. As stated in the paragraph above in the discussion on the payment of maternity benefits in terms of the UIA, and as amended by the UIAA, section 13(3) provides that a contributor is entitled to one day's benefit for every

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<sup>311</sup> Ibid 66–67.

<sup>312</sup> Field, Bagraim & Rycroft (note 2 above) 34; Dancaster (note 27 above) 180.

<sup>313</sup> Section 27(1) of the UIA.

<sup>314</sup> Ibid s 27(1)(a)–(d).

<sup>315</sup> Ibid s 27(2).

<sup>316</sup> Ibid s 27(4).

<sup>317</sup> Ibid s 28(1) and (2).

<sup>318</sup> Ibid s 28(4).

completed five days of employment as a contributor, and there is a maximum of 238 days' benefits in the four-year period immediately preceding the date of the application for benefits.

The provisions of the UIA relating to adoption benefits are flawed. Firstly, it will be noticed that the maternity benefits in the UIA make allowance for the separation of the right to maternity benefits and the accrual of the rights to the remaining benefits in terms of the Act. However, the section relating to adoption benefits makes no such provision. This means that a contributor's total accrued unemployment benefits will be diminished by applying for adoption benefits alone. In an instance where a contributor claims and receives the maximum of 238 days' benefits in the four-year period as adoption benefits; he or she will be excluded from the right to any remaining benefits.<sup>319</sup> Secondly, the right to adoption benefits is offered to only one contributor of the adopting parties.<sup>320</sup> Third, adopting parties are entitled to the adoption benefits only if the adopted child is below the age of two.<sup>321</sup> The provision is therefore specifically aimed at providing care-giving options to employees with babies.

The BCEA should offer adoption leave to both the working parents of the adopted child. The provision of adoption benefits in the UIA without a corresponding provision of adoption leave in the BCEA constitutes an anomaly in South African labour law.<sup>322</sup> The failure to provide adoption leave is clearly a gap in the South African labour legislation.<sup>323</sup>

#### **4.7 Health and safety of pregnant, postnatal, or breastfeeding employees**

Section 26 of the BCEA provides that employers are prohibited from requiring or permitting a pregnant or breastfeeding employee from working in hazardous environments which could affect the health and safety of the mother or child.<sup>324</sup> Where the employee was employed for night shifts, the BCEA states that the employer must offer suitable alternative employment upon identification of threats to the mother's health or if the alternative employment is reasonably

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<sup>319</sup> Huysamen (note 8 above) 64.

<sup>320</sup> Section 27(1) of the UIA.

<sup>321</sup> *Ibid* s 27(1)(c).

<sup>322</sup> Dancaster (note 27 above) 180.

<sup>323</sup> *Ibid* 181.

<sup>324</sup> Bonthuys (note 12 above) 273; Grogan (note 19 above) 65; Dupper 2004 (note 32 above) 432; Huysamen (note 8 above) 60.

practical.<sup>325</sup> The terms of section 26 place a low standard of care on the employer.<sup>326</sup> Alternative employment must be offered only where it is ‘reasonably practical’. This does not sufficiently protect the pregnant or breastfeeding employee.<sup>327</sup>

The Code of Good Practice on Pregnancy adds to section 26 of the BCEA by recognising the employer’s duty to protect the reproductive health of employees and by requiring employers to access and monitor circumstances which might be hazardous to the health of pregnant employees.<sup>328</sup> The Code of Good Practice on Pregnancy includes the legal requirements and methods for assessing and controlling risks to the health and safety of pregnant and breastfeeding employees; and lists the principal physical, ergonomic, chemical and biological hazards to the health and safety of pregnant and breastfeeding employees, as well as recommendations to prevent or control these risks.<sup>329</sup> Any departures from the Code of Good Practice on Pregnancy may be justified in the proper circumstances.<sup>330</sup> While these provisions provide substantial protection for the health and safety of pregnant and breastfeeding women; they fail to incorporate prohibitions on the employees’ obligations to work overtime.<sup>331</sup>

#### **4.8 Breastfeeding at the workplace**

The Code of Good Practice on Pregnancy recognises that women continue to work during pregnancy and while breastfeeding.<sup>332</sup> It provides guidelines concerning the protection of the health of women against potential hazards in their work environment for the periods of time during pregnancy, after the birth of a child and while breastfeeding.<sup>333</sup> According to the Code of Good Practice on Pregnancy, ‘arrangements should be made for employees who are

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<sup>325</sup> Section 26(1) and (2) of the BCEA; Bonthuys (note 12 above) 273; Grogan (note 19 above) 65.

<sup>326</sup> Bonthuys (note 12 above) 273.

<sup>327</sup> Ibid; Dancaster & Cohen (note 23 above) 232; Huysamen (note 8 above) 60.

<sup>328</sup> Dupper 2004 (note 32 above) 433; Huysamen (note 8 above) 61.

<sup>329</sup> Item 3 of the Code of Good Practice on Pregnancy.

<sup>330</sup> Ibid Item 2.4. The provision goes on to state ‘[f]or example, the number of employees employed in an establishment may warrant a different approach’.

<sup>331</sup> Bonthuys (note 12 above) 273; Dupper 2004 (note 32 above) 433–436.

<sup>332</sup> Item 1.1 of the Code of Good Practice on Pregnancy; Dupper 2004 (note 32 above) 434.

<sup>333</sup> Item 1.2 of the Code of Good Practice on Pregnancy.

breastfeeding to have breaks of 30 minutes twice per day for breastfeeding or expressing milk each working day for the first six months of the child's life'.<sup>334</sup>

#### **4.9 Childcare arrangements (including leave for care emergencies)**

According to the entitlement to family responsibility leave set out in the BCEA, an employee is entitled to a limited duration of three days in each annual leave cycle to attend to a wide range of care-giving responsibilities.<sup>335</sup> An employee is entitled to take family responsibility leave when a child is born; when a child is sick; and upon the death of a family member.<sup>336</sup> Therefore, the three days of family responsibility leave will have to be relied on upon the birth of a child and in the event that a care emergency arises as a result of illness of a child.<sup>337</sup> Since the mother is entitled to maternity leave, in most instances working fathers rely on family responsibility leave to operate as paternity leave and to be utilised upon the birth of their child. Since the mother may not have used her family responsibility leave during the annual leave cycle, the mother will still have her three days of family responsibility leave to use in the instance of a care emergency arising as a result of illness of a child.<sup>338</sup> This reinforces the gendered assumption that women are the primary caregivers.

The extent to which South African labour legislation provides for childcare arrangements is set out in the Code of Good Practice on the Arrangement of Working Time in the BCEA, which makes provision for family responsibilities in the consideration of shift work. It provides that the information the employer may require for the design of shift rosters includes the childcare needs of employees.<sup>339</sup> However, section 28(1)(b) of the Constitution states that every child has the right to family care or parental care, or to appropriate alternative care when removed from the family environment. This provision makes legislated workplace commitment for childcare arrangements desirable.

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<sup>334</sup> Ibid Item 5.13; Dupper 2004 (note 32 above) 436.

<sup>335</sup> Section 27(2) of the BCEA; Dancaster & Baird (note 1 above) 30; Dancaster (note 27 above) 188–189.

<sup>336</sup> Section 27(2) of the BCEA.

<sup>337</sup> Dancaster & Baird (note 1 above) 30.

<sup>338</sup> Ibid 31–32.

<sup>339</sup> Item 4.2.6 of the Code of Good Practice.



#### 4.10 Recent developments

In October 2012 the South African Department of Social Development released the *White Paper on Families* (White Paper), which is aimed at promoting family well-being and socio-economic development in South Africa.<sup>340</sup> One of the specific objectives of the White Paper is enhancing the ‘socialising, caring, nurturing and supporting capabilities of families so that their members are able to contribute affectively to the overall development of the country’.<sup>341</sup> This objective speaks to the importance of promoting the reconciliation of work and care.<sup>342</sup> The White Paper identifies the introduction of paternity leave as one of the recommended strategies for the promotion of a healthy family life.<sup>343</sup> A recommended strategy for the strengthening of family is the introduction of paternity or parental leave, to promote equal parenting care and responsibility between mothers and fathers, and to encourage gender equality in parenting. The White Paper relies on the Department of Labour and Department of Social Justice in carrying out these strategies.

It states that the Department of Labour must ensure that labour policies and laws support gender equality; and protect worker’s rights to monitoring fair practices regarding maternity leave, and mainstreaming education on gender equality and work–life balance at the workplace. Lastly and most significantly, it recommends the development and implementation of paternity leave.<sup>344</sup> The Department of Social Justice is relied upon to explore the possibility of the inclusion of paternity leave in the BCEA and strengthening the recognition of parenting and support for parents at the workplace.<sup>345</sup>

The inclusion of the right to paternity leave in labour legislation has gained support of the South African community and non-governmental organisations.<sup>346</sup> In 2014 a South African father petitioned to the National Council of Provinces (NCOP) for the introduction of the right to ten

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<sup>340</sup> Department of Social Development Republic of South Africa. *White Paper on Families in South Africa* October 2012 (White Paper on Families); Behari (note 5 above) 360.

<sup>341</sup> White Paper on Families (note 340 above) 8.

<sup>342</sup> Behari (note 5 above) 360.

<sup>343</sup> White Paper on Families (note 340 above) 40.

<sup>344</sup> *Ibid* 50–51.

<sup>345</sup> *Ibid* 46; Dancaster & Cohen (note 110 above) 2488.

<sup>346</sup> Finn (note 131 above)

days of paternity leave in the BCEA.<sup>347</sup> The petition was supported by non-governmental organisations, Sonke Gender Justice and Mosaic Women's Centre Training, Service and Healing Centre for Women.<sup>348</sup> Upon reviewing the petition, the NCOP considered the implementation of paternity leave. It recommended further consultations and the possibility of conducting an economic impact assessment for the introduction of paternity leave or the extension of family responsibility leave.<sup>349</sup>

In 2015 the African Christian Democratic Party (ACDP) drew up and presented to Parliament a private members' Bill proposing amendments to the BCEA and UIA.<sup>350</sup> The draft Labour Laws Amendment Bill (LLAB) seeks to introduce rights to parental leave, adoption leave, commissioning parental leave, and related benefits to the conditions of employment set out in the BCEA and the UIA.<sup>351</sup> It proposes the deletion of family responsibility leave from the BCEA and the insertion of parental leave, adoption leave, and commissioning parental leave into section 25 of the BCEA.<sup>352</sup>

According to the provision, an employee who is a parent of a child should be entitled to at least ten consecutive days of parental leave, to commence on the day the child is born or the day that the adoption order is granted.<sup>353</sup> The LLAB proposes the introduction of adoption leave to an adoptive parent of a child who is below the age of two.<sup>354</sup> The adoptive parent is entitled to adoption leave for the duration of at least ten consecutive weeks; or parental leave.<sup>355</sup> According to the provision, if an adoption order is made in respect of two adoptive parents, one of the

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<sup>347</sup> Ibid; Sonke Gender Justice: Press Release *Sonke Gender Justice Supports Petition for 10 Days Paternity Leave in South Africa: Fatherhood, Positive Parenting* (17 July 2014) <http://www.genderjustice.org.za/news-item/sonke-gender-justice-supports-petition-for-10-days-paternity-leave-in-south-africa/>, accessed on 14 December 2016.

<sup>348</sup> Ibid.

<sup>349</sup> NCOP Petitions and Executive Undertakings *Mayibuye Petition; Paternity Leave Petition; Committee Quarterly Report* (26 November 2014) <https://pmg.org.za/committee-meeting/17934/>, accessed on 14 December 2016; NCOP Petitions and Executive Undertakings 'ATC151016: Report of the Select Committee on Petitions and Executive Undertakings on the Hearing of the Paternity Leave Petition' (26 November 2014 at Parliament) <https://pmg.org.za/taled-committee-report/2529/>, accessed on 14 December 2016.

<sup>350</sup> *Labour Laws Amendment Bill* [PMB6– 2015] General Notice 1174 of 2015 GG 39445 of 25 November 2015. General Notice 1174 of 2015 GG 39445 of 25 November 2015 (Labour Laws Amendment Bill).

<sup>351</sup> Ibid.

<sup>352</sup> Ibid clauses 3 and 4.

<sup>353</sup> Ibid clause 3.

<sup>354</sup> Ibid.

<sup>355</sup> Ibid.

adoptive parents may take adoption leave while the other may take parental leave.<sup>356</sup> The provision states that the payment of adoption benefits will be determined by the Minister subject to the provisions of the UIA.<sup>357</sup>

Commissioning parental leave is envisioned for an employee who is a commissioning parent in a surrogate motherhood agreement.<sup>358</sup> Accordingly, the employee will be entitled to at least ten consecutive weeks of commissioning parental leave or ten consecutive days of parental leave.<sup>359</sup> The commissioning parental leave may commence on the date that the child is born as a result of a surrogate motherhood agreement.<sup>360</sup> If a surrogate motherhood agreement has two commissioning parents, one of the commissioning parents may take commissioning parental leave while the other may take parental leave.<sup>361</sup> Provision is made for the payment of commissioning parental benefits to be determined by the Minister subject to the provisions of the UIA.<sup>362</sup>

While notification requirements are attached to each leave entitlement, there are no qualifying periods of employment requirements in the draft LLAB.<sup>363</sup> Provision is made for the prohibition on the reduction of entitlements to parental leave, adoption leave, and commissioning parental leave.<sup>364</sup> The LLAB proposes amendments for the insertion of parental benefits and commissioning parental benefits to the UIA.<sup>365</sup> The right to parental benefits is proposed for the benefit of a contributor who is the registered father of the child;<sup>366</sup> is the parent of a child below the age of two in an adoption order; or is the parent of a child who has been born as a result of a surrogate motherhood agreement. The provision proposes that the contributor should be entitled

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<sup>356</sup> In terms of the Children's Act 38 of 2005, *ibid.*

<sup>357</sup> *Ibid.*

<sup>358</sup> In terms of the Children's Act 38 of 2005, *ibid.*

<sup>359</sup> *Ibid.*

<sup>360</sup> *Ibid.*

<sup>361</sup> *Ibid.*

<sup>362</sup> *Ibid.*

<sup>363</sup> *Ibid.*

<sup>364</sup> *Ibid* clause 5.

<sup>365</sup> *Ibid* clause 7 to 11.

<sup>366</sup> In terms of the Births and Deaths Registration Act 51 of 1992.

to parental benefits provided that the contributor has not claimed adoption benefits or commissioning parental benefits.<sup>367</sup>

The entitlement to parental benefits should commence on the date of childbirth or on the date that the court grants the adoption order.<sup>368</sup> Similarly, the LLAB proposes commissioning parental benefits to a contributor who is a commissioning parent of a child born out of a surrogate motherhood agreement, provided that the period for which the contributor is not working and the leave period taken is spent caring for the child.<sup>369</sup> Provision is made for the application of parental and commissioning parental benefits.<sup>370</sup>

The draft LLAB is clear in its objectives to introduce leave entitlements and benefits. It does not propose the adoption of paternity leave, and focuses on gender-neutral parental leave entitlements. The LLAB also aims to fill the gap in labour law which is the outcome of the omission to provide the right to adoption leave in the BCEA.<sup>371</sup> It also attempts to heal the gap created by the failure to provide leave to employees who have become parents through surrogacy agreements.<sup>372</sup> The objectives of the LLAB are commendable and a step forward for the reconciliation of work and care in South Africa. Together with the petition for paternity leave, the Private Members' Bill illustrates the community interests in the adoption of labour law rights and employment protections aimed at the reconciliation of work and care.<sup>373</sup>

The White Paper on Families, which was released by the South African Department of Social Development, highlights government commitment towards measures to reconcile work and care. However, the government has yet to display further commitment in line with the recommendations of the White Paper. It is submitted that these proposals should be considered

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<sup>367</sup> Clause 8 of Labour Laws Amendment Bill.

<sup>368</sup> Ibid.

<sup>369</sup> Ibid.

<sup>370</sup> Ibid clause 10.

<sup>371</sup> Burri (note 144 above) 281.

<sup>372</sup> Ibid; Behari (note 5 above).

<sup>373</sup> Finn (note 131 above); Labour Laws Amendment Bill; Sonke Gender Justice: Press Release *Sonke Gender Justice Supports Petition for 10 Days Paternity Leave in South Africa: Fatherhood, Positive Parenting* (17 July 2014) <http://www.genderjustice.org.za/news-item/sonke-gender-justice-supports-petition-for-10-days-paternity-leave-in-south-africa/>, accessed on 14 December 2016.

as the initial undertakings of a defined government commitment towards the adoption of more adequate labour laws for the support of employees with care-giving responsibilities.<sup>374</sup>

#### 4.11 Conclusion

The Constitution guarantees gender equality and fair labour practice.<sup>375</sup> South Africa has made legislative efforts to provide these rights through labour law and decisions of the Labour Court. While certain aspects of these efforts have proved effective, the labour laws of South Africa do not provide enough support to employees for the effective implementation of time off from work to provide care. In particular, unpaid maternity leave negatively impacts on the employment of women.<sup>376</sup> While trade unions may negotiate more favourable maternity benefits for the employee, many South African companies are not unionised. Where trade unions have accomplished paid maternity benefits for employees, the terms are not uniform across the employment sector. This means that there are no set minimum standards upon which the collective bargaining threshold could rest.<sup>377</sup>

Although cash benefits are provided through the social security system set out in the UIA, the provisions of the UIA do not offer enough protection for pregnant employees. The UIA does not cover atypical workers. A large number of women in the South African labour market are excluded from receiving a guaranteed income during their maternity leave.<sup>378</sup> In terms of the UIA, an employee may claim a maximum of 66 per cent of her ordinary salary for the first 238 days, and the remainder of the days will be paid at a flat rate of twenty per cent.<sup>379</sup> Furthermore, it will take up to approximately two years of contributions to the UIF for the employee to accumulate maternity benefits for the maximum period of 17.32 weeks.<sup>380</sup>

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<sup>374</sup> Field, Bagraim & Rycroft (note 2 above) 30; Dancaster & Baird (note 1 above) 41; Dancaster & Cohen (note 2 above) 33; Dancaster (note 27 above) 178.

<sup>375</sup> Section 9(3) and s 23 of the Constitution. Dancaster & Cohen (note 23 above) 232.

<sup>376</sup> Boswell & Boswell (note 8 above) 78.

<sup>377</sup> Dupper 2004 (note 32 above) 408.

<sup>378</sup> *Ibid.*

<sup>379</sup> *Ibid* 405; s 4 of the UIAA; Olivier & Govindjee (note 50 above) 2744; Dancaster (note 27 above) 182; Dupper & Govindjee (note 12 above) 406; Huysamen (note 8 above) 60.

<sup>380</sup> Dancaster (note 27 above) 184.

Although it would be unrealistic within the economic climate of South Africa to expect labour legislation or social security legislation to provide four months of paid maternity leave equal to the employee's full remuneration, legislative undertaking for effective maternity protection should at least involve the provision of a minimum period of paid maternity leave; or social security legislation should provide for a flat rate amount higher than 20 per cent of the contributor's earnings for the remaining portion of maternity leave, which should be claimable by typical and atypical pregnant employees, without any exceptions.<sup>381</sup>

According to a South African study of 361 enterprise-level agreements and 31 bargaining council agreements, most collective agreements in the country mirror the four months of maternity leave set out in the BCEA. Only seven per cent of the collective agreements in the study provided for an additional two months of unpaid maternity leave. Therefore, in most instances, the terms of collective agreements reinforce the provisions of the BCEA rather than improve them.<sup>382</sup> Ultimately, the duty falls on the employer to offer maternity terms that are more supportive to women than the provisions of the BCEA, through a collective agreement or a contract of employment.<sup>383</sup> This means that most South African employees must rely on the goodwill of their employers to find financial security during maternity leave.<sup>384</sup> Ideally, South African labour legislation should provide clear and certain minimum standards of paid maternity leave that are more inclusive of different types of workers and which ensure that women employees are not left to rely on the process of collective bargaining.<sup>385</sup>

Despite protective legislative efforts of the EEA and LRA, women remain targets of discrimination in the workplace based on pregnancy and childcare.<sup>386</sup> The lack of clarity and certainty with regard to the inclusion of pregnancy as a basis constituting unfair discrimination has left claims of alleged unfair discrimination on the grounds of pregnancy to be decided by the

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<sup>381</sup> Huysamen (note 8 above) 74; Bonthuys (note 12 above) 272.

<sup>382</sup> ILO Maternity & Paternity at Work (note 3 above) 40; T Elsley 'Outcomes of Collective Bargaining in South Africa' in *A Collective Bargaining Omnibus* Woodstock, South Africa, Labour Research Service (2007) <http://www.lrs.org.za/docs/Bargaining%20Indicators%202007.pdf>, accessed on 21 January 2016.

<sup>383</sup> Huysamen (note 8 above) 61; Bonthuys (note 8 above) 272.

<sup>384</sup> Dancaster & Cohen (note 23 above) 222.

<sup>385</sup> Dupper 2003 (note 12 above) 409.

<sup>386</sup> Boswell & Boswell (note 8 above) 78, Boswell and Boswell argue that maternity benefits should cover 100 per cent of a woman's salary.

interpretation of the courts. As seen in the case of *Woolworths (Pty) Ltd v Whitehead*,<sup>387</sup> the lack of legislative certainty may lead to decisions which reinforce stereotypes against pregnant employees and leave them unprotected. It is apparent from the case law discussed above that the current labour laws fail to provide certainty to employers and employees on their rights and responsibilities surrounding issues of maternity leave and family responsibility leave.<sup>388</sup>

While the inclusion of family responsibilities as grounds for discrimination in both the LRA and EEA is commendable, anti-discrimination legislation alone cannot cure the workplace inequalities faced by employees with care-giving responsibilities. Positive rights have been recognised as the most effective mechanism for social change. Currently, the LRA inadequately provides employees with three days of family responsibility leave for the care of their family. This is the only available leave option for fathers with family care responsibilities.<sup>389</sup>

The limited provision of family responsibility leave for the duration of three days is further circumscribed by the qualification requirements, which state that the employee must have been employed for at least four months, and must work for at least four days a week.<sup>390</sup> These qualifications exclude a number of employees from accessing the provision.<sup>391</sup> Three days of family responsibility leave within a twelve-month leave cycle, to be used for the birth of a child, the illness of a child, or the death of a family member is far too limited.<sup>392</sup> If the father has already taken three days of family responsibility leave upon the birth of his child, he will not have any family responsibility leave remaining in the event of illness of the child. The use of the leave for events of birth, sickness and death are inadequate in supporting employees with care-giving responsibilities.<sup>393</sup>

A major shortcoming of South African labour legislation is the failure to include the provision of adoption leave.<sup>394</sup> Adoption leave is omitted from the BCEA, and is not included in section 25 (the right to maternity leave); nor is it included in section 27 (the right to family responsibility

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<sup>387</sup> *Woolworths* (note 230 above).

<sup>388</sup> *Dancaster & Cohen* (note 23 above) 224.

<sup>389</sup> *Dupper 2004* (note 32 above) 408.

<sup>390</sup> *Huysamen* (note 8 above) 72; *Dancaster & Cohen* (note 110 above) 2488.

<sup>391</sup> *Dancaster & Cohen* (note 1 above) 33.

<sup>392</sup> *Dancaster* (note 27 above) 188–189.

<sup>393</sup> *Ibid*; *Dancaster & Baird* (note 1 above) 32.

<sup>394</sup> *Huysamen* (note 8 above) 66; *Dancaster & Baird* (note 1 above) 32; *Dancaster* (note 27 above) 180.

leave).<sup>395</sup> Although adoptive parents have no rights to adoption leave in terms of labour legislation, they are entitled to adoption benefits in terms of the UIA. This is a legislative irregularity which must be addressed.<sup>396</sup> It highlights the fragmented nature of South African labour laws reconciling work and care.<sup>397</sup>

The Codes of Good Practice attempt to provide additional protection to pregnant employees and employees with family responsibilities. Although the BCEA states that any person who interprets or applies the BCEA must take the relevant Codes of Good Practice into account, the Codes are considered only as guidelines and are not binding.<sup>398</sup> It may be said that the function of the Codes of Good Practice is to place the matters of concern in a clear, codified manner so as to establish a strong basis from which employers are able to negotiate their own conditions of employment to cater for the special needs.<sup>399</sup> Employers are able to use the Codes of Good Practice to negotiate maternity conditions for their workplace employment contracts.<sup>400</sup> However, the Codes of Good Practice contain weak and ineffective provisions for the promotion of the reconciliation of work and care.<sup>401</sup>

The detrimental effects of gaps in the South African legislation regulating the work–care conflict have meant that employees must rely on the goodwill of employers and the initiatives of trade unions to ensure the full effect of these entitlements. According to research, South African employers are not making efforts by means of workplace policies to improve the rights of employees to take time off from work to care for their children.<sup>402</sup> Furthermore, South African trade unions have not been shown to be bargaining over gendered labour issues.<sup>403</sup> The national legal framework supporting the reconciliation of work and care in South Africa is lacking to the extent that the government has little involvement in promoting the work and family

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<sup>395</sup> Dancaster (note 27 above) 180.

<sup>396</sup> *Ibid.*

<sup>397</sup> Dupper (note 6 above) 96.

<sup>398</sup> Section 87(3) of the BCEA.

<sup>399</sup> Grant (note 235 above) 91.

<sup>400</sup> *Ibid* 90–98.

<sup>401</sup> Dancaster & Cohen (note 1 above) 41; Dupper 2001 (note 32 above) 438.

<sup>402</sup> Dancaster (note 27 above) 192.

<sup>403</sup> *Ibid.*



integration.<sup>404</sup> Therefore, despite its international obligations and the international legal trends to provide efficient and effective laws surrounding the issue, South Africa has been slow to take initiatives towards legislative reform.

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<sup>404</sup> Dancaster & Cohen (note 24 above) 239.

## CHAPTER FIVE

### UNITED KINGDOM LABOUR LAWS GOVERNING THE RECONCILIATION BETWEEN WORK AND CARE

#### 5.1 Introduction

The regulation of the reconciliation of work and care in the UK has largely been driven by political agendas.<sup>1</sup> Introduced by the British New Labour Government in 1997, family-friendly strategies have resulted in numerous policy initiatives and legal reforms aimed at the reconciliation of work and family responsibilities.<sup>2</sup> The objectives of these initiatives and reforms have been firstly, to reconcile the paid work of employees with their care-giving responsibilities and secondly, to lessen the negative social effects caused by the divide between ‘work’ and ‘life’ which result from long working hours.<sup>3</sup> Although the UK’s status as a member of the EU has been affected by the outcome of the UK’s referendum on membership in the EU, its family-friendly initiatives and reforms have been inspired by the provisions of EU labour standards relating to the reconciliation of work and family.<sup>4</sup> In March 2017 the UK Government published a White Paper which makes provision for the continuation of EU-derived law as domestic law. The Government intends to enact the ‘Great Repeal Bill’, which will transfer all existing EU law into domestic law so as to prevent gaps in the law which would otherwise occur

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<sup>1</sup> KL Adams ‘A right to request flexible working: What can the UK teach us?’ (2014) 1 *Feminism and Legal Theory Project @ 30, Workshop on Labor and Employment* 1, 8; D Wheatley ‘Employee satisfaction and use of flexible working arrangements’ (2016) *Work, Employment and Society* 1; O Golyner ‘Family-friendly reform of employment law in the UK: An overstretched flexibility’ (2015) 37(3) *Journal of Social Welfare and Family Law* 378, 382.

<sup>2</sup> Golyner (note 1 above) 378; J Conaghan ‘Work, Family and the Discipline of Labour Law’ in J Conaghan & K Rittich (eds) *Labour Law, Work and Family* (2007) 19, 27; E Caracciolo di Torella ‘New labour, new dads – The impact of family friendly legislation on fathers’ (2007) 36 *Industrial Law Journal* 318; J Lewis, T Knijn et al ‘Patterns of development in work/family reconciliation policies for parents in France, Germany, the Netherlands, and the UK in the 2000s’ (2008) 15(3) *Social Politics: International Studies in Gender, State and Society* 261, 270; G Mitchell ‘Encouraging fathers to care: The Children and Families Act 2014 and shared parental leave’ (2015) 44(1) *Industrial Law Journal* 123; G James *The Legal Regulation of Pregnancy and Parenting in the Labour Market* (2009) 39.

<sup>3</sup> Conaghan (note 2 above) 27; Golyner (note 1 above) 383.

<sup>4</sup> Golyner (note 1 above) 382; R Guerrina ‘Mothering Europe: Feminist critique of European policies on motherhood and employment’ (2002) 9(1) *European Journal of Women Studies* 49; Caracciolo di Torella (note 2 above) 320; G James ‘The Work and Families Act 2006: Legislation to improve choice and flexibility?’ (2006) 35(3) *Industrial Law Journal* 272, 273; M Leon ‘Parental, maternity and paternity leave: European legal constructions of unpaid care giving’ (2007) 58(3) *Northern Ireland Legal Quarterly* 353, 355.

through the repeal of EU law.<sup>5</sup> As such, EU-derived laws remain relevant in understanding the foundation upon which the UK developed its legislative framework regulating the reconciliation of work and family.<sup>6</sup>

## 5.2 The scope and coverage of leave entitlements

The commitment to the adoption of family-friendly legislative entitlements began in 1997 with the election of the New Labour Government.<sup>7</sup> In 1998, the Government published the White Paper, *Fairness at Work*, which set out plans to adopt minimum standards relating to fairness and decency at the workplace.<sup>8</sup> This included the adoption of policies ‘that enhance family life while making it easier for people – both men and women – to go to work with less conflict between their responsibilities at home and at work’.<sup>9</sup> The Labour Government recognised the laws of the EU as a framework upon which to develop these policies by introducing new leave entitlements and extending the existing rights of employed caregivers.<sup>10</sup>

The family-friendly policies imposed by the Government in the White Paper were as follows:

- The extension of the duration of maternity leave from a fourteen-week entitlement to an eighteen-week entitlement, for the purpose of aligning it with the maternity pay period.<sup>11</sup>
- The simplification of notice requirements for maternity leave.<sup>12</sup>

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<sup>5</sup> GOV.UK *Publications: Policy Paper* <https://www.gov.uk/government/publications/the-great-repeal-bill-white-paper>, accessed on 12 May 2017.

<sup>6</sup> Golyner (note 1 above) 391.

<sup>7</sup> Conaghan (note 2 above) 19, 27; Golyner (note 1 above) 378; Caracciolo di Torella (note 2 above) 318; Mitchell (note 2 above) 123; James (note 2 above) 4; Lewis, Knijn et al (note 2 above) 270.

<sup>8</sup> The Fairness at Work White Paper (Cmnd. 3968), May 1998 (the Fairness at Work White Paper) at 1.9 <http://www.nationalarchives.gov.uk/webarchive/>, accessed on 18 October 2016; Golyner (note 1 above) 378; J Lewis & M Campbell ‘What’s in a name? “Work and family” or “work and life” balance policies in the UK since 1997 and the implications for the pursuit of gender equality’ (2008) 42(5) *Social Policy & Administration* 524, 527.

<sup>9</sup> RW Painter & AEM Holmes *Cases and Materials on Employment Law* (2015) 4; RW Painter & AEM Holmes *Cases and Materials on Employment Law* (2015) 10ed Oxford University Press: Online Resource Centre (Painter & Holmes Online Resource Centre) 1 [http://global.oup.com/uk/orc/law/employment/painter\\_holmes10e/](http://global.oup.com/uk/orc/law/employment/painter_holmes10e/), accessed on 18 October 2016; the Fairness at Work White Paper (note 8 above); Golyner (note 1 above) 382; Caracciolo di Torella (note 2 above) 319.

<sup>10</sup> J Lewis & M Campbell ‘UK work/family balance policies and gender equality, 1997–2005’ (2007) 14(1) *Social Politics: International Studies in Gender, State and Society* 4, 5; Caracciolo di Torella (note 2 above) 318.

<sup>11</sup> The Fairness at Work White Paper (note 8 above) 5.14; Painter & Holmes (note 9 above) 5.

<sup>12</sup> Ibid 5.17.

- The adoption of parental leave rights in compliance with the EU *Council Directive* (2010/18/EU) (Parental Leave Directive).<sup>13</sup>
- The entitlement of claiming extended maternity leave and parental leave for employees who have completed a qualifying period of one year of service in employment.<sup>14</sup>
- Provision for the continuance of the employment contract over the periods of maternity leave and parental leave, unless expressly terminated by dismissal or resignation.<sup>15</sup>
- The right to return to the job in which the employee was employed prior to absence due to parental leave, as had already been provided for with regard to absences as a result of maternity leave.<sup>16</sup>
- The provision of parental leave for adoptive parents for the duration of three months.<sup>17</sup>
- The provision of the right to reasonable time off for family emergencies and time off for urgent family reasons.<sup>18</sup>
- Protection against dismissals on the grounds of taking parental leave and time off for urgent family reasons.<sup>19</sup>

These proposals resulted in an era of legislative reforms aimed at the reconciliation of work and family.<sup>20</sup> The *Employment Relations Act 1999* extended maternity leave rights and introduced rights to parental leave, and time off to care for dependants.<sup>21</sup> The maternity and parental leave entitlements are implemented through the *Maternity and Parental Leave etc. (Terms and Conditions of Employment) Regulations, 1999* (MPLR) as amended, which set out the extent, qualifying conditions and procedural requirements of maternity leave and parental leave.<sup>22</sup> Later, the *Employment Act 2002* amended the *Employment Rights Act 1999* (ERA) to introduce first-time statutory rights to paternity and adoption leave and pay; the right to request flexible

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<sup>13</sup> Ibid 5.11.

<sup>14</sup> Ibid 5.19.

<sup>15</sup> Ibid 5.20.

<sup>16</sup> Ibid 5.22.

<sup>17</sup> Ibid 5.23.

<sup>18</sup> Ibid 5.28.

<sup>19</sup> Ibid 5.29.

<sup>20</sup> Painter & Holmes Online Resource Centre (note 9 above) 2; Golyner (note 1 above) 378.

<sup>21</sup> Employment Relations Act 1996, c. 18 (U.K.), s 7 (Employment Rights Act); Painter & Holmes Online Resource Centre (note 9 above) 2; Mitchell (note 2 above) 123, 124; Golyner (note 1 above) 382.

<sup>22</sup> The Maternity and Parental Leave etc. (Terms and Conditions of Employment) Regulations 1999 (U.K.), SI 1999/3312 (Maternity and Parental Leave Regulations); Painter & Holmes Online Resource Centre (note 9 above) 2; James (note 2 above) 39.

working arrangements for the care of young children; and make amendments to provisions of statutory maternity leave and pay.<sup>23</sup> The *Paternity and Adoption Leave (Amendment) Regulations 2002* (PALR) were adopted to give effect to the extent, qualifying conditions and procedural requirements of paternity and adoption leave and pay.<sup>24</sup>

The family-friendly agenda was adopted by the UK Coalition Government and in 2006 the *Work and Families Act 2006* (WFA) was enacted with the object of encouraging fathers to be involved in the care of their children.<sup>25</sup> The Act provides more choice with regard to the family decisions of who takes the time off to care for a newborn baby over the first year of birth.<sup>26</sup> In doing so, it extended statutory maternity and adoption pay; conferred powers to extend paternity leave and pay; and extended the right to request flexible working arrangements to carers of adults.<sup>27</sup> The *Children and Families Act, 2014* (CFA), which commenced on 5 April 2015, simplified the qualifying conditions for flexible work arrangements and introduced shared parental leave, which allows the employee on maternity leave to convert part of her maternity leave to shared parental leave, which may be shared with her spouse or partner.<sup>28</sup> The CFA also extends leave and pay to intended parents through surrogacy.<sup>29</sup>

The Government's approach towards the adoption of family-friendly policies has focused on the promotion of 'flexibility and choice'.<sup>30</sup> The measures aim to provide flexibility in employment arrangements and choice on how to balance work and family.<sup>31</sup> As such, entitlements to time off for the care of family as provided for by UK legislation is extensive and inclusive.<sup>32</sup> The family

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<sup>23</sup> Employment Act 2002, c. 22 (U.K.) (Employment Act); Employment Rights Act 1996; Painter & Holmes *Online Resource Centre* (note 9 above) 2; James (note 2 above) 39; Caracciolo di Torella (note 2 above) 319; Mitchell (note 2 above) 124; Golyner (note 1 above) 382.

<sup>24</sup> The Paternity and Adoption Leave (Amendment) Regulations 2006 (U.K.), SI 2006/2014 (Paternity and Adoption Leave Regulations).

<sup>25</sup> Work and Families Act 2006, c. 18 (U.K.) (Work and Families Act); Painter & Holmes *Online Resource Centre* (note 9 above) 2; James (note 2 above) 39; Golyner (note 2 above) 378.

<sup>26</sup> Caracciolo di Torella (note 2 above) 323.

<sup>27</sup> Work and Families Act; Painter & Holmes *Online Resource Centre* (note 9 above) 2; James (note 2 above) 40; Golyner (note 1 above) 383.

<sup>28</sup> Children and Families Act 2014, c. 6 (U.K.) (Children and Families Act); Painter & Holmes *Online Resource Centre* (note 9 above) 2; Mitchell (note 2 above) 123; Golyner (note 1 above) 383.

<sup>29</sup> Children and Families Act, s 122; Painter & *Online Resource Centre* (note 9 above) 2.

<sup>30</sup> Golyner (note 1 above) 379; James (note 2 above) 40; Lewis & Campbell (note 10 above) 9.

<sup>31</sup> Golyner (note 1 above) 383.

<sup>32</sup> *Ibid* 386.

leave rights extend to all ‘employees’ provided they meet the qualifying requirements attached to the entitlement. According to the ERA, an ‘employee’ is defined as ‘an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment’.<sup>33</sup> A ‘contract of employment’ means ‘a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing’.<sup>34</sup>

Therefore, all mothers who work under a contract of employment qualify as ‘employees’ and are entitled to maternity leave.<sup>35</sup> Employed fathers, who are responsible for the care of the child, are entitled to parental leave, paternity leave or shared parental leave, provided they meet the qualifying requirements attached to the entitlement.<sup>36</sup> These leave entitlements also extend to partners of the mother of the child, and adoptive parents.<sup>37</sup> The right to request flexible work arrangements is also available to employees, provided they meet the statutory requirements.<sup>38</sup> These leave entitlements also extend to employees who have a baby through surrogacy, and have been granted a parental order or an adoption order upon the birth of the child.<sup>39</sup>

### 5.3 Maternity leave

Adapted from the *Protection of Pregnant Workers Directive* (92/85/EEC) (Pregnant Workers Directive)<sup>40</sup> of the EU, the national framework for maternity protection in the UK has been developed to provide maximum protective rights to maternity leave and maternity pay.<sup>41</sup> The

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<sup>33</sup> Employment Rights Act; the Maternity and Parental Leave Regulations, reg 2(1); S Hardy *Labour Law and Industrial Relations in Great Britain* (2007) 91–92.

<sup>34</sup> *Ibid*; A Emir Selwyn’s *Law of Employment* (2016) 43.

<sup>35</sup> Employment Rights Act; GOV.UK *Maternity Pay and Leave* <https://www.gov.uk/maternity-pay-leave/eligibility>, accessed on 30 July 2016.

<sup>36</sup> Employment Rights Act.

<sup>37</sup> *Ibid*.

<sup>38</sup> GOV.UK *Flexible Working* <https://www.gov.uk/flexible-working/applying-for-flexible-working>, accessed on 18 October 2016.

<sup>39</sup> Children and Families Act, s 122; GOV.UK *Rights for Surrogate Mothers* <https://www.gov.uk/rights-for-surrogate-mothers>, accessed on 4 October 2016; Acas *Surrogacy – Rights for Intended Parents* <http://www.acas.org.uk/surrogacy>, accessed on 4 October 2016.

<sup>40</sup> Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC) [1992] OJ L348/1 (Pregnant Workers Directive).

<sup>41</sup> Caracciolo di Torella (note 2 above) 320; James (note 4 above) 273; Leon (note 4 above) 355.

right to maternity leave is set out in the ERA and the MPLR.<sup>42</sup> Maternity protection in the UK has been further strengthened by the enactment of the WFA.<sup>43</sup> The WFA provides that every employee is entitled to up to 52 weeks of statutory maternity leave.<sup>44</sup> Statutory maternity leave in the UK is made up of ‘compulsory maternity leave’ (the first two weeks following the birth of the child), ‘ordinary maternity leave’ (the first 26 weeks), and ‘additional maternity leave’ (the last 26 weeks).<sup>45</sup>

Section 72 of the ERA gives employees the right to be absent from work on the basis of maternity leave.<sup>46</sup> Compulsory maternity leave is set out in section 72 of the ERA. It provides that an employer shall not permit an employee to work within two weeks of childbirth.<sup>47</sup> An employer who contravenes this provision will be found guilty of an offence and liable to pay a fine.<sup>48</sup> Prohibitions arising under the *Health and Safety at Work etc. Act, 1974* may also apply.<sup>49</sup> In accordance with the provisions of the WFA, the MPLR were amended to remove the qualification requirements which created a distinction between ordinary maternity leave and additional maternity leave.<sup>50</sup>

The removal of these qualifications by the WFA means that all women employees whose babies were born on or after 5 April 2007 are entitled to 26 weeks of ordinary maternity leave and a further 26 weeks of additional maternity leave.<sup>51</sup> This effectively creates a statutory maternity period of 52 weeks which is applicable irrespective of the length of service of the employee, and irrespective of whether she is a permanent or temporary employee.<sup>52</sup> The additional maternity leave period must commence immediately following the end of the period of ordinary maternity

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<sup>42</sup> Employment Rights Act, s 72; the Maternity and Parental Leave Regulations.

<sup>43</sup> Work and Families Act; Caracciolo di Torella (note 2 above) 320; James (note 2 above) 41.

<sup>44</sup> Employment Rights Act, s 71(3), substituted by Work and Families Act, ss 31 and 32; Caracciolo di Torella (note 2 above) 320; Golyner (note 1 above) 383; C Rickard ‘Getting off the mommy track: An international model law solution to the global maternity discrimination crisis’ (2014) 47 *Vanderbilt Journal of Transitional Law* 1465, 1490.

<sup>45</sup> Emir (note 34 above) 189; James (note 2 above) 41.

<sup>46</sup> Employment Rights Act, s 72(1).

<sup>47</sup> Ibid; Rickard (note 44 above) 1490.

<sup>48</sup> Employment Rights Act, s 72(5).

<sup>49</sup> Ibid s 72(4).

<sup>50</sup> Emir (note 44 above) 189; G Pitt *Employment Law* (2007) 153–154.

<sup>51</sup> Ibid; Rickard (note 44 above) 1490; James (note 2 above) 41.

<sup>52</sup> Emir (note 34 above) 190; Leon (note 4 above) 356.

leave.<sup>53</sup> The differences between additional and ordinary maternity leave are that the employee will not accrue pension benefits during the last thirteen weeks of additional maternity leave, and the employee will face stricter requirements regarding the return to work from additional maternity leave.<sup>54</sup>

To claim maternity leave, the employee must give notice to her employer no later than the end of the fifteenth week before her expected week of confinement. The notice, which may be requested in writing, must indicate that she is pregnant, the expected week of childbirth, and the date on which she intends to begin her ordinary maternity leave.<sup>55</sup> The ordinary maternity leave period may start any time from the beginning of the eleventh week before the expected week of confinement.<sup>56</sup> The regulations make provision for instances where it may not be reasonably practicable for the employee to give fifteen weeks' notice of her intention to begin maternity leave. In such an instance, the employee must give notice as soon as is reasonably practicable.<sup>57</sup> The employer may request a certificate from a registered medical practitioner or registered midwife stating the expected week of childbirth.<sup>58</sup>

The employee may vary the date of commencement of her ordinary maternity leave by giving 28 days' notice. If that is not reasonably practicable, the employee must give notice as soon as is reasonably practicable.<sup>59</sup> Within 28 days of receiving the notice, the employer must notify the employee of the date upon which her additional maternity leave will end.<sup>60</sup> This provision ensures that the employee and employer are in consensus regarding the date she is expected to return to work, and prevents the miscalculation of dates which could lead to actions of detriment or dismissals.<sup>61</sup> Although the maternity leave period would ordinarily commence on the date indicated on the notice to the employer, the regulations make provision for the automatic commencement of the maternity leave period.

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<sup>53</sup> Emir (note 34 above) 191.

<sup>54</sup> Ibid.

<sup>55</sup> Ibid 190; the Maternity and Parental Leave Regulations 1999, reg 4(1); Pitt (note 50 above) 154; Rickard (note 44 above) 1490.

<sup>56</sup> The Maternity and Parental Leave Regulations, reg 4(2); Emir (note 34 above) 190.

<sup>57</sup> The Maternity and Parental Leave Regulations, reg 4; Emir (note 34 above) 190.

<sup>58</sup> The Maternity and Parental Leave Regulations, reg 4(1).

<sup>59</sup> Ibid reg 4; Emir (note 34 above) 190.

<sup>60</sup> Ibid.

<sup>61</sup> Emir (note 34 above) 190; Pitt (note 50 above) 154.



This would occur firstly on a day following the fourth week before the expected week of childbirth on which the employee is absent from work because of her pregnancy.<sup>62</sup> This provision envisages the prevention of reliance on sick leave during the maternity period. The provision is criticised because, should the employee intend postponing her maternity leave, she will automatically lose her right to return to work for the remaining period simply by virtue of having taken one day off from work during the period of four weeks prior to the expected date of childbirth.<sup>63</sup> Second, maternity leave would commence automatically on the day following the date on which the childbirth occurs. This provision envisages instances where the date of childbirth occurs before the date indicated on the notice to the employer.<sup>64</sup>

Section 71 of the ERA states that an employee who is absent from work as a result of maternity leave is entitled to the benefit of the terms and conditions of employment which would have applied had she not been absent.<sup>65</sup> Therefore, the employee's contract of employment continues over the duration of the maternity leave period, and the employee is entitled to all benefits which would apply under the terms and conditions of her employment contract, including the accrual of her annual leave.<sup>66</sup> However, the terms and conditions regarding remuneration are altered.<sup>67</sup> The ERA states further that during the maternity period, the employee is bound by any obligations arising under the terms and conditions of the employee's employment contract.<sup>68</sup> The express endurance of the employment contract ensures that both the employer and employee are bound by the duties of good faith, trust, and confidence which are implicit in an employment relationship.<sup>69</sup>

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<sup>62</sup> The Maternity and Parental Leave Regulations, reg 6; Emir (note 34 above) 190; Pitt (note 50 above) 154.

<sup>63</sup> Pitt (note 50 above) 154.

<sup>64</sup> The Maternity and Parental Leave Regulations, reg 6; Emir (note 34 above) 190; Pitt (note 50 above) 154.

<sup>65</sup> According to the Employment Rights Act, s 80C, 'terms and conditions' of employment 'includes matters connected with an employee's employment whether or not they arise under his contract of employment, but do not include terms and conditions about remuneration'; Employment Rights Act, s 71(4); Emir (note 34 above) 190; Pitt (note 50 above) 155.

<sup>66</sup> Emir (note 34 above) 189, 190; Pitt (note 50 above) 155.

<sup>67</sup> Ibid.

<sup>68</sup> Ibid; Employment Rights Act, s 71(4).

<sup>69</sup> Emir (note 34 above) 190; Pitt (note 50 above) 155.

The continuity of the employment contract will also apply during the period of additional maternity leave.<sup>70</sup> The regulations expressly set out that, during additional maternity leave, the employee is entitled to the benefit of her employer's implied obligation to her of trust and confidence. She is also entitled to any terms and conditions involving notice of the termination of the employment contract by her employer; compensation in the event of redundancy, or disciplinary or grievance procedures.<sup>71</sup> During the leave period, the employee is bound by her implied obligation to her employer of good faith and any terms and conditions relating to notice of the termination of the employment contract by her; the disclosure of confidential information; the acceptance of gifts or other benefits; or the employee's participation in any other business.<sup>72</sup>

The employee is entitled to return to work before the date upon which her additional maternity leave ends.<sup>73</sup> If the employee intends to return to work earlier than the end of her ordinary maternity leave period or her additional maternity leave period she is required to give to her employer not less than eight weeks' notice of the date on which she intends to return.<sup>74</sup> A failure to give such notice allows the employer to postpone the return date.<sup>75</sup> However, if the employee takes the full duration of 52 weeks of statutory maternity leave, then she does not have to give notice of her return to work.<sup>76</sup>

### 5.3.1 Maternity cash benefits and coverage

Employees who have taken maternity leave are entitled to maternity pay in the form of maternity allowance or statutory maternity pay, provided they meet the applicable eligibility requirements.<sup>77</sup> Maternity pay is governed by the *Social Security Contributions and Benefits Act 1986* (SSCBA), together with the *Statutory Maternity Pay (General) Regulations 1986* (as

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<sup>70</sup> Emir (note 34 above) 192.

<sup>71</sup> The Maternity and Parental Leave Regulations, reg 17(a).

<sup>72</sup> Ibid reg 17(b).

<sup>73</sup> Ibid reg 11; Pitt (note 50 above) 154.

<sup>74</sup> The Maternity and Parental Leave Regulations, reg 11(1); Painter & Holmes *Online Resource Centre* (note 9 above) 7.

<sup>75</sup> The Maternity and Parental Leave Regulations, reg 11(2); Painter & Holmes *Online Resource Centre* (note 9 above) 7.

<sup>76</sup> Painter & Holmes *Online Resource Centre* (note 9 above) 7.

<sup>77</sup> James (note 4 above) 273.

amended) (SMPR).<sup>78</sup> As of 1 April 2007, a pregnant employee is entitled to 39 weeks (or nine months) of statutory maternity pay, provided that she meets the applicable qualifying requirements.<sup>79</sup>

If an employee does not qualify for statutory maternity pay, then she is entitled to 39 weeks of maternity allowance, provided that she meets the applicable qualifying requirements.<sup>80</sup> The WFA has extended the maximum period for which statutory maternity pay and maternity allowance are payable from 26 weeks to 52 weeks.<sup>81</sup> This ensures that the maternity pay period corresponds with the maternity leave period. The WFA currently provides for a 39-week maternity pay period. However, the UK Government has expressed that the extension of the maternity pay period is a progressive step towards a goal of providing pregnant employees with one year of maternity pay.<sup>82</sup>

The qualifying requirements for statutory maternity pay are that firstly, the employee must have been continuously employed for a period of 26 weeks immediately before the fifteenth week prior to the birth of the baby. Secondly, the employee's normal weekly earnings must be at or above the lower earnings limit necessary for the payment of National Insurance contributions.<sup>83</sup> The employee's normal earnings must be calculated over a period of eight weeks ending with the last pay day before the end of the qualifying period.<sup>84</sup> In order to claim statutory maternity pay, the employee must give her employer notice of the date on which the employer's liability to pay the statutory maternity pay is expected to begin. The notice must be given at least 28 days before the date or, if that is not reasonably practicable, as soon as is reasonably practicable.<sup>85</sup>

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<sup>78</sup> Social Security Social Security Contributions and Benefits Act 1992, c. 4 (U.K.) (Social Security Contributions and Benefits Act); the Statutory Maternity Pay (General) Regulations 1986 (U.K.), SI 1986/1960 (Statutory Maternity Pay Regulations).

<sup>79</sup> Social Security Contributions and Benefits Act, s 165; The Statutory Maternity Pay Regulations, reg 2; The Statutory Maternity Pay, Social Security (Maternity Allowance) and Social Security (Overlapping Benefits) (Amendment) Regulations 2006 (U.K.), SI 2009/2379.

<sup>80</sup> Social Security Social Security Contributions and Benefits Act, s 35(2) states that a maternity allowance shall be payable for the period which, if she were entitled to statutory maternity pay, would be the maternity pay period.

<sup>81</sup> Work and Families Act, s 1.

<sup>82</sup> Work and Families Act, Explanatory Notes at par [11]; James (note 4 above) 273.

<sup>83</sup> Social Security Social Security Contributions and Benefits Act, s 164; Emir (note 34 above) 197; Pitt (note 50 above) 152.

<sup>84</sup> Social Security Social Security Contributions and Benefits Act, s 164; Emir (note 34 above) 197.

<sup>85</sup> Ibid.

The qualifying requirements for maternity allowance are firstly, that the employee is pregnant, and has reached the commencement of the eleventh week before the expected week of confinement. Second, the employee must have been engaged in employment as an employed or self-employed earner for any part of the week at least 26 of the 66 weeks immediately prior to the expected week of confinement. Thirdly, her average weekly earnings must not be less than the maternity allowance threshold for the tax year in which the beginning of the period of 66 weeks falls.<sup>86</sup> Lastly, the employee must not be entitled to statutory maternity pay for the same week in respect of the same pregnancy.<sup>87</sup> Since the employee need not be employed continuously or by the same employer for the 26 of the 66 weeks immediately prior to the expected week of confinement, the earnings from more than one job may be counted in determining her average weekly earnings.<sup>88</sup>

### **5.3.1.1 Funding maternity cash benefits**

The financing scheme for maternity cash benefits in the UK is made up of a mixed system of individual employer liability and social security.<sup>89</sup> Statutory maternity pay is paid by employers in accordance with the SMPR in weekly payments.<sup>90</sup> According to the SSCB, the employer makes National Insurance contributions towards statutory maternity pay.<sup>91</sup> Statutory maternity pay is treated as the employee's earnings.<sup>92</sup> Therefore, employers are entitled to recover the amount as a rebate on the payment of statutory maternity pay from their income tax and National Insurance contributions.<sup>93</sup> This rebate discharges the employer's liability in respect of the contributions paid out as statutory maternity pay.<sup>94</sup> The rebate is funded by the Commissioner of Inland Revenue.<sup>95</sup> Employers of medium to large firms can claim a rebate of 92 per cent of the

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<sup>86</sup> Social Security Social Security Contributions and Benefits Act, s 35(2).

<sup>87</sup> *Ibid.*

<sup>88</sup> Emir (note 34 above) 197–198.

<sup>89</sup> ILO (2014) *Maternity and Paternity at Work: Law and Practice across the World*, International Labour Organisation, Geneva 26 <http://www.ilo.org/maternityprotection>, accessed on 20 January 2015.

<sup>90</sup> GOV.UK *Maternity Benefits Technical Guidance* <https://www.gov.uk/government/publications/maternity-benefits-technical-guidance/maternity-benefits-technical-guidance>, accessed on 2 January 2017.

<sup>91</sup> Social Security Social Security Contributions and Benefits Act, s 167.

<sup>92</sup> GOV.UK *Maternity Benefits Technical Guidance* <https://www.gov.uk/government/publications/maternity-benefits-technical-guidance/maternity-benefits-technical-guidance>, accessed on 2 January 2017.

<sup>93</sup> Social Security Social Security Contributions and Benefits Act, s 1; the Statutory Maternity Pay Regulations; Emir (note 34 above) 196; Pitt (note 50 above) 152.

<sup>94</sup> Social Security Social Security Contributions and Benefits Act, s 167(6).

<sup>95</sup> *Ibid* s 167(1).

payment and small employers can claim a rebate of 103 per cent.<sup>96</sup> Maternity allowance is payable out of the National Insurance Fund to self-employed persons and those persons who contribute voluntarily to the National Insurance.<sup>97</sup> It is a contributory benefit paid by the Department for Work and Pensions as a social security benefit.<sup>98</sup>

### **5.3.1.2 Methods of calculating maternity benefits**

Statutory maternity pay is payable at a rate of 90 per cent of the employee's weekly earnings for the first six weeks of maternity leave.<sup>99</sup> Thereafter, it is paid at the prescribed rate (which is currently £139.58), or at a rate of 90 per cent of the employee's average weekly earnings, whichever of the amounts is lower.<sup>100</sup> Therefore, the rate of payment for the remaining 33 weeks of leave is lower.<sup>101</sup> The employee is entitled to statutory maternity pay even if she does not intend to return to work from her maternity leave.<sup>102</sup> The SMPR set out provisions to account for the effects of statutory maternity pay through various situations which may arise over the maternity leave period.<sup>103</sup> Maternity allowance, payable in the event that the employee does not qualify for statutory maternity pay, is paid at a rate of either £139.58, or at a rate of 90 per cent of the employee's average weekly earnings, whichever of the amounts is lower.<sup>104</sup>

### **5.3.2 Eligibility for and exclusions from maternity leave and cash benefits**

Whereas an employee is entitled to statutory maternity leave of twelve months, statutory maternity pay is payable for only nine months, with only the first six weeks of pay being income related.<sup>105</sup> This means that employees are less likely to take the full twelve months of statutory

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<sup>96</sup> Ibid s 167(2); M O'Brien & A Koslowski 'United Kingdom Country Note' in A Koslowski, S Blum & P Moss (eds) *International Network of Leave Policies and Research 2016: 12th International Review of Leave Policies and Related Research* (2016) 359 [http://www.leavenetwork.org/lp\\_and\\_r\\_reports/](http://www.leavenetwork.org/lp_and_r_reports/), accessed on 20 December 2016.

<sup>97</sup> Social Security Social Security Contributions and Benefits Act, s 1(2) and s 35.

<sup>98</sup> Ibid s 20; Emir (note 34 above) 196; Pitt (note 50 above) 152; Leon (note 4 above) 356; JobCentre 'What is the JobCentre Plus?' JobCentreGuide <http://www.jobcentreguide.co.uk/jobcentre-plus-guide/4/what-is-the-jobcentre-plus>, accessed on 2 January 2017.

<sup>99</sup> Social Security Social Security Contributions and Benefits Act, s 166; James (note 2 above) 41; Leon (note 4 above) 356.

<sup>100</sup> The Statutory Maternity Pay Regulations, reg 6; Emir (note 34 above) 196; Pitt (note 50 above) 152.

<sup>101</sup> Emir (note 34 above) 197; Pitt (note 50 above) 153.

<sup>102</sup> Pitt (note 50 above) 153; Leon (note 4 above) 356.

<sup>103</sup> Emir (note 34 above) 197.

<sup>104</sup> Social Security Social Security Contributions and Benefits Act, s 35A.

<sup>105</sup> James (note 2 above) 42.

maternity leave unless they have the financial stability to manage their family expenses over the last three months of maternity leave with no income. This payment structure over maternity leave fails to account for dual-earner households, where both parents need to be earning a full income in order to maintain the financial stability of the family. It also overlooks the financial stability of single-parent households, families in low income brackets, and families with more than one child.<sup>106</sup> The failure to provide income for the final three months of the maternity leave defeats the purpose of providing additional maternity leave as the lack of income may force the employee to return to work prematurely so that she can earn her full salary.<sup>107</sup>

Since the removal of the qualification requirements by the WFA, maternity leave is available to all employees who work under an employment contract.<sup>108</sup> The express statutory provision of the continuity of the employment contract provides employees with additional employment protection over the maternity leave period. The right to statutory maternity pay exists separately from the right to maternity leave.<sup>109</sup> While maternity leave applies to ‘employees’, statutory maternity pay applies to ‘employed earners’.<sup>110</sup> An ‘employed earner’ is a person who is gainfully employed under a contract of service, or an office. The category of ‘employed earner’ is slightly wider than the definition of ‘employee’.<sup>111</sup>

However, to qualify as an employed earner, the employee must make contributions to the National Insurance Fund. This means that self-employed women who do not make such contributions are not entitled to statutory maternity leave.<sup>112</sup> A self-employed woman is nevertheless an ‘employee’ for the entitlement of maternity leave and the right to return to work, and while she may not be entitled to statutory maternity leave, she may rely on maternity pay in

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<sup>106</sup> *Ibid.*

<sup>107</sup> *Ibid.*

<sup>108</sup> The only employees that are excluded from maternity leave are members of the armed forces, share fisherwomen, members of the constabulary, and agency workers who are not employed under a contract of employment by an agency or hirer. See Emir (note 34 above) 42, 190.

<sup>109</sup> Pitt (note 50 above) 153.

<sup>110</sup> Emir (note 34 above) 196.

<sup>111</sup> *Ibid.*

<sup>112</sup> *Ibid.*

the form of a maternity allowance.<sup>113</sup> Therefore, the scope and coverage of the provision of maternity leave in the UK is wide.

### 5.3.3 Maternity and surrogacy agreements

According to the CFA, an employee who has become a new parent through surrogacy is entitled to adoption leave and pay, provided that they have been granted a parental order or an adoption order after the birth of the child.<sup>114</sup> This provision applies where the baby is born on or after 15 April 2015.<sup>115</sup> As such, the parent who becomes the legal parent of the child is entitled to adoption leave and pay, whereas the co-parent or partner to the parental order or adoption is entitled to paternity leave and pay or parental leave, provided the qualifying conditions are met. The parents are also entitled to utilise shared parental leave, provided the qualifying conditions are met.<sup>116</sup>

### 5.3.4 Time off from work to attend antenatal appointments

According to the ERA, an employee who is pregnant, and has, on the advice of a registered medical practitioner or registered midwife or registered nurse, made an appointment to receive antenatal care, is entitled to be permitted by her employer to take time off during working hours to attend the appointment.<sup>117</sup> There are no eligibility requirements for the right to time off to attend antenatal care appointments. The employee is entitled to time off from work for antenatal care irrespective of the number of hours or days worked for the employer, and irrespective of whether she is a permanent or temporary worker.<sup>118</sup> Upon request from her employer, the employee must produce a certificate stating that she is pregnant and an appointment card or some

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<sup>113</sup> Ibid.

<sup>114</sup> Children and Families Act, s 122; GOV.UK *Rights for Surrogate Mothers* <https://www.gov.uk/rights-for-surrogate-mothers>, accessed on 4 October 2016; Acas *Surrogacy – rights for intended parents* <http://www.acas.org.uk/surrogacy>, accessed on 4 October 2016.

<sup>115</sup> Ibid. A parental order must be applied for in terms of the Human Fertilisation and Embryology Act 2009, c. 22 (U.K.), s 58. Accordingly, the court makes an order providing that if the child has never been carried by a woman who is not one of the applicants, then the child must be treated in law as the child of the applicants. To qualify for a parental order, the applicants must be husband and wife; or civil partners to each other; or two persons who are living as partners in an ‘enduring family relationship’.

<sup>116</sup> GOV.UK *Rights for Surrogate Mothers* <https://www.gov.uk/rights-for-surrogate-mothers>, accessed on 4 October 2016; Acas *Surrogacy – rights for intended parents* <http://www.acas.org.uk/surrogacy>, accessed on 4 October 2016.

<sup>117</sup> Employment Rights Act, s 55(1); Emir (note 34 above) 185.

<sup>118</sup> Emir (note 34 above) 185.

other document showing that the appointment has been made.<sup>119</sup> The employee is entitled to be paid for her period of absence at the appropriate hourly rate.<sup>120</sup>

The employee is entitled to present a complaint to an employment tribunal based on the employer's unreasonable refusal to allow the employee to take time off from work to attend the antenatal appointment, or the employer's failure to pay any amount to which the employee is entitled under section 56.<sup>121</sup> In addition to such recourse, the MPLR protect the employee from any detriment by any act, or any deliberate failure to act, by her employer for the reason that she took time off for antenatal care.<sup>122</sup> Actions which would constitute detriment include the refusal to pay the employee for the time she was absent from work to attend the antenatal appointment.<sup>123</sup> Accordingly, the employee may claim compensation, which may include an award for injury to feelings.<sup>124</sup>

Furthermore, the CFA provides that an employee who is a partner of a pregnant woman has an unpaid right to take time off from work to accompany the pregnant woman to her antenatal appointments.<sup>125</sup> The employee may not take time off from work to attend antenatal appointments in terms of this section unless the appointment is made on the advice of a registered medical practitioner, registered midwife, or registered nurse.<sup>126</sup> The right encompasses time off during working hours in order to accompany a woman when she attends an appointment at any place for the purpose of receiving antenatal care. The employee must have a qualifying relationship with a pregnant woman or her expected child.<sup>127</sup> There are no further eligibility requirements to qualify for the right to time off to attend antenatal appointments.<sup>128</sup>

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<sup>119</sup> Employment Rights Act, s 55(2).

<sup>120</sup> Ibid s 56(1); According to s 56 of the ERA, the appropriate hourly rate is the amount of one week's pay divided by the number of normal working hours in a week for that employee in terms of the employee's current contract of employment.

<sup>121</sup> Employment Rights Act, s 57(1).

<sup>122</sup> The Maternity and Parental Leave Regulations, reg 19; Emir (note 34 above) 186.

<sup>123</sup> Emir (note 34 above) 186.

<sup>124</sup> Ibid.

<sup>125</sup> Employment Rights Act, s 57ZE(1); Children and Families Act, s 127(1); Rickard (note 44 above) 1493; Emir (note 34 above) 186.

<sup>126</sup> Employment Rights Act, s 57ZE(4); Children and Families Act, s 127(1).

<sup>127</sup> Employment Rights Act, s 57ZE(7); Children and Families Act, s 127(1); the employee would have a qualifying relationship with the pregnant women if he or she is a husband of the pregnant woman or is a partner in a civil



### 5.3.5 Employment protection and non-discrimination

Regulation 19 of the MPLR provides that an employee is entitled not to be subjected to any detriment by any act or omission by her employer for the reasons of pregnancy; childbirth; suspension from work on maternity grounds; or taking ordinary or additional maternity leave.<sup>129</sup> Detrimental treatment may occur where the employee is treated badly in the workplace for reasons relating to pregnancy and maternity.<sup>130</sup> Examples of such ill treatment would involve the failure of an employer to promote the deserving employee, instances of verbal abuse made towards the employee, or the alteration of the employee's working hours and conditions without her consent, for reasons relating to her pregnancy.<sup>131</sup>

The ERA, together with the *Equality Act, 2010* (EA), set out the primary sources of protection against such detriment by providing the right to return to work from maternity leave; the protection against dismissal for reasons of pregnancy, childbirth or maternity; and the protection against discrimination on the grounds of pregnancy and maternity.<sup>132</sup> According to the ERA, the dismissal of an employee on the grounds of pregnancy, childbirth or maternity constitutes an automatically unfair dismissal.<sup>133</sup> The legislative provisions which provide protection against pregnancy and maternity discrimination are set out in the EA.<sup>134</sup> Prior to the enactment of the EA, employment discrimination on the basis of pregnancy and maternity was addressed through the *Sex Discrimination Act, 1975* (SDA), and various judicial decisions.<sup>135</sup>

As stated in Chapter Three of this thesis, the UK has been bound by EU legislation and decisions of the ECJ.<sup>136</sup> Many cases dealing with the employment protection of pregnant or post-natal

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union with the pregnant women; lives with the woman in an enduring family relationship but is not her relative; is the father of the expected child; or is the parent or potential parent of a child born from surrogacy.

<sup>128</sup> Emir (note 34 above) 186.

<sup>129</sup> Employment Rights Act, s 47C; the Maternity and Parental Leave Regulations, reg 19.

<sup>130</sup> G James 'The Law relating to Pregnancy and Maternity Leave' in T Wright & H Conley *Gower Handbook of Discrimination at Work* (2011) 47.

<sup>131</sup> James (note 2 above) 28.

<sup>132</sup> Employment Rights Act, s 71(4), 73(4) and s 99(3)(a); the Maternity and Parental Leave Regulations, regs 18 and 20.

<sup>133</sup> Employment Rights Act, s 99(3)(a); Equality Act 2010, c. 15 (U.K.) (Equality Act), ss 13 and 18.

<sup>134</sup> Equality Act.

<sup>135</sup> Emir (note 34 above) 145; James (note 130 above) 52; Pitt (note 50 above) 47; Painter & Holmes (note 9 above) 182.

<sup>136</sup> See Chapter 3.

employees have been decided in terms of the EU *Directive on Equal Treatment (76/207/EEC)* (Equal Treatment Directive).<sup>137</sup> The Directive, now repealed by *the Directive of the European Parliament and of the Council (2006/54/EC)* (2006 Equal Treatment Directive), set out the protection of women on grounds of maternity and pregnancy.<sup>138</sup> The decisions of the ECJ acknowledged that less favourable treatment in the workplace on the grounds of pregnancy or maternity constituted sex discrimination.<sup>139</sup> While section 18 of the Equality Act codifies many of the principles set out in such cases, they remain relevant in their illustrations of the judicial intervention that has been necessary in pursuit of the protection against pregnancy and maternity discrimination in the UK workplace.<sup>140</sup>

### **5.3.5.1 The right to return to work**

Women on maternity leave are provided with employment protection in the form of the right to return to work.<sup>141</sup> There are slight differences which exist for the right to return to work from ordinary maternity leave, and the right to return to work from additional maternity leave.<sup>142</sup> According to the MPLR, an employee on ordinary maternity leave has the right to return to the job in which she was employed before her absence.<sup>143</sup> The employee is entitled to return with her seniority, pension rights and similar rights as they would have been if she had not been absent, and on terms and conditions not less favourable than those which would have applied if she had not been absent.<sup>144</sup>

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<sup>137</sup> Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions [1976] OJ L039/40 (Equal Treatment Directive); EC Landau & Y Beigbeder *From ILO Standards to EU Law: The case of equality between men and women at work* (2008) 99, 138–140, R Blanpain *European Labour Law* (2008) 475.

<sup>138</sup> Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast) OJ L204/23 (2006 Equal Treatment Directive).

<sup>139</sup> Sex Discrimination Act 1975, c. 65 (U.K.) ss 3A and 6A; James (note 130 above) 47; Painter & Holmes (note 50 above) 269.

<sup>140</sup> Emir (note 34 above) 144; Pitt (note 50 above) 45; James (note 130 above) 52; Painter & Holmes (note 9 above) 238, 269.

<sup>141</sup> Employment Rights Act, s 71(4) and 73(4); the Maternity and Parental Leave Regulations, reg 18.

<sup>142</sup> Emir (note 34 above) 192.

<sup>143</sup> Employment Rights Act, s 71(4); the Maternity and Parental Leave Regulations, reg 18.

<sup>144</sup> The Maternity and Parental Leave Regulations, reg 18A.

Upon returning from additional maternity leave, an employee is similarly entitled to return with her seniority, pension rights and similar rights as they would have been if she had not been absent, and on terms and conditions not less favourable than those which would have applied if she had not been absent.<sup>145</sup> Although the period of absence during the additional maternity leave will count as continuous employment, the employee will not accrue pension rights during the thirteen weeks of unpaid maternity leave that make up additional maternity leave.<sup>146</sup> Pension rights are suspended over this period.<sup>147</sup>

### ***5.3.5.2 Automatically unfair dismissals***

Section 99 of the ERA, as amended, states that an employee who is dismissed shall be regarded as unfairly dismissed if the reason for the dismissal relates to pregnancy, childbirth or maternity.<sup>148</sup> Regulation 20 of the MPLR states that an employee who is dismissed is entitled to be regarded as unfairly dismissed if the reason or principal reason for the dismissal is the pregnancy of the employee; the fact that she has given birth to a child; the suspension of the employee on the grounds of maternity; or the fact that she took, or applied for the benefits of, ordinary maternity leave, additional maternity leave, or time off to attend antenatal appointments.<sup>149</sup>

Furthermore, the dismissal will be automatically unfair if the employee failed to return after a period of ordinary or additional maternity leave in a case where the employer did not notify her of the date on which the period in question would end, and she reasonably believed that that period had not ended; or the employer gave her less than 28 days' notice of the date on which the period in question would end, and it was not reasonably practicable for her to return on that date.<sup>150</sup> Therefore, the failure of the employer to allow the employee to return to work from her ordinary maternity leave will amount to an automatically unfair dismissal.<sup>151</sup>

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<sup>145</sup> Ibid.

<sup>146</sup> Ibid.

<sup>147</sup> Emir (note 34 above) 194.

<sup>148</sup> Employment Rights Act, s 99(3)(a); James (note 2 above) 55.

<sup>149</sup> The Maternity and Parental Leave Regulations, reg 20.

<sup>150</sup> The Maternity and Parental Leave Regulations, reg 20(6).

<sup>151</sup> Employment Rights Act, s 99; the Maternity and Parental Leave Regulations, reg 20; Emir (note 34 above) 192; Pitt (note 50 above) 155.

The employer must have had knowledge of the employee's pregnancy at the time that the decision to dismiss was taken in order for the action to constitute an automatically unfair dismissal.<sup>152</sup> In *Ramdoolar v Bycity Ltd*,<sup>153</sup> the employee brought a claim of automatically unfair dismissal for the reason of pregnancy, in terms of regulation 20 of the MPLR. The case dealt with the issue of whether the employer had knowledge of the employee's pregnancy prior to her dismissal. The employee claimed that she informed the employer of her pregnancy on the day of her diagnosis.<sup>154</sup> The employer claimed that he had had no prior knowledge of her pregnancy, and that the reasons for the dismissal were her inability to perform her routine tasks, as well as arriving late to work for reasons other than pregnancy.<sup>155</sup> The Tribunal found that the employer had no knowledge of the pregnancy and that the dismissal was not automatically unfair. The Employment Appeals Tribunal (EAT) upheld the decision and found that for a dismissal to be automatically unfair, it is necessary for the employer to know or believe that the employee was pregnant and dismiss her for a reason connected with that knowledge or belief.<sup>156</sup>

There are two instances in which the failure to allow the employee to return to work from her ordinary maternity leave will not amount to an automatically unfair dismissal.<sup>157</sup> The first instance applies if the employee returns to work after a period of two or more consecutive periods of statutory leave, such as ordinary maternity leave and additional maternity leave, or additional adoption leave, or parental leave lasting more than four weeks; and it is not reasonably practicable for her to return to her same position of work for any reason other than redundancy. Accordingly, if the employee cannot continue employment for any reason other than redundancy, the employee must be offered another job that is suitable and appropriate in the circumstances.<sup>158</sup> This provides the employer with a defence to the automatic unfair dismissal of an employee returning from maternity leave.<sup>159</sup>

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<sup>152</sup> *Ramdoolar v Bycity Ltd* [2004] UKEAT I-3007; Emir (note 34 above) 143; James (note 130 above) James (note 2 above) 59.

<sup>153</sup> *Ramdoolar* (note 152 above).

<sup>154</sup> *Ibid* at par [2].

<sup>155</sup> *Ibid* at par [3].

<sup>156</sup> *Ibid* at par [4].

<sup>157</sup> Emir (note 34 above) 192; Pitt (note 50 above) 155.

<sup>158</sup> The Maternity and Parental Leave Regulations, reg 20(7); Painter & Holmes (note 9 above) 547.

<sup>159</sup> Pitt (note 50 above) 157.

The second instance occurs where the employee becomes redundant while on maternity leave and as a result of the redundancy it is not practicable for the employer to continue to employ her under her existing contract of employment. In such a situation, the employer must offer the employee a suitable available vacancy.<sup>160</sup> The new contract of employment must be such that the work to be done under it is of a kind which is both suitable in relation to the employee and appropriate for her to do in the circumstances. Furthermore, the provisions of the new employment contract which regulate capacity; place of employment; and terms and conditions of employment must not be substantially less favourable to the employee in comparison to the terms which would have existed had she continued to be employed under the previous contract.<sup>161</sup> The new contract must take effect immediately on the ending of her employment under the previous contract.<sup>162</sup> Accordingly, if there is a suitable vacancy available and the employee is dismissed for the reason of redundancy, the dismissal is automatically unfair.<sup>163</sup> However, the dismissal will be considered fair in a situation of redundancy if there is no suitable available vacancy.

In the case of *Sefton Borough Council v Wainwright*,<sup>164</sup> an employee claimed automatically unfair dismissal on the basis that her employment position was made redundant while she was on maternity leave. The employer conducted a restructuring of the workplace resulting in two posts being merged into one. Consequently, either the employee or her colleague would become redundant. The employee had been absent on maternity leave from July 2012. The employer conducted interviews in December 2012, interviewing the employee and her colleague. The claimant employee was unsuccessful and was dismissed on grounds of redundancy.

The employee relied on regulation 10 of MPLR. At the Employment Tribunal, it was held that the employee was on maternity leave at the time of the redundancy. Therefore, she should have been offered a suitable available vacancy rather than being dismissed. The Employment Tribunal found that regulation 10 gives rise to an absolute right. As such, the employee's dismissal was

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<sup>160</sup> The Maternity and Parental Leave Regulations, regs 10 and 18(4).

<sup>161</sup> *Ibid* reg 10(3).

<sup>162</sup> *Ibid* reg 10(2).

<sup>163</sup> *Ibid* reg 20(1)(b); Painter & Holmes (note 9 above) 547.

<sup>164</sup> *Sefton Borough Council v Wainwright* [2015] IRLR 90.

automatically unfair. The EAT upheld the decision by finding that the employer was obliged to assess what available vacancies might have been suitable and to offer one or more of those vacancies to the employee.<sup>165</sup>

A woman who claims unfair dismissal in terms of section 99 of the ERA may approach the Employment Tribunal, irrespective of her length on service.<sup>166</sup> This differs from a claim of ordinary unfair dismissal in terms of the ERA, which requires a minimum period of 1 year of service in the employment position before the employee may claim unfair dismissal.<sup>167</sup> Therefore, section 99 of the ERA widens the scope of the legislation and allows greater access for employees with claims of automatically unfair dismissal on the basis of pregnancy and maternity.<sup>168</sup>

An allegation of any unfair dismissal involves a two-stage inquiry. The first question that is asked is whether there was a dismissal. Second, it must be determined whether the dismissal was unfair. With regard to the first inquiry, the onus falls on the employee to prove that she was dismissed. Once the dismissal is proved, the employer must prove that the dismissal was fair.<sup>169</sup> Nevertheless, the ERA provides that an employee who is dismissed while pregnant or on maternity leave is entitled to written reasons for her dismissal.<sup>170</sup> The employee does not need to have been employed for any requisite period of time to receive written reasons for such a dismissal. She is entitled to the written reasons without putting in a request for them.<sup>171</sup>

### **5.3.5.3 Non-discrimination**

The EA provides that pregnancy and maternity is a protected characteristic upon which lies a prohibition against discrimination.<sup>172</sup> This means that discrimination on the basis of pregnancy and maternity constitutes prohibited conduct in the form of direct discrimination. Section 13 of

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<sup>165</sup> Painter & Holmes *Online Resource Centre* (note 2 above) 1, 5.

<sup>166</sup> James (note 2 above) 55; *R v SS for Employment ex parte EOC* [1994] ICR 317 (HL).

<sup>167</sup> James (note 2 above) 55.

<sup>168</sup> *Ibid.*

<sup>169</sup> *Ibid.*

<sup>170</sup> Employment Rights Act, s 92(4).

<sup>171</sup> Emir (note 34 above) 458.

<sup>172</sup> Equality Act, s 4.

the Act states that the less favourable treatment of a person, on the grounds of a protected characteristic, amounts to discrimination.<sup>173</sup> Section 18 of the EA applies exclusively to pregnancy and maternity discrimination in the workplace.<sup>174</sup> Section 18 is more extensive than section 13. It states that a person discriminates against a woman if, in the protected period in relation to her pregnancy, he or she treats her unfavourably because of her pregnancy or because of illness suffered by her as a result of pregnancy.<sup>175</sup> Section 18 states further that conduct which includes discrimination is the unfavourable treatment of a woman because she is on compulsory maternity leave, or because she is exercising or seeking to exercise, or has exercised, the right to ordinary or additional maternity leave.<sup>176</sup> The provisions of section 18 protect not only employees but applicants for employment as well.<sup>177</sup>

Section 13 is a general provision that applies to all pregnancy and maternity discrimination, while section 18 applies exclusively to discrimination in the workplace.<sup>178</sup> Section 18 provides greater protection than section 13. Section 13 protects against ‘less favourable’ treatment, while section 18 protects against ‘unfavourable’ treatment. In proving ‘less favourable’ treatment, the claimant must show comparable treatment, whereas ‘unfavourable’ treatment does not require comparison.<sup>179</sup> This requirement of ‘unfavourable’ treatment in the EA is significant because, prior to the enactment of the EA, the SDA prevented pregnancy discrimination through the prohibition of ‘less favourable’ treatment on the grounds of sex.<sup>180</sup> As the EA now states ‘unfavourable treatment’, an employee who is discriminated against on the basis of pregnancy and maternity does not need to prove that she was treated differently in comparison to another employee.

Cases which have established direct discrimination on the grounds of pregnancy and maternity, and thus have influenced the enactment of section 18 of the EA, date back to the case of *Dekker*

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<sup>173</sup> Ibid s 13.

<sup>174</sup> Ibid s 18.

<sup>175</sup> Ibid s 18(2).

<sup>176</sup> Ibid s 18(3) and 18(4).

<sup>177</sup> Ibid s 39.

<sup>178</sup> Emir (note 34 above) 121.

<sup>179</sup> Ibid 120–121.

<sup>180</sup> James (note 130 above) 49.

*v Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus*.<sup>181</sup> As discussed in Chapter Three of this thesis, the case was historic as it set out a legal precedent that the discriminatory treatment of a woman on the basis of her pregnancy results in direct discrimination.<sup>182</sup> The court made it clear that a decision taken to refuse the employment of a woman on the grounds of her pregnancy is directly linked to the sex of the individual employee.<sup>183</sup> It is irrelevant whether or not a man would have been appointed to the position.<sup>184</sup> Therefore, discrimination on the grounds of pregnancy amounts to direct discrimination.<sup>185</sup> This principle is not set out in section 18 of the EA.<sup>186</sup>

In the case of *Handels- og Kontorfunktionærernes Forbund i Danmark, acting on behalf of Birthe Vibeke Hertz v Dansk Arbejdsgiverforening, acting on behalf of Marked K/S*,<sup>187</sup> the court found that the dismissal of an employee on the basis of pregnancy constituted direct discrimination.<sup>188</sup> However, the protection against direct discrimination was qualified by the ruling that, after the maternity leave period, there is no reason to distinguish pregnancy-related illness from any other type of illness.<sup>189</sup> In dealing with the instance of the employee's dismissal for absence from work as a result of pregnancy-related illness, the court said that there was no reason why pregnancy-related illness should be distinguished from any other illness.<sup>190</sup> The court compared the pregnancy-related illness to that of a sick man, and held that if the absence of a man caused by sickness would lead to dismissal, then a dismissal for absence from work for pregnancy-related illness under the same work conditions would not constitute direct discrimination on the grounds of sex.<sup>191</sup>

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<sup>181</sup> Case C-177/88 *Dekker v Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus* [1990] ECR I-3941.

<sup>182</sup> *Ibid* at paras [12], [26]; Emir (note 34 above) 144; James (note 130 above) 50; Pitt (note 50 above) 46; Painter & Holmes (note 9 above) 46; Landau & Beigbeder (note 137 above) 143–144.

<sup>183</sup> *Dekker* (note 181 above) 3941 at par [17].

<sup>184</sup> *Ibid*.

<sup>185</sup> *Ibid*; Painter & Holmes (note 9 above) 272.

<sup>186</sup> Emir (note 34 above) 144.

<sup>187</sup> Case C-179–88 *Handels- og Kontorfunktionærernes Forbund i Danmark, acting on behalf of Birthe Vibeke Hertz v Dansk Arbejdsgiverforening, acting on behalf of Aldi Marked K/S* [1990] ECR I-3979; Landau & Beigbeder (note 137 above) 99, 144–145; Blanpain (note 137 above) 568; TK Hervey *Justifications for sex discrimination in employment* (1993) 62.

<sup>188</sup> *Handels- og Kontorfunktionærernes, acting on behalf of Birthe Vibeke Hertz* (note 187 above) 3979 at par [13].

<sup>189</sup> *Ibid* at par [2]–[4] and [16].

<sup>190</sup> *Ibid* at par [15].

<sup>191</sup> *Ibid* at par [17–18]; James (note 130 above) 50; Emir (note 34 above) 145; Painter & Holmes (note 9 above) 272.



This decision that the dismissal of an employee for absences relating to pregnancy-related illness does not constitute direct discrimination was overturned in *Webb v EMO Air Cargo (UK) Ltd*.<sup>192</sup> As discussed in Chapter Three of this thesis, the court in *Webb* found that the situation of a woman who is incapable of performing her employment functions for reasons related to her pregnancy can in no way be comparable to that of a man who is incapable of performing his employment functions for medical or other reasons.<sup>193</sup> Thus, the court found that in determining discrimination, it was inappropriate to compare the treatment of the pregnant woman dismissed for illness to that of a man dismissed for illness.<sup>194</sup> The case of *Webb* confirmed that discrimination on the grounds of pregnancy and maternity amounts to direct discrimination on the grounds of sex.<sup>195</sup>

However, the protection against discrimination for absence due to pregnancy-related illness applies only within a ‘protected period’ during pregnancy and maternity leave.<sup>196</sup> In *Handels- og Kontorfunktionærernes Forbund i Danmark, acting on behalf of Larsson v Dansk Handel & Service, acting on behalf of Føtex Supermarked A/S*, a pregnant employee took maternity leave in accordance with national legislation.<sup>197</sup> The employee had been suffering from illness related to her pregnancy and took a further period of sick leave after her maternity leave.<sup>198</sup> The employee was dismissed for taking lengthy periods of absence. The employee claimed that her dismissal while she was on sick leave amounted to discrimination, and was contrary to the *Directive on Equal Treatment (76/207/EEC)*.<sup>199</sup> The basis for the claim was that the employee’s illness began during her pregnancy, and continued after the expiry of her maternity leave.<sup>200</sup> The court held that once the maternity leave period set down by national law has expired, the employee is not automatically protected against dismissal for absence due to illness arising from

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<sup>192</sup> Case C-32/93 *Webb v EMO Air Cargo (UK) Ltd* [1994] ECR I-3567; OC Dupper ‘Maternity’ MP Olivier et al (eds) *Introduction to Social Security* (2004) 399, 409.

<sup>193</sup> *Webb* (note 192 above) at par [24].

<sup>194</sup> Pitt (note 50 above) 45–46.

<sup>195</sup> *Webb* (note 192 above); Dupper (note 192 above) 409; Pitt (note 50 above) 46; Painter & Holmes (note 9 above) 270, 273.

<sup>196</sup> Pitt (note 50 above) 47; Emir (note 34 above) 143; James (note 130 above) 47.

<sup>197</sup> Case C-400-95 *Handels- og Kontorfunktionærernes Forbund i Danmark, acting on behalf of Larsson v Dansk Handel & Service, acting on behalf of Føtex Supermarked A/S* [1995] ECR I-02757.

<sup>198</sup> *Ibid* at paras [2]–[4].

<sup>199</sup> *Ibid* at par [4].

<sup>200</sup> *Ibid* at par [5].

pregnancy or maternity.<sup>201</sup> The court said that this rule applies even where the illness arose during pregnancy and continued during and after the maternity leave period.<sup>202</sup>

In the case of *Brown v Rentokil*,<sup>203</sup> the employee informed the employer that she was pregnant and took time off from work by submitting a series of four weekly certificates indicating pregnancy-related illnesses.<sup>204</sup> The employer dismissed the employee for contravention of the contractual term of her employment that an employee could not be absent as a result of sickness for a period of more than 26 continuous weeks.<sup>205</sup> With reliance on the *Directive on Equal Treatment (76/207/EEC)*, the employee claimed that the dismissal was automatically unfair on the grounds of sex discrimination. It was found that a dismissal of an employee for absences caused by pregnancy-related illness is linked to the inherent risk of pregnancy and must be regarded as a fact of pregnancy.<sup>206</sup> The court held that such a dismissal can affect only women, and therefore constitutes direct discrimination on the grounds of sex.<sup>207</sup> In setting out the decision, the court found that absence resulting from pregnancy-related illness during pregnancy and maternity leave cannot justify dismissal. However, absences after the maternity leave period must be compared to a man in a similar position who is absent as a result of sickness.<sup>208</sup>

According to the EA, a protected period in relation to the prohibition of discrimination against pregnancy begins from the time that the pregnancy begins, and extends until the end of her additional maternity leave period.<sup>209</sup> If the employee returns to work before the end of her additional maternity leave period, the protected period ends when she returns to work after the pregnancy.<sup>210</sup> If the employee has not taken ordinary or additional maternity leave, the protection against such discrimination ends at the end of the two weeks' compulsory maternity leave

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<sup>201</sup> Ibid at par [23].

<sup>202</sup> Ibid at par [26]; Emir (note 34 above) 145; Painter & Holmes (note 9 above) 274.

<sup>203</sup> Case-394/96 *Brown v Rentokil* [1998] ECR I-4224.

<sup>204</sup> Ibid at par [4].

<sup>205</sup> Ibid at paras [5]–[7].

<sup>206</sup> Ibid at par [24].

<sup>207</sup> Emir (note 34 above).

<sup>208</sup> *Brown* (note 203 above) at par [27]; Landau & Beigbeder (note 137 above) 150; Painter & Holmes (note 9 above) 274.

<sup>209</sup> Equality Act, s 18(6).

<sup>210</sup> Ibid.

beginning with the end of the pregnancy.<sup>211</sup> In *Lyons v DWP Jobcentre Plus*,<sup>212</sup> the employee was dismissed following a period of absence from work as a result of illness caused by postnatal depression. The depression began while the employee was on maternity leave and continued after the expiry of her maternity leave.<sup>213</sup> The employee relied on sections 13 and 18 of the EA to claim that the dismissal amounted to direct discrimination, or discrimination on the grounds of pregnancy or maternity.<sup>214</sup>

The Employment Tribunal referred to the case of *Handels- og Kontorfunktionærernes Forbund i Danmark, acting on behalf of Larsson v Dansk Handel & Service, acting on behalf of Føtex Supermarked A/S*,<sup>215</sup> and found that section 18 of the EA did not apply to dismissals which occurred outside of the protected period. On appeal, the court stated that:

‘When a pregnancy-related illness arises during pregnancy or maternity leave and persists after the maternity leave period, an employer is permitted to take into account periods of absence due to that illness, after the end of maternity leave, in computing any period of absence justifying dismissal, in the same way that a man’s absences for illness are taken into account.’<sup>216</sup>

The EAT upheld the decision on the basis that a dismissal would amount to unfavourable treatment constituting discrimination in terms of section 18 of the EA only if it occurs between the beginning of the pregnancy and the end of maternity leave period.<sup>217</sup> The protection against discrimination extends to a situation where the decision to implement unfavourable treatment was taken during the protected period but implemented only after the end of the protected period. Such treatment will be regarded as occurring in the protected period.<sup>218</sup>

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<sup>211</sup> Ibid.

<sup>212</sup> Case-348/13 *Lyons v DWP Jobcentre Plus* [2014] ECR I-1401.

<sup>213</sup> Ibid at par [2–5].

<sup>214</sup> Ibid at par [9].

<sup>215</sup> Ibid at par [13]; *Handels- og Kontorfunktionærernes Forbund i Danmark, acting on behalf of Larsson* (note 197 above).

<sup>216</sup> *Lyons* (note 212 above) at par [31].

<sup>217</sup> Ibid at par [31].

<sup>218</sup> Equality Act, s 18(5).

The right not to be discriminated against on the grounds of pregnancy and maternity is not absolute.<sup>219</sup> In *Gillespie and others v Northern Health and Social Services Board and others*, a woman claimed that she had suffered sex discrimination because of the reduction of her salary from her ordinary rate of pay to the rate of statutory maternity pay over her maternity leave period.<sup>220</sup> The ECJ held that national legislation sets out the rate of statutory maternity pay, and is entitled to do so, provided that the amount is not set so low as to undermine the purpose of the maternity leave.<sup>221</sup> As such, differential treatment over the maternity leave period does not constitute discrimination if the particular differential treatment is set out as a lawful legislative provision.<sup>222</sup>

Employment protection in the form of the prohibition against dismissal and discrimination is limited in the scope of its protection for two main reasons. Firstly, the requirement that the employer must have had prior knowledge of the pregnancy for a dismissal to be automatically unfair on the grounds of pregnancy places an onus on the employee to disclose her pregnancy. It provides the employer with protection against accusations that he dismissed an employee on the grounds of pregnancy where evidence indicates that the employer had no prior knowledge of the pregnancy, and there had been another valid, non-pregnancy-related, reason for the dismissal.<sup>223</sup> However, the employee must notify the employer of her pregnancy in order to protect herself against dismissal.<sup>224</sup>

Secondly, the employee is not protected against discrimination on the basis of pregnancy and maternity after the ‘protected period’, or after the end of her maternity leave. This means that after the end of her maternity leave, the employee must conform to the ordinary working patterns, irrespective of any conflicts between the care-giving responsibilities for her baby and her work.<sup>225</sup> Many women suffer from pregnancy-related illnesses many months after

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<sup>219</sup> Emir (note 34 above) 144–145; James (note 2 above) 52.

<sup>220</sup> Case-342/92 *Gillespie and others v Northern Health and Social Services Boards* [1996] ECR I-475 at par [3–6].

<sup>221</sup> Ibid at par [20]; Emir (note 34 above) 145; James (note 130 above) 52; Pitt (note 50 above) 47; Painter & Holmes (note 9 above) 182.

<sup>222</sup> Emir (note 34 above) 144.

<sup>223</sup> James (note 2 above) 59–60.

<sup>224</sup> James (note 130 above) 53–54.

<sup>225</sup> Ibid 53.

childbirth.<sup>226</sup> If the employee experiences differential treatment after the protected period has ended, she will have to rely on proving discrimination on the grounds of sex, rather than discrimination on the grounds of pregnancy and maternity. This means that the employee will have to prove that she experienced less favourable treatment by comparison.<sup>227</sup> Therefore, the scope of the protection against discrimination on the grounds of pregnancy and maternity is limited as it fails to protect those women employees who suffer long-term pregnancy-related illness after childbirth.<sup>228</sup>

### 5.3.6 Keep-in-touch days

The WFA introduced ‘keep-in-touch days’ to provide the employee on maternity leave with the right to work up to ten days during the leave period without losing her entitlement to statutory maternity pay.<sup>229</sup> The objective of providing keep-in-touch days is to assist in the communication between the employer and the employee during the maternity leave (or adoption leave) period.<sup>230</sup> The employee has the flexibility to communicate as well as the choice to communicate with the employer over the maternity leave period, without terminating her maternity leave.<sup>231</sup> Keep-in-touch days apply to employees whose child was born after 1 April 2007. The days may be exercised at any time other than the first two weeks of compulsory maternity leave.<sup>232</sup> The work which may be done within the ten days includes training or any activity undertaken for the purposes of keeping in touch with the workplace.<sup>233</sup> The days are not compulsory, and should the employee refuse to utilise her keep-in-touch days, she will be protected against any detrimental treatment or dismissal that may result from the refusal.<sup>234</sup> The employee is entitled to be paid at

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<sup>226</sup> James (note 2 above) 58.

<sup>227</sup> Ibid.

<sup>228</sup> Ibid 60; James (note 130 above) 54.

<sup>229</sup> The Maternity and Parental Leave Regulations, reg 9; the Paternity and Adoption Leave Regulations; regulation 9 inserts regulation 12A into the Maternity and Parental Leave Regulations and regulation 14 inserts 21A into the Paternity and Adoption Leave Regulations; G James ‘Enjoy your leave but “keep in touch”: Help to maintain parent/workplace relations’ (2006) 36 *Industrial Law Journal* 315; James (note 2 above) 192.

<sup>230</sup> James (note 229 above) 315.

<sup>231</sup> Golyner (note 1 above) 388.

<sup>232</sup> The Maternity and Parental Leave Regulations, reg 12A; the Paternity and Adoption Leave Regulations, reg 21A; James (note 229 above) 315.

<sup>233</sup> The Maternity and Parental Leave Regulations, reg 12A(3); the Paternity and Adoption Leave Regulations, reg 21A(3); James (note 229 above) 315.

<sup>234</sup> James (note 229 above) 316; Emir (note 34 above) 192.

the rate of statutory maternity pay, unless the employer and employee reach agreement regarding a higher rate of payment.<sup>235</sup>

The regulations also provide that the employer and the employee may agree to make reasonable contact with each other during the leave period.<sup>236</sup> Such contact may be necessary to discuss details regarding the employee's return to work, communicating workplace information or discussing opportunities at the workplace open to the employee, such as promotions.<sup>237</sup> While the keep-in-touch days claim to support gender equality in the workplace, the entitlement has been criticised for appearing obligatory and unnecessary.<sup>238</sup> The provision may assist the employee in the transition from maternity leave to her return to work; however, it may place added pressure on the mother on maternity leave to assist her employer during her absence.<sup>239</sup> Although the employee is protected against detrimental treatment if she chooses to refuse the keep-in-touch days, there is evidence to suggest that few women employees bring claims based on poor treatment in the workplace.<sup>240</sup>

#### 5.4 Paternity leave

The UK offers employees with a choice of one or two consecutive weeks of paternity leave provided by the PALR.<sup>241</sup> The leave may be taken for the purpose of caring for a child or supporting the mother of the child.<sup>242</sup> The leave may be taken within 56 days of the birth of a child or the placement of an adopted child.<sup>243</sup> In order to claim paternity leave, the employee must be the father of the child; or if he is not the father of the child, he must be married to or the partner of the mother of the child.<sup>244</sup> If the employee is the father of the child, he must have or

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<sup>235</sup> James (note 229 above) 316; James (note 2 above) 192.

<sup>236</sup> The Maternity and Parental Leave Regulations, reg 12A; the Paternity and Adoption Leave Regulations, reg 21A; James (note 229 above) 315; Emir (note 34 above) 192.

<sup>237</sup> Emir (note 34 above) 192.

<sup>238</sup> James (note 34 above) 316–317; James (note 2 above) 42.

<sup>239</sup> James (note 229 above) 316–317.

<sup>240</sup> Ibid 317; Golyner (note 1 above) 389.

<sup>241</sup> Employment Rights Act, s 80; the Paternity and Adoption Leave Regulations, reg 5(1); James (note 2 above) 43; Emir (note 34 above) 200.

<sup>242</sup> The Paternity and Adoption Leave Regulations, reg 4(1).

<sup>243</sup> Ibid reg 5(2); James (note 2 above) 43; Emir (note 34 above).

<sup>244</sup> The Paternity and Adoption Leave Regulations, reg 4(2); Emir (note 34 above) 200.

expect to have responsibility for the upbringing of the child.<sup>245</sup> The employee must have been employed continuously for a period of not less than 26 weeks ending with the week immediately preceding the fourteenth week before the expected week of the child's birth.<sup>246</sup>

In the case of adoption, the child must be under the age of eighteen in order for the employee to claim paternity leave.<sup>247</sup> In such instances, the employee must be either married to or the partner of the child's adopter, and must have or expect to have the main responsibility for the upbringing of the adopted child together with the child's adopter.<sup>248</sup> The employee must have been continuously employed for a period of not less than 26 weeks ending with the week in which the child's adopter is notified of having been matched with the child.<sup>249</sup>

In order to take paternity leave, the employee must give his employer notice of his intention to take leave.<sup>250</sup> The notice must specify the expected week of the child's birth; the length of the period of leave that the employee has chosen to take; and the date on which, the employee has chosen that his period of leave should begin.<sup>251</sup> The notice must be provided in or before the 15th week before the expected week of the child's birth, or in a case where it was not reasonably practicable for the employee to give such notice, as soon as is reasonably practicable. Where the employer requests it, an employee must also give his employer a declaration, signed by the employee, setting out the purpose of the leave and that he has met the conditions set out in the PALR.<sup>252</sup>

In the instance of adoption, the employee must give notice of the date on which the adopter was notified of having been matched with the child; the date on which the child is expected to be placed with the adopter; the length of the period of leave that the employee has chosen to take, and the date on which the period of leave should begin.<sup>253</sup> Notice must be given to the employer

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<sup>245</sup> The Paternity and Adoption Leave Regulations, reg 4(2)(b) and (c); Emir (note 34 above) 200.

<sup>246</sup> The Paternity and Adoption Leave Regulations, reg 4(2)(a); Emir (note 34 above) 200.

<sup>247</sup> Emir (note 34 above) 200.

<sup>248</sup> The Paternity and Adoption Leave Regulations, reg 8(2)(b) and (c).

<sup>249</sup> Ibid; reg 8(2)(a); Emir (note 34 above) 200.

<sup>250</sup> The Paternity and Adoption Leave Regulations, reg 6(1); Emir (note 34 above) 201.

<sup>251</sup> The Paternity and Adoption Leave Regulations, reg 6(2).

<sup>252</sup> Ibid reg 6(3).

<sup>253</sup> Ibid reg 10(1).

no more than seven days after the date on which the adopter is notified of having been matched with the child, or in a case where it was not reasonably practicable, as soon as is reasonably practicable.<sup>254</sup> Where the employer requests it, an employee must also give his employer a declaration, signed by the employee, setting out the purpose of the leave and that he has met the conditions set out in the PALR.<sup>255</sup> The regulations make provision for the employee to vary the date of his leave.<sup>256</sup>

During the paternity leave period the employee is entitled to the benefit of all of the terms and conditions of employment which would have applied if he had not been absent, and is bound by any obligations arising under those terms and conditions.<sup>257</sup> The employee is entitled to return to the job in which he was employed before his absence, provided that he has taken an isolated period of leave, or paternity leave which does not include any period of additional maternity leave or additional adoption leave or a period of parental leave of more than four weeks.<sup>258</sup> If it is not reasonably practicable for the employer to permit him to return to that job, he must be appointed to another job which is both suitable for him and appropriate for him to do in the circumstances.<sup>259</sup> The employee is protected against any detrimental treatment by the employer for the reason that he took or sought to take paternity leave.<sup>260</sup> The employee is also protected against unfair dismissal on the basis that he took or sought to take paternity leave.<sup>261</sup>

#### **5.4.1 Statutory paternity pay**

Statutory paternity pay is payable for two weeks at a rate of 90 per cent of the employee's weekly earnings or at the prescribed rate of £139.58, whichever of the amounts is lower.<sup>262</sup> The qualifying requirements for statutory paternity pay are that, firstly, the employee must have been

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<sup>254</sup> Ibid reg 10(3).

<sup>255</sup> Ibid regs 6(3) and 10(3); Emir (note 34 above) 201.

<sup>256</sup> The Paternity and Adoption Leave Regulations, regs 6(4) and 10 (4).

<sup>257</sup> According to the Employment Rights Act, s 80C, 'terms and conditions' of employment 'includes matters connected with an employee's employment whether or not they arise under his contract of employment, but do not include terms and conditions about remuneration; 'the Paternity and Adoption Leave Regulations, reg 12(1) and (2).

<sup>258</sup> The Paternity and Adoption Leave Regulations, reg 13(1).

<sup>259</sup> Ibid reg 13(2).

<sup>260</sup> Ibid reg 28.

<sup>261</sup> Ibid reg 29.

<sup>262</sup> Social Security Social Security Contributions and Benefits Act, s 171ZE; Emir (note 34 above) 202.



continuously employed for a period of 26 weeks immediately before the fourteenth week prior to the birth of the baby.<sup>263</sup> Secondly, the employee's normal weekly earnings must be at or above the lower earnings limit necessary for the payment of National Insurance contributions.<sup>264</sup> The employee's normal earnings must be calculated over a period of eight weeks ending with the last payday before the end of the qualifying period.<sup>265</sup> In order to claim statutory paternity pay, the employee must give the employer notice of the date from which he expects his liability to pay the statutory paternity pay to begin.

The notice must be given 28 days before the date from which he expects payment or, if that is not reasonably practicable, as soon as is reasonably practicable.<sup>266</sup> Furthermore, the employee must provide a written declaration stating that he meets the conditions relating to a relationship with a newborn child; and a relationship with the child's mother.<sup>267</sup> In the instance of an adoption, the employee must provide a written declaration stating that he is the person on the parental order on whose application the court has made a parental order in respect of a child, or, who is an intended parent of a child.<sup>268</sup>

Considering that paternity leave is the only leave provision for the exclusive use of fathers for the care of their child, the short duration of the leave, the strict eligibility requirements, and the poor rate of payment fail to encourage employee participation in paternity leave.<sup>269</sup> The main downfall of the paternity leave provision is that it reinforces the gendered assumption that women are the primary caregivers, and that men should fulfil their roles as employees before they may commit to their family responsibilities.<sup>270</sup> For instance, the duration of paternity leave is two weeks; whereas a mother is entitled to 52 weeks if maternity leave, together with an

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<sup>263</sup> Social Security Social Security Contributions and Benefits Act, s 171ZA and 171ZB; the Statutory Paternity Pay and Statutory Adoption Pay Regulations 2002 (U.K), SI 2002/2822 (Statutory Paternity Pay and Statutory Adoption Pay Regulations); Emir (note 34 above) 201.

<sup>264</sup> Social Security Social Security Contributions and Benefits Act, s 171ZA and 171ZB; Emir (note 34 above) 201.

<sup>265</sup> *Ibid.*

<sup>266</sup> The Statutory Paternity Pay and Statutory Adoption Pay Regulations, reg 6(2); Emir (note 34 above) 202.

<sup>267</sup> The Statutory Paternity Pay and Statutory Adoption Pay Regulations, reg 9; Social Security Social Security Contributions and Benefits Act, s 171ZA; Emir (note 34 above) 202.

<sup>268</sup> The Statutory Paternity Pay and Statutory Adoption Pay Regulations, reg 9; Social Security Social Security Contributions and Benefits Act, s 171ZB; Emir (note 34 above) 202.

<sup>269</sup> Caracciolo di Torella (note 2 above) 322–324; James (note 2 above) 43–44; Leon (note 4 above) 356.

<sup>270</sup> Caracciolo di Torella (note 2 above) 322–324; James (note 2 above) 43–44.

automatic and compulsory period of two weeks. In order to claim the two weeks of paternity leave, the employee must meet strict eligibility requirements. This appears to suggest that the mother is entitled to time off from work to care for her newborn, while the father is not.<sup>271</sup>

In meeting the eligibility requirements, fathers are rewarded for their continuity of employment with the right of claiming paternity leave.<sup>272</sup> Paternity leave is a benefit to which the employee is entitled once he has earned it through his commitment to his employment. Therefore, this model of paternity leave strengthens the gendered assumption that the primary role of a man is as a breadwinner.<sup>273</sup> Furthermore, two weeks of leave cannot be satisfactory for a father who wishes to spend time caring for his newborn child and supporting the mother in her recovery from childbirth.<sup>274</sup>

The poor rate of statutory paternity pay may result in many fathers being unable to afford to take paternity leave. Some fathers may be the sole or primary income providers, or may have such significant financial responsibilities for the maintenance of his family that they cannot rely on the rate of statutory paternity pay.<sup>275</sup> Lastly, the provision of paternity leave in the PALR has been criticised by academics for stating that the purpose of paternity leave is caring for a child and ‘supporting the mother of the child’. While this is an identifiable purpose for the provision of paternity leave, it has been stated that the inclusion of these words in the regulations as the identified purpose of paternity leave fails to promote equal parenting.<sup>276</sup>

## 5.5 Parental leave

Parental leave in the UK is regulated by the MPLR, which was adopted to give statutory effect to the EU *Parental Leave Directive* of 1996 (96/34/EC) (1996 Parental Leave Directive), repealed

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<sup>271</sup> Caracciolo di Torella (note 2 above) 322; James (note 2 above) 44.

<sup>272</sup> James (note 2 above) 44.

<sup>273</sup> *Ibid.*

<sup>274</sup> *Ibid.*

<sup>275</sup> *Ibid.*; Caracciolo di Torella (note 2 above) 324.

<sup>276</sup> L Haas ‘Parental leave and gender equality: Lessons from the European Union’ (2003) 20(1) *Review of Policy Research* 89, 91; L Lancaster & M Baird ‘Workers with care responsibilities: Is work-family integration adequately addressed in South African labour law?’ (2008) 29 *ILJ* 22, 34; Caracciolo di Torella (note 2 above) 322; James (note 2 above) 44.

by *Council Directive* 2010/18/EU.<sup>277</sup> As discussed in Chapter Two, the 1996 Parental Leave Directive sets out the entitlement of unpaid parental leave, which may be granted for a maximum period of four months. Matters related to the implementation of the parental leave are left to the discretion of the member states.<sup>278</sup> As a result of the enactment of the *European Union (Parental Leave) Regulations 2013*, employees in the UK are entitled to eighteen weeks of parental leave.<sup>279</sup>

The duration of parental leave has increased from the provision of thirteen weeks, as provided by the MPLR, to eighteen weeks.<sup>280</sup> Parental leave may be claimed for the purpose of caring for a child.<sup>281</sup> In order to be eligible for parental leave, the employee must have been continuously employed for a period of one year, and must be responsible for the care of the child.<sup>282</sup> An employee is responsible for the care of a child if he or she has ‘parental responsibility’ over the child as set out in section 3 of the *Children Act, 1989*.<sup>283</sup>

Accordingly, the parent must have all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property.<sup>284</sup> The mother of the child is automatically considered to have parental responsibility of the child. The father will acquire parental responsibility only if he is married to the child’s mother; or, if he is unmarried, he will acquire parental responsibility as the child’s father upon the registration of the birth, or by the conclusion of a parental responsibility agreement, or by court order.<sup>285</sup> This means that guardians and adoptive parents of the child will qualify for parental leave.<sup>286</sup>

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<sup>277</sup> Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and the ETUC [1996] OJ L145/4 (1996 Parental Leave Directive); Council Directive 2010/18/EU of 8 March 2010 implementing the revised Framework Agreement on parental leave concluded by BUSINESS EUROPE, UEAPME, CEEP and ETUC and repealing Directive 96/34/EC [2010] OJ L68/13 (Parental Leave Directive); Blanpain (note 137 above) 613; Painter & Holmes (note 9 above) 39.

<sup>278</sup> Caracciolo di Torella (note 2 above) 324; James (note 2 above) 46.

<sup>279</sup> The European Union (Parental Leave) Regulations 2013, SI 81/2013; Golyner (note 1 above) 386.

<sup>280</sup> The Maternity and Parental Leave Regulations, reg 14; European Union (Parental Leave) Regulations 2013, SI 81/2013, reg 4A; Emir (note 34 above) 192.

<sup>281</sup> The Maternity and Parental Leave Regulations, reg 13.

<sup>282</sup> Ibid; Emir (note 34 above) 192.

<sup>283</sup> The Maternity and Parental Leave Regulations, regs 2 and 13; the Children Act 1989, c. 41 (U.K.), s 3.

<sup>284</sup> The Children Act 1989, c. 41 (U.K.), s 3.

<sup>285</sup> Ibid s 4.

<sup>286</sup> Emir (note 34 above) 192.

The right to take parental leave endures from the time the child is born until the child reaches the age of eighteen years.<sup>287</sup> The qualifying employee may take up to four weeks of leave in one year.<sup>288</sup> The leave must be taken in complete blocks. This means that if the employee takes only a few days of the week as parental leave, it will still count as a week of parental leave.<sup>289</sup> In *South Central Trains Ltd v Rodway*,<sup>290</sup> a male employee sought to take a day of absence from work to care for his son. He applied for annual leave, which could not be guaranteed to be approved. Therefore, the employee made a written application for parental leave. The application for parental leave was denied for the reason that there was no one to cover the employee's post for the day.<sup>291</sup> The employee did not attend work for the day and was subsequently sent a warning for non-attendance.<sup>292</sup>

The employee claimed that he had been subjected to detrimental treatment by taking or seeking to take parental leave.<sup>293</sup> He was successful in the Employment Tribunal.<sup>294</sup> However, on appeal, the EAT found that the employee could not lawfully take a single day of parental leave, but had to take five days.<sup>295</sup> The court held that the minimum period of parental leave which an employee can take is a period which constitutes one week of leave.<sup>296</sup> Therefore, the disciplinary action which followed was lawful. The court found no detrimental treatment.<sup>297</sup>

The employee must give at least 21 days' notice of the dates when the leave will be taken.<sup>298</sup> If the employee is expecting a baby or is adopting a child, then he or she must give notice at least 21 days before the expected week of childbirth or placement.<sup>299</sup> The regulations make provisions for the postponement of leave by the employer where the employer considers that the operation

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<sup>287</sup> The Maternity and Parental Leave Regulations, reg 15.

<sup>288</sup> *Ibid* schedule 2, par 8; James (note 2 above) 45; Emir (note 34 above) 192; Case 0099/04 *South Central Trains Ltd v Rodway* [2004] UKEAT I-0308.

<sup>289</sup> Emir (note 34 above) 192; *South Central Trains* (note 289 above)

<sup>290</sup> *South Central Trains* (note 289 above); Caracciolo di Torella (note 2 above) 325; James (note 2 above) 46.

<sup>291</sup> *South Central Trains* (note 289 above) at par [2].

<sup>292</sup> *Ibid* at par [2].

<sup>293</sup> *Ibid* at par [3].

<sup>294</sup> *Ibid* at par [4].

<sup>295</sup> *Ibid* at par [13].

<sup>296</sup> *Ibid*.

<sup>297</sup> *Ibid* at par [15]; Golynger (note 1 above) 386.

<sup>298</sup> The Maternity and Parental Leave Regulations, sch 2, par 3.

<sup>299</sup> *Ibid* sch 2, par 4 and 5.

of his business would be unduly disrupted if the employee took leave during the period identified in his notice. However, the leave cannot be postponed for longer than six months.<sup>300</sup>

Although the provision of parental leave is commendable in its objective of providing family-friendly rights to employees, the provision has many shortcomings. For instance, the case of *South Central Trains Ltd v Rodway* reflects the inflexibility of the parental leave provisions.<sup>301</sup> The case confirmed that the leave must be taken in weekly blocks.<sup>302</sup> This is inflexible, and limits the options of employees who need to take single days of leave to care for children.<sup>303</sup> The provision of parental leave also allows the employer to postpone the leave for a period of six months in the interests of undisrupted business operations.<sup>304</sup> Thus, the employee may not be able to rely on parental leave in instances where the leave must be taken to attend to an urgent matter.<sup>305</sup>

Parental leave is unpaid.<sup>306</sup> It is for this reason that parental leave is not often utilised by employees.<sup>307</sup> Most employees cannot take unpaid absences from work.<sup>308</sup> This is particularly the case for fathers, who are often the primary financial income providers of the family.<sup>309</sup> Therefore, while the leave entitlement may be commended for its unbiased structure, by allowing either the mother or the father to apply for a non-transferable individual entitlement of leave, it fails to account for existing gender stereotypes which place women in the lower income bracket and as the primary child-carer.<sup>310</sup> The further limitation that parental leave may be taken only by employees who have parental responsibility for the child narrows the scope of parental leave.<sup>311</sup>

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<sup>300</sup> Ibid sch 2, par 6.

<sup>301</sup> Caracciolo di Torella (note 2 above), 325; James (note 2 above) 46.

<sup>302</sup> *South Central Trains* (note 289 above); Caracciolo di Torella (note 2 above) 325; James (note 2 above) 46.

<sup>303</sup> Caracciolo di Torella (note 2 above) 325; James (note 2 above) 46.

<sup>304</sup> The Maternity and Parental Leave Regulations, sch 2, par 6.

<sup>305</sup> Caracciolo di Torella (note 2 above) 325.

<sup>306</sup> James (note 2 above) 45.

<sup>307</sup> Ibid 46.

<sup>308</sup> Caracciolo di Torella (note 2 above) 326.

<sup>309</sup> Ibid.

<sup>310</sup> Ibid 325–327; James (note 2 above) 46.

<sup>311</sup> Golyner (note 2 above) 386–387.

It excludes cohabitating partners; and for this reason, some households may find that only one of the persons in a partnership or cohabitation may qualify for parental leave.<sup>312</sup>

### 5.5.1 Shared parental leave

Shared parental leave and pay was introduced by the CFA.<sup>313</sup> The leave entitlement is applicable to eligible parents of children born on or after 5 April 2015.<sup>314</sup> It is further regulated by the *Statutory Shared Parental Leave (Terms and Conditions of Employment) Regulations, 2014* (ShPLR), and shared parental pay is also regulated by the ShPLR.<sup>315</sup> Shared parental leave and pay applies to the eligible mother/adopter of a child, and the child's father/adoptive parent, or the mother's/adopter's partner.<sup>316</sup> It is described as a 'new statutory right' for employees with a partner who is working, or who has recently been working, as an employed earner or as self-employed.<sup>317</sup> The new statutory right allows eligible employees to share up to 50 weeks of shared parental leave and up to 37 weeks of statutory shared parental pay.<sup>318</sup>

#### 5.5.1.1 Application of shared parental leave

Shared parental leave applies to an employee couple who share primary responsibility of a child at the time of birth, or placement for adoption.<sup>319</sup> It offers mothers/adopters the entitlement to share their remaining weeks of maternity leave or adoption leave with a co-parent.<sup>320</sup> The co-

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<sup>312</sup> Golyner (note 2 above) 386–387.

<sup>313</sup> Children and Families Act, s 117(1).

<sup>314</sup> Ibid; Employment Rights Act, s 75E; the Shared Parental Leave (Terms and Conditions of Employment) Regulations 2014 (U.K.), SI 2014/3050 (the Shared Parental Leave Regulations) reg 2(1); the Statutory Shared Parental Pay (General) Regulations 2014 (U.K.), SI 2014/3051 (Statutory Shared Parental Pay Regulations) reg 3; Rickard (note 44 above) 1493; Golyner (note 2 above) 384; Mitchell (note 2 above) 123; Emir (note 34 above) 202.

<sup>315</sup> The Shared Parental Leave Regulations; the Statutory Shared Parental Pay Regulations 2014.

<sup>316</sup> Explanatory Memorandum to the Shared Parental Leave Regulations; the Statutory Shared Parental Pay Regulations; the Maternity and Adoption Leave (Curtailed of Statutory Rights of Leave) Regulations 2014 (U.K.), SI 2014/3052 (Maternity and Adoption Leave (Curtailed) Regulations).

<sup>317</sup> Explanatory Memorandum to the Shared Parental Leave Regulations; the Statutory Shared Parental Pay Regulations; the Maternity and Adoption Leave (Curtailed) Regulations.

<sup>318</sup> The Shared Parental Leave Regulations; the Statutory Shared Parental Pay Regulations.

<sup>319</sup> Employment Rights Act, s 75E; Children and Families Act, s 117(1); The Shared Parental Leave Regulations, regs 3(3)(a) and 4(3)(a); Rickard (note 44 above) 1493; Golyner (note 2 above) 384; Mitchell (note 2 above) 123; Compact Law *Shared Parental Leave – What you need to know* <http://www.compactlaw.co.uk/free-legal-articles/shared-parental-leave.html>, accessed on 5 August 2016.

<sup>320</sup> Employment Rights Act, s 75E; Children and Families Act, s 117(1); Rickard (note 44 above) 1493; Emir (note 34 above) 202.

parent may be the father/adopter of the child, or the mother's spouse, or partner.<sup>321</sup> Shared parental leave operates by enabling the eligible employee to reduce her maternity leave or adoption leave upon reaching the end of the compulsory leave period. This is known as 'the entitlement to curtail statutory rights to leave'.<sup>322</sup> The remainder of the untaken maternity or adoption leave may be taken as shared parental leave.

The leave may be curtailed upon notice to curtail maternity or adoption leave at a specified future date, or by simply returning to work.<sup>323</sup> The remaining maternity leave or adoption leave is then transferred to the co-parent.<sup>324</sup> Essentially, shared parental leave may encompass a period of 50 weeks, made up of 52 weeks of maternity leave minus two weeks of compulsory maternity leave.<sup>325</sup> As such, it works alongside traditional maternity leave to provide working parents with more flexibility and choice when reconciling employment and family demands.<sup>326</sup>

#### **5.5.1.2 Shared parental leave period claims**

Shared parental leave may be claimed any time between the birth of a child, or the placement of a child for adoption or with prospective adopters, and must be taken before the child's first birthday or the first anniversary of the placement.<sup>327</sup> The leave must be taken in complete blocks, although the blocks of leave may be continuous or discontinuous.<sup>328</sup> Each parent is entitled to three continuous blocks of leave. The leave of each parent may be taken at the same time or separately.<sup>329</sup>

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<sup>321</sup> Golyner (note 2 above) 384; Emir (note 34 above) 202.

<sup>322</sup> The Maternity and Adoption Leave (Curtailed) Regulations.

<sup>323</sup> Ibid; Explanatory Memorandum to the Shared Parental Leave Regulations; the Statutory Shared Parental Pay Regulations.

<sup>324</sup> Emir (note 34 above) 202.

<sup>325</sup> The Shared Parental Leave Regulations, reg 6; Rickard (note 44 above) 1493; Golyner (note 1 above) 384.

<sup>326</sup> Golyner (note 1 above) 384; Emir (note 34 above) 202.

<sup>327</sup> The Shared Parental Leave Regulations, reg 7(1).

<sup>328</sup> Ibid reg 7(2) and (3); Emir (note 34 above) 202.

<sup>329</sup> The Shared Parental Leave Regulations, reg 16(1); Mitchell (note 2 above) 127–128; GOV.UK *Shared Parental Leave and Pay* <https://www.gov.uk/shared-parental-leave-and-pay/booking-blocks-of-leave>, accessed on 7 August 2016.

Therefore, employees can take leave in a continuous block or they can return to work intermittently between their periods of leave.<sup>330</sup> The minimum period of shared parental leave which may be taken is one week.<sup>331</sup> The structure of a 50-week leave entitlement available to both parents of a child is supportive of shared parental care.<sup>332</sup> By providing parents with the choice of accessing their leave continuously or in discontinuous blocks, together with the provision that the leave may be taken by the parents at the same time or separately, means that the law does not intend to prescribe care-giving roles to the parents.<sup>333</sup> The parents are allowed to structure the leave according to their family needs.<sup>334</sup>

Shared parental leave includes the equivalent of ‘keep-in-touch days’, applicable to maternity leave in the form of ‘shared parental leave-in-touch days’.<sup>335</sup> These days may be used by the employee on shared parental leave to work up to twenty days during the leave period.<sup>336</sup> The shared parental leave-in-touch days are not compulsory, and should the employee refuse to utilise the days, he or she will be protected against any detrimental treatment or dismissal that may result from the refusal.<sup>337</sup>

### **5.5.1.3 Statutory shared parental pay**

Shared parental pay arises from the transfer of untaken statutory maternity pay or maternity allowance.<sup>338</sup> This means that the statutory maternity pay or maternity allowance due to the mother may be transferred as statutory shared parental pay.<sup>339</sup> The mother/adopter and the co-parent to whom the shared parental leave is transferred is entitled to statutory shared parental pay for a total of 39 weeks, less the number of weeks that maternity allowance or statutory maternity

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<sup>330</sup> Mitchell (note 2 above) 127.

<sup>331</sup> The Shared Parental Leave Regulations, reg 7(4).

<sup>332</sup> Mitchell (note 2 above) 128.

<sup>333</sup> Ibid.

<sup>334</sup> Ibid.

<sup>335</sup> The Shared Parental Leave Regulations, reg 37.

<sup>336</sup> Ibid; Emir (note 34 above) 203.

<sup>337</sup> Ibid.

<sup>338</sup> Section 165(3A) of the Social Security Contributions and Benefits Act, as amended by s 120(4) of the Children and Families Act, provides that the duration of the maternity pay period may be reduced in accordance with terms and conditions set out in regulations.

<sup>339</sup> Social Security Contributions and Benefits Act, Part 12ZC; Children and Families Act, s 119.



pay is paid to the mother.<sup>340</sup> Shared parental leave is paid at a weekly rate of £138.18 a week, or 90 per cent of the normal weekly earnings of the individual claiming statutory shared parental pay, depending on whichever amount is less.<sup>341</sup> The final thirteen weeks of statutory shared parental leave is unpaid.<sup>342</sup> Statutory shared parental pay is not payable after the child's first birthday or the first anniversary of the placement for adoption.<sup>343</sup>

The statutory shared parental pay offered to employees is lower than statutory maternity pay. Whereas statutory maternity pay is paid at 90 per cent of the weekly earnings and thereafter 90 per cent of the weekly earnings or the prescribed weekly rate, depending on whichever is lower, statutory shared parental pay and paternity leave are paid at the lower rate of 90 per cent of the weekly earnings or the prescribed weekly rate throughout the entire period. This may discourage the transfer of maternity leave to shared parental leave.<sup>344</sup>

Furthermore, the unequal remuneration between men and women for the purpose of carrying out their care-giving responsibilities reinforces gendered assumptions. Women are offered a higher amount of pay during maternity leave, whereas men are offered a lot less upon accessing shared parental leave. This presents maternity leave as the more favourable leave option and, in turn, reinforces the stereotype that women are primarily caregivers, while their roles as employees are a secondary function.<sup>345</sup>

Statutory shared parental pay is criticised for being paid at a level that is below minimum wage.<sup>346</sup> The low level of payment means that in most instances shared parental leave will not be utilised concurrently because both parents will not be able to afford to receive statutory shared parental pay rather than their usual income. The low level of pay would also discourage fathers from taking shared parental leave in instances where the father is the main breadwinner.<sup>347</sup>

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<sup>340</sup> The Statutory Shared Parental Pay Regulations, reg 10.

<sup>341</sup> *Ibid* reg 40.

<sup>342</sup> Rickard (note 44 above) 1494.

<sup>343</sup> The Shared Parental Leave Regulations; the Statutory Shared Parental Pay Regulations, reg 11.

<sup>344</sup> Golyner (note 1 above) 385.

<sup>345</sup> *Ibid*.

<sup>346</sup> Mitchell (note 2 above) 131.

<sup>347</sup> *Ibid*.

#### 5.5.1.4 Eligibility

In order to claim shared parental leave and statutory shared parental pay, the mother/adopter must first trigger the leave entitlement by curtailing the statutory maternity leave to which she is entitled; or where she has not curtailed her leave in that way, the mother/adopter has to return to work before the end of her statutory maternity leave.<sup>348</sup> The mother/adopter and the co-parent must then meet the following requirements to be eligible for shared parental leave and statutory shared parental pay. Both the mother/adopter and the co-parent must:

- satisfy the continuity of the employment test;
- satisfy the employment and earnings test;
- at the date of the child's birth, carry out the main responsibility for the care of the child;
- have complied with the condition that notice and evidence of the leave entitlement must be given to their employers; and
- have complied with the condition that a period of leave notice be given to the employer.<sup>349</sup>

Each entitlement to shared parental leave and pay is not affected by the number of children born or expected as a result of the same pregnancy.<sup>350</sup>

An employee satisfies the continuity of employment test if the employee has been continuously self-employed or employed with an employer for a period of not less than 26 weeks ending with the fifteenth week before the expected week of birth, or the week in which the adoptive parent has been notified of having been matched for adoption with the child; and remains in continuous employment until the week before any period of shared parental leave taken by the employee.<sup>351</sup>

The employment and earnings test requires the employee or self-employed earner to have worked for at least 26 weeks in the 66 weeks leading up to the child's expected week of childbirth, or the week in which the adoptive parent has been notified of having been matched

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<sup>348</sup> The Shared Parental Leave Regulations, reg 4 (2)(d).

<sup>349</sup> The Shared Parental Leave Regulations; the Statutory Shared Parental Pay Regulations.

<sup>350</sup> The Shared Parental Leave Regulations, regs 4(4) and 5(4); the Statutory Shared Parental Pay Regulations, reg 11.

<sup>351</sup> The Shared Parental Leave Regulations, reg 35.

for adoption with the child; and the employee must have earned an average of at least £30 a week in any thirteen weeks.<sup>352</sup>

Both the mother/adopter and the co-parent must give the employer notice of the entitlement and the intention to take shared parental leave.<sup>353</sup> Written notice must be given to the employer at least eight weeks before the start of the first period of shared parental leave, indicating specified information as set out in the regulations.<sup>354</sup> The notice must be accompanied by a declaration indicating compliance with the conditions of entitlement for shared parental leave, and consenting to the amount of leave which each parent intends to take.<sup>355</sup> The regulations make provisions for the parents to provide further written notice to their employers varying the periods of shared parental leave each parent intends to take.<sup>356</sup>

Shared parental leave may be criticised for its onerous eligibility requirements which appear to obstruct the co-parent's access to the leave. The leave is dependent on the curtailment of maternity leave. The co-parent cannot access shared parental leave without the mother triggering the leave.<sup>357</sup> The mother has an automatic right to time off from work to care for her child in the form of maternity leave. The mother also determines whether or not the co-parent can access the shared parental leave.<sup>358</sup> Furthermore, whereas there are no eligibility requirements for an employee's access to maternity leave, the eligibility for shared parental leave requires the employee to meet the continuity of employment test and the employment and earnings test. The onerous eligibility requirements of shared parental leave may discourage the utilisation of shared parental leave by fathers. Ultimately, if the requirements of access to maternity leave are compared with those of shared parental leave, it appears that the legislation favours maternity over shared parental leave.<sup>359</sup>

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<sup>352</sup> Ibid reg 36; Emir (note 34 above) 202.

<sup>353</sup> The Shared Parental Leave Regulations, regs 8 and 9; the Statutory Shared Parental Pay Regulations, regs 6 and 7.

<sup>354</sup> The Shared Parental Leave Regulations, regs 8(1) and 9(1); the Statutory Shared Parental Pay Regulations, regs 6(1) and 7(1); Emir (note 34 above) 203.

<sup>355</sup> The Shared Parental Leave Regulations, regs 8(3) and 9(3); the Statutory Shared Parental Pay Regulations, regs 6(3) and 7(3).

<sup>356</sup> The Shared Parental Leave Regulations, reg 11(1).

<sup>357</sup> Mitchell (note 2 above) 129.

<sup>358</sup> Ibid 131.

<sup>359</sup> Ibid 129.

### 5.5.2 Employment protection attached to parental leave and shared parental leave

The ERA states that an employee who is absent from work because of parental and shared parental leave is entitled to the benefits, and is bound by the obligations, of the terms and conditions of employment which would have applied had the employee not been absent.<sup>360</sup> The ERA, together with the regulations, provides employment protection to the employee who takes or seeks to take parental leave or shared parental leave. The MPLR and SPLR provide the same employment protection to employees who have taken parental leave as those who return to work from additional maternity leave.<sup>361</sup> This applies irrespective of whether or not the employee has taken a previous leave of absence for paternity leave or ordinary maternity or adoption leave.<sup>362</sup>

If the employee takes parental or shared parental leave as a period following additional maternity leave or additional adoption leave, she is entitled to return from leave to the job in which she was employed before her absence unless it would not have been reasonably practicable for her to return to that job. In such an instance, the employer must offer the employee a job which is suitable and appropriate for her to do in the circumstances.<sup>363</sup> The employee is entitled to terms and conditions of employment which are no less favourable than those which would have applied had she not been absent.<sup>364</sup> The ERA provides that an employee may present a complaint to an employment tribunal based on the employer's unreasonable postponement or prevention of the parental leave period.<sup>365</sup> In the event that the employment tribunal find the claim to be well-founded, the tribunal should make a declaration to that effect and the employer would have to pay the employee an amount of money determined in accordance with the procedure set out in the section.<sup>366</sup>

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<sup>360</sup> Employment Rights Act, ss 75I and 77; Emir (note 34 above) 204.

<sup>361</sup> The Maternity and Parental Leave Regulations, reg 18(1); the Shared Parental Leave Regulations, reg 18(1)

<sup>362</sup> Emir (note 34 above) 204.

<sup>363</sup> The Maternity and Parental Leave Regulations, reg 18(3); the Shared Parental Leave Regulations, reg 18(2).

<sup>364</sup> The Maternity and Parental Leave Regulations, reg 18(5); the Shared Parental Leave Regulations, reg 41(3); Emir (note 34 above) 205; James (note 2 above) 46.

<sup>365</sup> Employment Rights Act, s 80.

<sup>366</sup> Ibid.

The employee is protected against any detrimental treatment by the employer for the reason that he or she took or sought to take parental or shared parental leave.<sup>367</sup> The employee is also protected against unfair dismissal on the basis that he or she took or sought to take parental or shared parental leave.<sup>368</sup>

## 5.6 Adoption leave

Employees in the UK are entitled to ordinary adoption leave (the first 26 weeks), and additional adoption leave (the last 26 weeks) provided by the PALR.<sup>369</sup> Adoption leave is available only to the child's adopter, who is the person matched with the child for adoption by an adoption agency. Where two people have been matched jointly, the couple must decide which of them will be considered the primary adopter for the purposes of the PALR.<sup>370</sup> Since it is only the primary adopter who may claim adoption leave, the spouse or partner may claim paternity leave and pay, or parental leave. The adopters are also entitled to utilise shared adoption leave, provided that they meet the qualifying requirements.<sup>371</sup>

Prior to the commencement of the PALR on 5 April 2015, the employee intending to take adoption leave had to fulfil the qualifying condition of continuous employment of 26 weeks at the date that the employee was notified of a match with the child.<sup>372</sup> The amendment regulations now omit this requirement with the effect that there are no qualifying conditions of eligibility to claim adoption leave provided that the employee provides notice and evidence of the adoption.<sup>373</sup>

In order to claim ordinary adoption leave, the employee must have been matched with a child by an adoption agency and must have agreed that the child should be placed with him or her for adoption.<sup>374</sup> The employee must give the employer notice indicating the date of when the child is expected to be placed with him for adoption, and the date on which the employee has chosen for

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<sup>367</sup> *Ibid* s 47C; the Maternity and Parental Leave Regulations, reg 20; the Shared Parental Leave Regulations, reg 42.

<sup>368</sup> Employment Rights Act, s 99; the Maternity and Parental Leave Regulations, reg 20; the Shared Parental Leave Regulations, reg 43; Painter & Holmes (note 9 above) 413; Emir (note 34 above) 205.

<sup>369</sup> Employment Rights Act, s 75A and 75B; the Paternity and Adoption Leave Regulations, reg 15.

<sup>370</sup> The Paternity and Adoption Leave Regulations, reg 2; Emir (note 34 above) 198.

<sup>371</sup> *Ibid*.

<sup>372</sup> The Paternity and Adoption Leave Regulations, reg 15(2)(b).

<sup>373</sup> The Paternity and Adoption Leave Regulations 2002 (U.K.), SI 2002/2788, regs 15 and 16.

<sup>374</sup> *Ibid* reg 15.

the leave period to begin.<sup>375</sup> The notice must be given to the employer no more than seven days after the date on which the employee is notified of having been matched with the child for the purposes of adoption, or if such notice period is not reasonably practicable, then notice must be given as soon as is reasonably practicable.<sup>376</sup> Lastly, in order to claim the leave the employee must also provide his employer with evidence, in the form of one or more documents issued by the adoption agency that matched the employee with the child, at the employer's request.<sup>377</sup>

The ordinary adoption leave period begins on the date specified by the employee in his notice to the employer. The additional adoption leave period begins the day after the last day of his ordinary adoption leave period.<sup>378</sup> The employee may vary the date of commencement of the ordinary adoption leave by giving 28 days' notice. If that is not reasonably practicable, the employee must give notice as soon as is reasonably practicable.<sup>379</sup> The adoption leave may end prematurely where the employee has begun a period of adoption leave in respect of the child, and is subsequently notified that the placement will not be made, or if the child dies or is returned to the agency.<sup>380</sup> Furthermore, where an employee is dismissed after an ordinary or additional adoption leave period has begun but before the time when the period would end, the period ends at the time of the dismissal.<sup>381</sup>

The employee who takes ordinary and additional adoption leave is entitled to the same rights as those of an employee who takes ordinary and additional maternity leave.<sup>382</sup> During the adoption leave period the employee is entitled to the benefit of all of the terms and conditions of employment which would have applied had the employee not been absent, and is bound by any obligations arising under those terms and conditions.<sup>383</sup> The employee may agree to have reasonable contact with the employer over the adoption leave period, and may agree to carry out

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<sup>375</sup> Ibid reg 17(1).

<sup>376</sup> Ibid reg 17(2).

<sup>377</sup> Ibid reg 17(3).

<sup>378</sup> Ibid reg 18, 20(2).

<sup>379</sup> Ibid reg 17(4)–(6).

<sup>380</sup> Ibid reg 22(1).

<sup>381</sup> Ibid reg 24.

<sup>382</sup> Emir (note 34 above) 198.

<sup>383</sup> The Paternity and Adoption Leave Regulations, regs 19 and 21.

up to ten days' of work for the employer during the leave period (keep-in-touch days).<sup>384</sup> The employee on ordinary and additional adoption leave is also entitled to the same rights to return to work as an employee on ordinary and additional maternity leave.<sup>385</sup> The employee is protected against any detrimental treatment by the employer for the reason that he or she took or sought to take ordinary and additional adoption leave.<sup>386</sup> The employee is also protected against unfair dismissal on the basis that he or she took or sought to take ordinary and additional adoption leave.<sup>387</sup>

### 5.6.1 Statutory adoption pay

The employee is entitled to 39 weeks of statutory adoption pay, provided that he or she meets the applicable qualifying requirements.<sup>388</sup> The requirements are that the employee has been in employed earner's employment with an employer for a continuous period of at least 26 weeks; and has ceased to work for the employer. The employee's normal weekly earnings for the period of eight weeks ending with the relevant week must not be less than the lower earnings limit necessary for the payment of National Insurance contributions. Lastly, the employee must have elected to receive statutory adoption pay.<sup>389</sup> A person may not elect to receive statutory adoption pay if he or she has elected to receive statutory paternity pay.<sup>390</sup>

Statutory adoption leave is available for a continuous period of 26 weeks of ordinary adoption leave, and for a further thirteen weeks of additional adoption leave.<sup>391</sup> In addition to providing that the employer liable for the statutory adoption pay upon evidence of the employee's entitlement to receive adoption pay, the requirements state that the employee must give his or her employer notice of the date from which he or she expects that the liability to pay statutory

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<sup>384</sup> Emir (note 34 above) 199.

<sup>385</sup> The Paternity and Adoption Leave Regulations, reg 26.

<sup>386</sup> Employment Rights Act, s 47C; the Maternity and Parental Leave Regulations, reg 20; the Shared Parental Leave Regulations, reg 42.

<sup>387</sup> Employment Rights Act, s 99; the Maternity and Parental Leave Regulations, reg 20; the Shared Parental Leave Regulations, reg 43; Painter & Holmes (note 9 above) 413; Emir (note 34 above) 205.

<sup>388</sup> Social Security Social Security Contributions and Benefits Act, s 171ZL(1); the Statutory Paternity Pay and Statutory Adoption Pay Regulations.

<sup>389</sup> Social Security Social Security Contributions and Benefits Act, s 171ZL(2). According the Act, the 'relevant week' is the week immediately preceding the 14th week before the expected week of the child's birth, s 171ZL(3).

<sup>390</sup> Social Security Social Security Contributions and Benefits Act, s 171ZL(4).

<sup>391</sup> Ibid s 171ZN; Emir (note 34 above) 200.

maternity pay is to begin. The notice must be given at least 28 days before the date or, if that is not reasonably practicable, as soon as is reasonably practicable.<sup>392</sup>

### **5.6.2 Funding maternity cash benefits**

Adoption benefits are paid in terms of the applicable social security scheme.<sup>393</sup> Employers may claim a rebate on the payment from their National Insurance contributions which they have paid to the Inland Revenue.<sup>394</sup>

### **5.6.3 Methods of calculating maternity benefits**

Statutory adoption pay is available at a rate of 90 per cent of the employee's weekly earnings for the first six weeks of adoption leave; and thereafter, at a rate of either the prescribed rate (which is currently £139.58), or at a rate of 90 per cent of the employee's average weekly earnings, whichever of the amounts is lower.<sup>395</sup>

#### ***5.6.3.1 Time off from work to attend antenatal appointments***

The CFA provides a paid right and an unpaid right to take time off from work to attend adoption appointments.<sup>396</sup> In terms of these rights, an employee who has been notified by an adoption agency that a child is to be, or is expected to be, placed for adoption with the employee alone is entitled to be permitted by the employer to take time off during working hours to attend an appointment at any place for the purpose of having contact with the child or for any other purpose connected with the adoption.<sup>397</sup> The employee may elect whether to utilise the right to paid time off or unpaid time off.<sup>398</sup> The right lapses on the date of or the date after the child's

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<sup>392</sup> Social Security Social Security Contributions and Benefits Act, s 171ZL(4); Statutory Paternity Pay and Statutory Adoption Pay Regulations, reg 24.

<sup>393</sup> GOV.UK *Get Financial Help with Statutory Pay* <https://www.gov.uk/recover-statutory-payments/reclaiming>, accessed on 21 August 2016.

<sup>394</sup> Social Security Social Security Contributions and Benefits Act, s 1; Emir (note 34 above) 196; Pitt (note 50 above) 200.

<sup>395</sup> Social Security Social Security Contributions and Benefits Act, s 171ZN; Emir (note 34 above) 200.

<sup>396</sup> Employment Rights Act, s 57ZJ and 57JL; Children and Families Act, s 128(1).

<sup>397</sup> Employment Rights Act, s 57ZJ(1); Children and Families Act, s 128(1).

<sup>398</sup> Employment Rights Act, s 57ZJ(2)(b) and 57ZL(2); Children and Families Act, s 128(1).



placement for adoption with the employee.<sup>399</sup> The employee is entitled to the same protective rights as an employee who takes time off to attend antenatal appointments.<sup>400</sup>

## 5.7 Health and safety of pregnant, postnatal, or breastfeeding employees

The health of a pregnant employee in the UK is protected primarily by the *Management of Health and Safety at Work Regulations 1999*.<sup>401</sup> In terms of the regulation, every employer is required to make a suitable and sufficient assessment of the risks to the health and safety of his employees to which they are exposed while they are at work.<sup>402</sup> This is known as a risk assessment.<sup>403</sup> Regulation 16 specifically provides for risk assessment in respect of new or expectant mothers.<sup>404</sup> This covers employees who are pregnant, who have given birth within the preceding six months, or who are breastfeeding.<sup>405</sup> The employer is required to carry out an action in terms of regulation 16 only once the employee notifies the employer in writing that she is a new or expectant mother.<sup>406</sup>

The regulation operates together with the EU Pregnant Workers Directive to protect the new or expectant mother from any adverse processes or working conditions, or physical, biological or chemical agents.<sup>407</sup> The level of risk to which a new or expectant mother is exposed must be assessed together with any risks to which she is exposed outside the workplace.<sup>408</sup> The employer must alter the employee's working conditions or hours of work to avoid any such risks, if it is reasonable to do so.<sup>409</sup> If it is not reasonable to do so, the employer is required to suspend the employee from working for so long as is necessary to avoid such risk. The suspension is carried out in terms of section 66 of the ERA.<sup>410</sup>

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<sup>399</sup> Employment Rights Act, s 57ZJ(4) and 57ZL(3); Children and Families Act, s 128(1).

<sup>400</sup> Employment Rights Act, s 57ZM; Children and Families Act, s 128(1).

<sup>401</sup> Management of Health and Safety at Work Regulations 1999 (U.K.), SI 1999/3242 (Health and Safety at Work Regulations); Emir (note 34 above) 186.

<sup>402</sup> Health and Safety at Work Regulations, reg 3.

<sup>403</sup> Emir (note 34 above) 186.

<sup>404</sup> Health and Safety at Work Regulations, reg 16.

<sup>405</sup> Ibid reg 1.

<sup>406</sup> Ibid reg 18.

<sup>407</sup> Ibid reg 16(1).

<sup>408</sup> Ibid reg 16(4).

<sup>409</sup> Ibid reg 16(2).

<sup>410</sup> Ibid reg 16(3); Employment Rights Act, s 66.

Where a new or expectant mother works at night; and a certificate from a registered medical practitioner or a registered midwife shows that it is necessary for her health or safety that she should not be at work for any specified period of time, the employer is required to suspend the employee from work for so long as is necessary to avoid such risk.<sup>411</sup> However, where an employer has available suitable alternative work for an employee, the employee has a right to be offered the alternative work before being suspended from work on maternity grounds.<sup>412</sup> If the employee is suspended, she has the right to be paid over the suspension period.<sup>413</sup>

## 5.8 Breastfeeding at the workplace

The laws of the UK do not prescribe breastfeeding breaks in the workplace to allow an employee to breastfeed while at work.<sup>414</sup> According to section 13 of the EA, less favourable treatment of a woman for the reason that she is breastfeeding amounts to sex discrimination.<sup>415</sup> Therefore, should the employee request time off to breastfeed her child at the workplace and the request is denied, she may rely on section 13 of the EA to prove that the employer's refusal of the request amounts to sex discrimination. However, in order for the employee to claim sex discrimination successfully in this regard, she must show that she experienced less favourable treatment in comparison to the treatment of other employees.<sup>416</sup>

According to regulation 16 of the *Management of Health and Safety at Work Regulations 1999*, employers are required to carry out risk assessments for the health and safety of breastfeeding employees.<sup>417</sup> If the assessment reflects that the risk is too high, the employer must alter the employee's working conditions or hours of work to avoid the risk. If these measures are not reasonably possible, the employer must suspend the employee from working for as long as is necessary.<sup>418</sup> However, where an employer has available suitable alternative work for an employee, the employee has a right to be offered the alternative work before being suspended

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<sup>411</sup> Health and Safety at Work Regulations, reg 17.

<sup>412</sup> Employment Rights Act, s 67.

<sup>413</sup> *Ibid* s 68.

<sup>414</sup> *Acas Guide on accommodating breastfeeding employees in the workplace* (January 2014) <http://www.acas.org.uk>, accessed on 11 October 2016.

<sup>415</sup> Employment Rights Act, s 13(6)(a); Emir (note 34 above) 121.

<sup>416</sup> Emir (note 34 above) 121; Painter & Holmes (note 9 above) 238.

<sup>417</sup> Health and Safety at Work Regulations; Emir (note 34 above) 186.

<sup>418</sup> Employment Rights Act, s 66.

from work on maternity grounds.<sup>419</sup> If the employee is suspended, she has the right to be paid over the suspension period.<sup>420</sup>

## **5.9 Childcare arrangements (including leave for care emergencies) and flexible working arrangements**

### **5.9.1 Childcare arrangements (including leave for care emergencies)**

UK legislation makes extra provision for childcare in the entitlement to unpaid time off to care for dependants as provided by section 57A of the ERA.<sup>421</sup> An employee is entitled to take a reasonable amount of time off during working hours in order to take necessary action to provide assistance when a dependant falls ill; to make arrangements for the provision of care for a dependant who is ill or injured; because of the unexpected disruption or termination of arrangements for the care of a dependant; or to deal with an incident which involves a child of the employee and which occurs unexpectedly in a period during which an educational establishment which the child attends is responsible for him or her, among other instances.<sup>422</sup> The ERA specifies that the term ‘dependant’ includes a child.<sup>423</sup> The employee must tell his employer the reason for his absence and how long he expects to be absent as soon as reasonably practicable.<sup>424</sup> The entitlement is to be used in emergency situations to provide the employee with time to arrange alternative care for the child.<sup>425</sup>

### **5.9.2 Flexible working arrangements**

The right to request flexible working arrangements was introduced to the UK in 2003 by the *Employment Act, 2002* (amending the ERA, 1996, section 80F).<sup>426</sup> The right is ‘a right to

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<sup>419</sup> Ibid s 67.

<sup>420</sup> Ibid s 68.

<sup>421</sup> Ibid s 57A; Emir (note 34 above) 205.

<sup>422</sup> Employment Rights Act, s 57A(1)(a)–(e).

<sup>423</sup> Ibid s 57A(3); Dancaster & Baird (note 276 above) 30.

<sup>424</sup> Employment Rights Act, s 57A(2).

<sup>425</sup> James (note 2 above) 50; Dancaster & Baird (note 276 above) 31.

<sup>426</sup> Employment Act (amending the Employment Rights Act 1996 (U.K.), s 80F; Employment Rights Act, s 80 F-I; Adams (note 1 above) 2; Emir (note 34 above) 206; L Dancaster ‘Work-life balance and the legal right to request flexible working arrangements’ (2006) 9(2) *South African Journal of Economic and Management Sciences* 175, 176; S Hardy *Labour Law and Industrial Relations in Great Britain* 156.

request' and not an entitlement to flexible working arrangements.<sup>427</sup> Accordingly, the change in working arrangements may relate to the hours of work required; the time at which the employee is required to be at work; and where the employee is required to work, being between the employee's home and the place of business of the employer.<sup>428</sup> Types of flexible working arrangements<sup>429</sup> include job sharing,<sup>430</sup> part-time work,<sup>431</sup> flexitime,<sup>432</sup> compressed hours of work,<sup>433</sup> annualised hours,<sup>434</sup> staggered hours,<sup>435</sup> phased retirement,<sup>436</sup> and working from home.<sup>437</sup>

The right to request flexible working arrangements is available to qualifying employees who meet the requirements of the duration of employment set out by regulations.<sup>438</sup> The *Flexible Working (Terms and Conditions of Employment) Regulations, 2014* state that an employee who has been continuously employed for a period of at least 26 weeks is entitled to make a flexible working application.<sup>439</sup> Prior to June 2014, the request for flexible working arrangements had to be made for the purpose of enabling the employee to care for a child under the age of 17 or a

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<sup>427</sup> Caracciolo di Torella (note 2 above) 321; Emir (note 34 above) 207; L Lancaster & T Cohen 'Workers with family responsibilities: A comparative analysis to advocate for the legal right to request flexible working arrangements in South Africa' (2010) 34(1) *SALJ* 34(1) 30, 38.

<sup>428</sup> Employment Rights Act, s 80 F(1)(a); Lancaster & Baird (note 276 above) 39; Lancaster & Cohen (note 427 above) 37; JA Durkalski 'Fixing economic flexibilization: A role for flexible work laws in the workplace policy agenda' (2009) 32(2) *Berkley Journal of Employment and Labour Law* 381, 388.

<sup>429</sup> Lancaster (note 426 above) 176; Lancaster & Cohen (note 427 above) 37; Wheatley (note 1 above) 5–7; GOV.UK *Flexible Working* <https://www.gov.uk/flexible-working/types-of-flexible-working>, accessed on 20 July 2016.

<sup>430</sup> Two people do one job and split the hours, see GOV.UK *Flexible Working* <https://www.gov.uk/flexible-working/types-of-flexible-working>, accessed on 20 July 2016; Durkalski (note 428 above) 388.

<sup>431</sup> Working less than full-time hours (usually by working fewer days).

<sup>432</sup> The employee chooses when to start and end work (within agreed limits) but works certain 'core hours', eg 10am to 4pm every day.

<sup>433</sup> Working full-time hours but over fewer days.

<sup>434</sup> Employees have to work a certain number of hours over the year but they have some flexibility about when they work. There are sometimes 'core hours' which the employee regularly works each week, and they work the rest of their hours flexibly or when there is extra demand at work.

<sup>435</sup> The employee has different start, finish and break times from other workers.

<sup>436</sup> Default retirement age has been phased out and older workers can choose when they want to retire. This means they can reduce their hours and work part time.

<sup>437</sup> It may be possible to do some or all of the work from home or anywhere else other than the normal place of work.

<sup>438</sup> Employment Rights Act, s 80F(8)(a) and (b); Employment Act.

<sup>439</sup> Flexible Working (Terms and Conditions of Employment) Regulations 2014 (U.K.), SI 2014/1398 (Flexible Working Regulations), reg 3.

disabled child under the age of 18 years, or a person aged 18 and over.<sup>440</sup> With the enactment of the CFA, the requirement that the applicant should be a carer was removed.<sup>441</sup> As such, an employee with 26 weeks' continuous service will be able to make an application for flexible working arrangements for any reason.<sup>442</sup> The right is limited to one application per twelve-month period.<sup>443</sup>

The procedure for the request for flexible working arrangements requires that the request be made in writing, must be dated, and must state whether the employee has previously made any such application to the employer and, if so, when.<sup>444</sup> The employer is required to deal with the application in a reasonable manner and must notify the employee of the decision on the application within the decision period.<sup>445</sup> The decision period is a period of three months beginning on the date that the application was made.<sup>446</sup> In dealing with the application 'in a reasonable manner', the employer must follow the guidelines set out in the Advisory, Conciliation and Arbitration Service (Acas) 'Code of Practice on Handling in a Reasonable Manner Requests to Work Flexibly'.<sup>447</sup> The employer may deny the request on one or more of the following business grounds:

- additional costs;
- an effect on the ability to meet customer demand;
- inability to reorganise work among existing staff;
- inability to recruit new staff;
- a detrimental impact on quality;
- a detrimental impact on performance;
- insufficiency of work during period of work proposed by the employee; or

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<sup>440</sup> Employment Rights Act, s 80 F(3); Work and Families Act, s 12 (2).

<sup>441</sup> Children and Families Act, s 131(1); Emir (note 34 above) 206.

<sup>442</sup> Golyner (note 2 above) 383; L Dancaster 'State Measures towards Work-care Integration in South Africa' in Z Mokomane *Work-Family Interface in Sub-Saharan Africa: Challenges and Responses* (2014) 177, 191.

<sup>443</sup> Employment Rights Act, s 80 F(4); Employment Act; Dancaster & Cohen (note 427 above) 37.

<sup>444</sup> Flexible Working Regulations, reg 4.

<sup>445</sup> Children and Families Act, s 132(2); Employment Rights Act, s 80G(1)(a).

<sup>446</sup> Children and Families Act, s 132(3); Children and Families Act Explanatory Notes, Commentary on ss – Part 9; Employment Rights Act, s 80F.

<sup>447</sup> Golyner (note 2 above) 388; Acas *The Right to Request Flexible Working* <http://www.acas.org.uk/index.aspx?articleid=1616>, accessed on 21 July 2016.

- planned structural changes.<sup>448</sup>

The request will be considered as withdrawn if the employee, without good reason, fails to attend two consecutive meetings to discuss the request or to discuss a decision to appeal.<sup>449</sup>

Provision is made for complaints to be taken to employment tribunals following the rejection of the application based on incorrect facts, or the incorrect treatment of the application as withdrawn.<sup>450</sup> In the case of *Commotion Limited v Ruddy*,<sup>451</sup> the employee approached the Employment Tribunal with the complaint that her employer had unreasonably rejected her request for a flexible working arrangement. The employee had made an application in terms of section 80F of the ERA to reduce her working hours to a three-day week in order to care for her granddaughter. The employer rejected the request on the basis that all employees were expected to work uniform hours to promote ‘good team spirit’.<sup>452</sup>

As a result of the rejection, the employee resigned. The EAT stated that to establish whether or not the decision by the employer to reject the application was based on incorrect facts, the Tribunal must examine the evidence as to the circumstances surrounding the situation to which the application gave rise.<sup>453</sup> In doing so, the EAT found that the employer could not justify the rejection and that the change in working hours could not have had a detrimental effect on the employer’s business.<sup>454</sup> The decision of the Employment Tribunal, that the employer improperly considered the flexible working request, was upheld by the EAT.<sup>455</sup>

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<sup>448</sup> Employment Rights Act, s 80G(1)(b); Employment Act; *Dancaster* (note 426 above) 176; *Dancaster & Cohen* (note 427 above) 38; *Hardy* (note 33 above) 157; *Emir* (note 34 above) 208; *Dancaster* (note 442 above) 191.

<sup>449</sup> Children and Families Act, s 132(4); Children and Families Explanatory Notes, Commentary on ss – Part 9; Employment Rights Act, s 80F(1D).

<sup>450</sup> Children and Families Act, s 133(2); Children and Families Explanatory Notes, Commentary on ss – Part 9; Employment Rights Act, s 80H(2); *Dancaster & Cohen* (note 427 above) 38; *Emir* (note 34 above) 207.

<sup>451</sup> *Commotion Limited v Ruddy* [2006] IRLR 171 (EAT).

<sup>452</sup> *Ibid* at par [5].

<sup>453</sup> *Ibid* at par [38].

<sup>454</sup> *Ibid* at par [39]–[42].

<sup>455</sup> *Durkalski* (note 428 above) 390; *Adams* (note 1 above) 16–18; E Grabham ‘Doing things with time: Flexibility, adaptability, and elasticity in UK equality cases’ (2011) 26 *Canadian Journal of Law and Society* 485, 494.

The ERA provides protection against detrimental treatment based on flexible working requests.<sup>456</sup> Accordingly, the employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer on the grounds that the employee has submitted an application to request flexible working arrangements, has taken a complaint to an employment tribunal, or has alleged the existence of any circumstance which would constitute a ground for bringing such proceedings.<sup>457</sup> A dismissal on the above grounds will constitute an unfair dismissal.<sup>458</sup>

In the case of *British Airways Plc v Starmar*,<sup>459</sup> the employee was a mother of a two-year-old child and was expecting her second child. The employee had applied in terms of the flexible working provision of the ERA to reduce her full-time hours to 50 per cent, qualifying her as a part-time employee. The employer refused the application on the basis that the employee had to work 75 per cent of her full-time hours to remain employed as a part-time employee. The employee claimed that the refusal amounted to indirect sex discrimination. The employer relied on the grounds under section 80G(1)(b) of the ERA in justification of the refusal to accept the application.

In particular, the employer relied on the burden of additional costs, inability to reorganise work among existing employees, detrimental effect on quality and performance, and inability to recruit extra employees as grounds for the refusal of the application. The EAT found that the requirement of working 75 per cent of the hours, rather than 50 per cent, to qualify as a part-time employee, was a 'provision, criterion, or practice' which had a 'disparate impact'.<sup>460</sup> The requirements for the hours of work were found to be more disadvantageous towards women than men.<sup>461</sup> It was found that the grounds upon which the employer relied for the refusal of the

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<sup>456</sup> Employment Rights Act, s 47C; Employment Act, s 80I(3).

<sup>457</sup> Employment Rights Act, s 104C; Employment Act, s 80I(4); *Dancaster* (note 426 above) 178.

<sup>458</sup> Employment Rights Act, s 104C; Employment Act, s 80I(4); *Dancaster* (note 426 above) 178; *Painter & Holmes* (note 9 above) 413.

<sup>459</sup> *British Airways Plc v Starmar* [2005] IRLR 862 (EAT).

<sup>460</sup> *Ibid* at par [3]; the Sex Discrimination Act, s 1(2)(b).

<sup>461</sup> *Starmar* (note 459 above) at par [32–34].

application could not be justified. The employee therefore succeeded with her claim of indirect sex discrimination.<sup>462</sup>

A significant factor of the right to request flexible working arrangements is that the acceptance of the request results in a permanent variation of the employment contract.<sup>463</sup> The variation of the contract operates to give effect to the changes of the flexible working arrangement. There is currently no mechanism in place for the reversion of the employment contract to the standard terms and conditions.<sup>464</sup> Once the application is accepted, the employment contract can revert to the standard terms and conditions only upon another application to request flexible working arrangements.<sup>465</sup> The employee's needs for the flexible working arrangement may not be permanent. Because of the limitation that only one application may be made per twelve months, the employee will have to commit to the flexible working arrangement for twelve months before submitting a request to change to the standard employment contract. This is disadvantageous to employees whose requests result in a reduction in income as a result of a reduction in hours of work.<sup>466</sup>

The extension of the right to request flexible working arrangements to every employee means that any employee who is continuously employed for a period of at least 26 weeks is entitled to apply for flexible working arrangements regardless of his or her care-giving responsibilities.<sup>467</sup> For this reason, the right is referred to as 'employee-friendly' rather than 'family-friendly'.<sup>468</sup> Although the right provides the employee with control over his or her working-time or location, the extension to all employees may be detrimental to support of the reconciliation of work and care.<sup>469</sup> The requests of employees who are parents and family carers, and who genuinely require

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<sup>462</sup> Grabham (note 455 above) 495; Painter & Holmes (note 9 above) 259.

<sup>463</sup> Employment Rights Act, s 80F-I; Employment Act; Golyner (note 1 above) 387; Adams (note 1 above) 13; Emir (note 34 above) 207; Dancaster (note 442 above) 187.

<sup>464</sup> Adams (note 1 above) 13.

<sup>465</sup> Golyner (note 1 above) 387.

<sup>466</sup> Adams (note 1 above) 13.

<sup>467</sup> Golyner (note 1 above) 389.

<sup>468</sup> Ibid 387; Wheatley (note 1 above) 3.

<sup>469</sup> Ibid.



employment flexibility to account for their family responsibilities, will be considered together and in competition with the requests of other employees.<sup>470</sup>

## 5.10 Take-up rates of leave entitlements

The most recent available data on the take-up rates of statutory maternity and paternity leave in the UK may be found in the *Maternity and Paternity Rights and Women Returners Survey 2009/10* (MPRWRS).<sup>471</sup> The MPRWRS monitored the take-up rates of statutory maternity and paternity leave in 2009 and 2010.<sup>472</sup> The survey indicates that since the 2008 increase of the duration of statutory maternity leave from 32 weeks to 39 weeks, more mothers have begun taking longer periods of statutory maternity leave.<sup>473</sup> While fourteen per cent of employees had taken 26 weeks of statutory maternity leave, 55 per cent had taken 39 weeks of leave or less.<sup>474</sup> Less than 45 per cent of employees had utilised the final thirteen weeks of statutory maternity leave.<sup>475</sup> This may be attributed to the lack of maternity pay during the final thirteen weeks of statutory maternity leave.<sup>476</sup>

Employees who had taken the lowest durations of paid maternity leave were low-income earners and part-time employees, while those who took longer durations of paid maternity leave were high-income earners and full-time employees.<sup>477</sup> With regard to paternity leave, it was indicated that 49 per cent of fathers had taken statutory paternity leave.<sup>478</sup> The majority of employees who had taken statutory paternity leave utilised the full two-week duration of statutory paternity leave.<sup>479</sup>

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<sup>470</sup> Golynger (note 1 above) 389.

<sup>471</sup> O'Brien & Koslowski (note 96 above) 359; J Chanfreau, S Gowland, Z Lancaster et al *Maternity and Paternity Rights and Women Returners Survey 2009/2010* (2011) Department of Work and Pensions. And Department of Business Innovation and Skill Research Report No 777 <https://www.gov.uk/government/publications/maternity-and-paternity-rights-and-women-returners-survey-200910-rr777>, accessed on 20 December 2016.

<sup>472</sup> The survey interviewed 2,031 mothers and 1,253 fathers whose children were aged between 12 and 18 months, and who worked at some point in the 12 months before the baby's birth. O'Brien & Koslowski (note 96 above) 365; Chanfreau, Gowland, Lancaster et al (note 471 above).

<sup>473</sup> Chanfreau, Gowland, Lancaster et al (note 471 above).

<sup>474</sup> Chanfreau, Gowland, Lancaster et al (note 471 above).

<sup>475</sup> O'Brien & Koslowski (note 96 above) 365.

<sup>476</sup> Ibid.

<sup>477</sup> Ibid 365–366.

<sup>478</sup> Ibid 366; Chanfreau, Gowland, Lancaster et al (note 471 above).

<sup>479</sup> O'Brien & Koslowski (note 96 above) 366.

The *Fourth Work-Life Balance Employee Survey, 2012 (WLB4)* was conducted in 2011 and is the most recent survey reflecting take-up rates of parental leave and flexible working arrangements. The WLB4 surveyed employees over the age of sixteen years old, and living in Great Britain.<sup>480</sup> According to the survey, 79 per cent of parent employees were aware of their right to request flexible working arrangements.<sup>481</sup> The awareness of the right to request flexible working arrangements was highest among female employees with dependent children. The survey showed that 84 per cent of female employees with dependent children were aware of their right, and in comparison, 73 per cent of male employees with dependent children were aware of the right to request flexible working arrangements.<sup>482</sup>

The most common type of flexible working arrangement which was made available to employees was part-time work.<sup>483</sup> It was reported that 80 per cent of employees who were working flexibly worked part-time, 56 per cent worked temporarily reduced hours, and 48 per cent worked flexitime hours.<sup>484</sup> By 2011, only 22 per cent of surveyed employees had requested flexible working arrangements over the previous two years. The pattern of the take-up rates indicated that more women requested flexible working arrangements than men. It was reported that 79 per cent of requests for flexible working arrangements were granted.<sup>485</sup>

Interviews carried out by the survey indicated that 57 per cent of employees reported that the availability of flexible working arrangements was very or quite important to them as employees.<sup>486</sup> The advantages of flexible working arrangements were identified by employees as increased amounts of free time, increased amounts of time spent with family, improved work–life balance, and greater convenience.<sup>487</sup> While 48 per cent of employees reported no negative consequences of flexible working arrangements, 18 per cent reported lower pay as a negative

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<sup>480</sup> S Tipping, J Chanfreau, J Perry & C Tait (2012) *The Fourth Work-Life Balance Employee Survey* (2012) Department of Business Innovation & Skills Employment Relations Research Series 122 [http://www.esds.ac.uk/doc/7112/mrdoc/pdf/7112\\_employee\\_survey.pdf](http://www.esds.ac.uk/doc/7112/mrdoc/pdf/7112_employee_survey.pdf), accessed on 20 December 2016.

<sup>481</sup> Ibid.

<sup>482</sup> Ibid.

<sup>483</sup> Ibid.

<sup>484</sup> Ibid.

<sup>485</sup> Ibid.

<sup>486</sup> Ibid.

<sup>487</sup> Ibid.

consequence.<sup>488</sup> It was a significant finding of the survey that 90 per cent of employees agreed that the choice of working flexibly improved morale. However, 35 per cent of employees reported that people who work flexibly create more work for others.<sup>489</sup>

The WLB4 also considered the take-up rates of parental leave in the year 2011. Accordingly, eleven per cent of parents with children under the age of six had taken parental leave.<sup>490</sup> Recent reports also find a slow take-up rate attached to shared parental leave.<sup>491</sup> In April 2016, My Family Care and Women's Business Council surveyed 200 employers and 1 000 employees to determine take-up rates of shared parental leave.<sup>492</sup> According to the results, only one per cent of men have utilised shared parental leave, while 55 per cent of women stated that they would not want to share their maternity leave.<sup>493</sup> The main reasons why men have not taken shared parental leave was found to be the financial affordability of the leave, the lack of awareness of the right to shared parental leave, and the unwillingness of women to share their maternity leave.<sup>494</sup> However, research indicates that the take-up rates are set to rise, as 63 per cent of male employees with young children indicated consideration of taking shared parental leave.<sup>495</sup>

## 5.11 Conclusion

The initiatives of the New Labour Government have made a number of improvements to the regulation of work–family responsibilities by improving choice and flexibility in the UK.<sup>496</sup> In giving effect to such an agenda, there has been a movement towards the inclusion of rights which extend to fathers; and the inclusion of rights which extend to both parents.<sup>497</sup> However, ‘family-

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<sup>488</sup> Ibid.

<sup>489</sup> Ibid.

<sup>490</sup> Ibid.

<sup>491</sup> My Family Care and Women's Business Council *Shared Parental Leave: Where Are We Now?* (2016)

<https://www.myfamilycare.co.uk/news/blog/shared-parental-leave-our-findings.html>, accessed on 21 December 2016.

<sup>492</sup> Ibid.

<sup>493</sup> Ibid.

<sup>494</sup> Ibid.

<sup>495</sup> Ibid.

<sup>496</sup> Caracciolo di Torella (note 2 above) 318.

<sup>497</sup> Mitchell (note 2 above) 132.

friendly' legislation of the UK does not necessarily mean 'father-friendly'.<sup>498</sup> The provision of paternity leave, parental leave and shared parental leave affirms the role of fathers as caregivers. Nevertheless, the UK provides extensive inclusive, comprehensive and broad statutory maternity rights and protections, to the extent that the comparative 'father-friendly' provisions may be considered as a limited inclusion to the family-friendly legislative package.<sup>499</sup>

The principal shortcoming of UK maternity rights is that the current structure of the statutory maternity pay period is criticised for failing to account for the financial instability that may result from not receiving a normal salary.<sup>500</sup> Although the UK government has indicated plans to extend the statutory maternity pay period to twelve months so as to match the statutory maternity leave entitlement, it has not done so as yet.<sup>501</sup> It has been suggested that rather than extending the period for which the employee can claim statutory maternity pay to meet the remaining three months of unpaid leave, the income-related statutory maternity pay period of six weeks should be extended.<sup>502</sup> This would allow all women to make the most of their entitlement to maternity leave and pay without financial strain.<sup>503</sup>

Statutory paternity leave is a two-week entitlement, whereas a mother may take up to 52 weeks of statutory maternity leave. There is a considerable difference in the leave available to a mother compared to the leave available to a father for the care of a child.<sup>504</sup> This difference extends to the amount paid over the leave periods, with statutory maternity pay offering an income-related amount over a period of six weeks, unlike paternity leave, which is paid at the lower of 90 per cent of the employee's weekly earnings or the prescribed rate of £139.58.<sup>505</sup> Apart from reinforcing the stereotype that women are more entitled to time off to care for a child because

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<sup>498</sup> Caracciolo di Torella (note 2 above) 327; Golyner (note 1 above) 379; James (note 2 above) 40; Lewis & Campbell (note 10 above) 9.

<sup>499</sup> Mitchell (note 2 above) 125; Lewis & Campbell (note 10 above) 15.

<sup>500</sup> James (note 2 above) 41–42.

<sup>501</sup> *Ibid* 41.

<sup>502</sup> *Ibid* 42.

<sup>503</sup> James (note 4 above) 273.

<sup>504</sup> Caracciolo di Torella (note 2 above) 318; James (note 2 above) 45; F Deven & P Moss 'Leave arrangements for parents: Overview and future outlook' (2002) 5(3) *Community, Work & Family* 237, 241.

<sup>505</sup> Caracciolo di Torella (note 2 above) 318; James (note 2 above) 45; Lewis & Campbell (note 10 above) 15.

they are the primary caregivers, paternity leave fails to provide sufficient financial security or incentive for fathers to take and rely on paternity leave.<sup>506</sup>

Similarly, the current parental leave structure fails to encourage fathers to take parental leave.<sup>507</sup> Although it offers a gender-neutral, individual and non-transferable right to leave for the care of a child up to the age of eighteen years, the leave is unpaid and inflexible. It fails to provide incentives for the use of the entitlement to both mothers and fathers.<sup>508</sup> Furthermore, the duration of eighteen weeks of parental leave must be used over a period of a year in blocks of four weeks per year.<sup>509</sup> The employee is not entitled to claim a continuous eighteen-week period of parental leave.<sup>510</sup> Such implementation is contrary to the objective of parental leave to allow employees to care for their child for a period of time.<sup>511</sup> Furthermore, the requirement of legal parental responsibility excludes many households from the use of parental leave. An employee in a cohabitation or partnership and who does not share legal parental responsibility of a child is not able to rely on parental leave. In such an instance, the gender-neutral, individual and non-transferable entitlement to leave for the care of a child becomes superfluous. This essentially eliminates flexibility and choice.<sup>512</sup>

The CFA adopted shared parental leave and flexible work arrangements in an attempt to redress the gendered and inflexible approach to parental leave and to encourage shared parenting as a means of remedying the stereotype reinforced by leave entitlements, that the mother is the primary caregiver.<sup>513</sup> The provision of the right to shared parental leave is progressive.<sup>514</sup> Provided that shared parental leave is utilised by fathers, the gendered assumption of the male breadwinner and female caregiver may be challenged.<sup>515</sup> Shared parental leave was introduced with the intention of encouraging shared parental care-giving responsibilities and providing

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<sup>506</sup> Caracciolo di Torella (note 2 above) 322–324; James (note 2 above) 45.

<sup>507</sup> Caracciolo di Torella (note 2 above) 326–327; James (note 2 above) 46; Golynger (note 1 above) 386.

<sup>508</sup> Caracciolo di Torella (note 2 above) 325–327; James (note 2 above) 46.

<sup>509</sup> Golynger (note 1 above) 386.

<sup>510</sup> Deven & Moss (note 504 above) 241.

<sup>511</sup> *Ibid.*

<sup>512</sup> Golynger (note 1 above) 387.

<sup>513</sup> Golynger (note 1 above) 383.

<sup>514</sup> Rickard (note 44 above) 1494.

<sup>515</sup> Mitchell (note 2 above) 128.

flexibility for the involvement of fathers in family care.<sup>516</sup> However, access to the leave provision is entirely dependent on the exercise of the option to curtail maternity leave, which must be made by the mother.<sup>517</sup> The low level of statutory shared parental pay is inadequate and introduces disincentives to fathers with access to shared parental leave.<sup>518</sup> Once again the resultant effect of the otherwise innovative family leave provision only reinforces gendered assumptions of the care-giving roles of mothers and fathers.<sup>519</sup>

Flexible work arrangements are a gender-neutral provision aimed at assisting employees to maintain a balance between work and family demands.<sup>520</sup> Research has indicated that despite being a gender-neutral provision, the right to request flexible working arrangements is most often accessed by and granted to women employees.<sup>521</sup> This has been found to disadvantage women by sustaining the gendered assumption that women require flexibility to balance their workplace and care-giving demands, more than men do.<sup>522</sup> Furthermore, a successful request to work flexibly results in a reduction in employment hours. As a consequence, the employee must face a reduction in income and future disadvantages in potential promotions.<sup>523</sup> Therefore, the resultant effect of flexible working arrangements nevertheless may reinforce the stereotype that women are the primary caregivers.<sup>524</sup>

Despite these shortcomings, the extent to which the Government has intervened to promote such legislative reforms is significant and commendable.<sup>525</sup> The reform has been recognised as an accomplishment through ‘substantial policy continuity’.<sup>526</sup> The laws of the UK which govern the

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<sup>516</sup> Golyner (note 1 above) 386–384.

<sup>517</sup> Mitchell (note 2 above) 123–133; My Family Care and Women’s Business Council *Shared Parental Leave: Where Are We Now?* (2016) <https://www.myfamilycare.co.uk/news/blog/shared-parental-leave-our-findings.html>, accessed on 21 December 2016.

<sup>518</sup> Mitchell (note 2 above) 131–132.

<sup>519</sup> *Ibid* 123–133.

<sup>520</sup> Golyner (note 1 above) 383.

<sup>521</sup> Wheatley (note 1 above) 4; Caracciolo di Torella (note 2 above) 318; Lewis & Campbell (note 10 above) 21; Tipping, Chanfreau, Perry & Tait (note 481 above).

<sup>522</sup> Wheatley (note 1 above) 4.

<sup>523</sup> *Ibid*.

<sup>524</sup> *Ibid*.

<sup>525</sup> Lewis & Campbell (note 10 above) 21.

<sup>526</sup> Lewis & Campbell (note 10 above) 21; Dancaster (note 442 above) 192; R Smit ‘Family-related policies in Southern African countries: Are working parents reaping any benefits?’ (2011) 42(1) *Journal of Comparative Family Studies* 15, 32.

reconciliation of work and family do provide choice and flexibility. While substantive gender equality is not yet achieved, employees are presented with options of leave to care for their families and with flexibility in how to utilise that leave.<sup>527</sup>

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<sup>527</sup> Lewis & Campbell (note 10 above) 21.

## CHAPTER SIX

### COMPARATIVE ANALYSES

#### 6.1 Introduction

As a member state of the UN, South Africa has ratified the ICESCR, the CEDAW and the UNCRC.<sup>1</sup> The only ILO conventions applicable to reconciliation of work and care which have been ratified by South Africa are the *Discrimination (Employment and Occupation) Convention, 1958 (No. 111)*<sup>2</sup> and the *Night Work Convention, 1990 (No. 171)*.<sup>3</sup> Nevertheless, a comparative analysis of the minimum standards of the ILO maternity protection conventions will serve as a benchmark, indicating the extent to which South African labour laws are failing to provide for the reconciliation of work and care.<sup>4</sup> South Africa is bound by the regional standards set out by the AU and the SADC.<sup>5</sup> A comparative analysis is necessary to determine whether South Africa's labour laws meet the objectives set out by these regional standards.

South African labour laws addressing the work-care conflict are very much underdeveloped in comparison to the laws of the UK.<sup>6</sup> Through government commitment to a family-friendly political agenda, the UK has established a comprehensive legislative framework encompassing a

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<sup>1</sup> International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) art 10(1); Convention on the Elimination of all forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW); Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (UNCRC).

<sup>2</sup> International Labour Conference (42<sup>nd</sup> Session) Convention concerning Discrimination in Respect of Employment and Occupation (Geneva, adopted 25 June 1958, entry into force 15 June 1960) (Discrimination (Employment & Occupation) Convention, 1958).

<sup>3</sup> International Labour Conference (77<sup>th</sup> Session) Convention concerning Night Work (Geneva, adopted 26 June 1990; entry into force 4 January 1995).

<sup>4</sup> E Huysamen 'Women and Maternity: Is there truly equality in the workplace between men and women, and between women themselves?' in K Malherbe & J Sloth-Nielsen (eds) *Labour Law into the Future: Essays in honour of D'Arcy du Toit* (2012) 46–75, 57.

<sup>5</sup> African Union *AU in a Nutshell* <https://www.au.int/web/en/au-nutshell>, accessed on 26 June 2016; A Saurome 'The role of SADC institutions in implementing SADC treaty provisions dealing with regional integration' (2012) 15(2) *PER/PELJ* 454, 457; MP Olivier & ER Kalula 'Regional Social Security' in MP Olivier, N Smit, ER Kalula *Social Security: A Legal Analysis* (2003) 656–678; M Nyenti & LG Mpedi 'The impact of the SADC Social Protection Instruments on the setting up of a minimum social protection floor in Southern African countries' (2012) 15(1) *PER/PELJ* 243, 249; R Smit 'Family-related policies in Southern African Countries: Are working parents reaping any benefits?' (2011) 42(1) *Journal of Comparative Family Studies* 15; L Dancaster & T Cohen 'Leave for working fathers in the SADC region' (2015) 36 *ILJ* 2474.

<sup>6</sup> L Dancaster & M Baird 'Workers with care responsibilities: Is work-family integration adequately addressed in South African labour law?' (2008) 29 *ILJ* 22, 41.



number of leave entitlements and corresponding employment protections aimed at the reconciliation of work and care.<sup>7</sup> A comparative analysis of the South African laws against those of the UK will indicate legislative possibilities. These legislative possibilities may be relied on in consideration of the introduction of more adequate labour laws for the reconciliation of work and care in South Africa.<sup>8</sup> The comparative analysis will be confined to salient aspects of the laws and labour standards.

## 6.2 Comparative analyses of international labour standards

Maternity protection in South African law consists of all the elements set out in the *Maternity Protection Convention, 2000 (No. 183)*.<sup>9</sup> These elements are:

- maternity leave for a period of the pregnancy, the childbirth and the postnatal care of the child;
- benefits in the form of cash for the period of maternity leave and healthcare related to the pregnancy;
- health protection at work during pregnancy and the period of breastfeeding;
- employment protection and non-discrimination, in the forms of security of employment and the right to return to work after maternity leave, as well as the protection against discrimination based on maternity; and
- breastfeeding arrangements to provide employees with periods of breastfeeding breaks.<sup>10</sup>

South Africa has not ratified any of the ILO maternity protection Conventions.<sup>11</sup> The scope and coverage of maternity protection in South African law is limited as a result of numerous

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<sup>7</sup> O Golyner 'Family-friendly reform of employment law in the UK: an overstretched flexibility' (2015) 37(3) *Journal of Social Welfare and Family Law* 383; E Caracciolo di Torella 'New Labour, new dads – The impact of family friendly legislation on fathers' (2007) 36 *Industrial Law Journal* 318; G Mitchell 'Encouraging fathers to care: The Children and Families Act 2014 and Shared Parental Leave' (2015) 44(1) *Industrial Law Journal* 123, 125; J Lewis & M Campbell 'UK Work/family balance policies and gender equality, 1997–2005' (2007) 14(1) *Social Politics: International Studies in Gender, State and Society* 4, 15.

<sup>8</sup> Dancaster & Baird (note 6 above) 25.

<sup>9</sup> International Labour Conference (88th Session) Convention concerning the Revision of the Maternity Protection Convention (Revised), 1952 (Geneva, adopted 15 June 2000, entry into force: 7 Feb 2002) (Maternity Protection Convention, 2000).

<sup>10</sup> Ibid; *Maternity Resource Package: From Aspiration to Reality for All/Module 1: Maternity Protection at Work: What is it?* International Labour Office, Conditions of Work and Employment Programme (TRAVAIL)-Geneva: ILO, 2012, 2 [http://www.ilo.org/global/publications/ilo-bookstore/order-online/books/WCMS\\_193968/lang--en/index.htm](http://www.ilo.org/global/publications/ilo-bookstore/order-online/books/WCMS_193968/lang--en/index.htm), accessed on 30 July 2015; Huysamen (note 4 above) 55.

qualifying requirements and exclusions. The *Maternity Protection Convention, 2000* aims for wide and inclusive maternity protection. It states that maternity protection should apply to all female persons without discrimination, and should include atypical employees and employees in non-standard work arrangements.<sup>12</sup>

A specific category of employees excluded from the right to maternity leave in South Africa are part-time employees who work less than 24 hours a month for an employer.<sup>13</sup> Wider categories of employees are excluded from receiving maternity cash benefits through the UIA.<sup>14</sup> The UIA excludes atypical employees who work less than 24 hours a month for an employer; public servants; and persons who have resigned or temporarily suspended their employment.<sup>15</sup> These exclusions prevent South African labour laws from meeting the standards of the scope and coverage of maternity protection set out in the *Maternity Protection Convention, 2000*.<sup>16</sup>

The *Maternity Protection Convention, 2000* states further that where a pregnant employee does not meet the conditions to qualify for cash benefits under national law and practice, she shall be entitled to adequate benefits out of social assistance funds, subject to the means test required for such assistance.<sup>17</sup> Therefore, the Convention envisions a substitute for contributory maternity cash benefits where employees who would otherwise be eligible for receipt of maternity benefits fail to meet the qualifying conditions for the applicable regime.<sup>18</sup> The South African social security structure provides maternity cash benefits only through the UIA.<sup>19</sup> Therefore, if

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<sup>11</sup> Ratification of ILO Conventions. <http://www.ilo.org/dyn/normlex>, accessed on 21 November 2016.

<sup>12</sup> Maternity Protection Convention, 2000 (note 9 above) art 1; L Addati 'Extending maternity protection to all women: Trends, challenges and opportunities' (2015) 68(1) *International Social Security Review* 73.

<sup>13</sup> ET van Kerken & MP Olivier 'Unemployment insurance' in MP Olivier et al (eds) *Introduction to Social Security* (2004) 415, 436, 443; Grogan *Workplace Law* (2009) 26; Huysamen (note 4 above) 61–62.

<sup>14</sup> O Dupper, M Olivier & A Govindjee 'Extending coverage of the unemployment insurance-system in South Africa' (2010) 21 *Stell LR* 438, 448; L Dancaster 'State measures towards work-care integration in South Africa' in Z Mokomane *Work-Family Interface in Sub-Saharan Africa: Challenges and Responses* (2014) 177, 184; Van Kerken & Olivier (note 13 above) 436

<sup>15</sup> Section 3 of the Unemployment Insurance Act 63 of 2001 (UIA); E Bonthuys 'Gender and Work' E Bonthuys & C Albertyn (eds) *Gender, Law & Justice* (2007) 256, 272; Van Kerken & Olivier (note 13 above) 435–444.

<sup>16</sup> Addati (note 12 above) 73.

<sup>17</sup> Maternity Protection Convention, 2000 (note 9 above) art 6(6).

<sup>18</sup> ILO (2014) *Maternity and Paternity at Work: Law and practice across the world*, international labour organisation, Geneva 24 <http://www.ilo.org/maternityprotection>, accessed on 20 January 2015.

<sup>19</sup> Section 3 of the UIA; Van Kerken & Olivier (note 13 above) 435–444; Bonthuys (note 15 above) 272.

employees are excluded from the UIA, there is no substitute form of social assistance to provide excluded employees with maternity cash benefits.

Nevertheless, the provision of maternity benefits through the UIA complies with the *Social Security (Minimum Standards) Convention, 1952 (No. 102)*.<sup>20</sup> The convention requires maternity protection to be provided through social security measures.<sup>21</sup> The UIA is social security legislation which provides benefits to contributing employees.<sup>22</sup> However, the provision of maternity benefits through the UIA fails to comply with the *Social Protection Floors Recommendation, 2012 (No. 202)*.<sup>23</sup> The Social Protection Floors Recommendation, 2012 provides that maternity care and income security should be provided as a minimum social security guarantee to persons of an active age who are unable to earn sufficient income due to reasons such as pregnancy.<sup>24</sup> The qualification requirements and exclusions set out in the UIA prevent the extension of maternity benefits as minimum social security guarantee to pregnant employees.

The BCEA sets out two statutory requirements to be fulfilled before maternity leave can be claimed. These involve the compliance with a notice period and the production of a medical certificate.<sup>25</sup> According to the Maternity Protection Convention, 2000 the only statutory requirement which should be applicable is the production of a medical certificate.<sup>26</sup> A notice period is not prescribed as a minimum qualification for maternity leave.<sup>27</sup> The BCEA offers

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<sup>20</sup> International Labour Conference (35th Session) Convention concerning Minimum Standards of Social Security (Geneva, adopted 28 June 1952, entry into force 27 April 1955) (Social Security (Minimum Standards) Convention, 1952).

<sup>21</sup> Ibid art 2(a)(ii); A Otting 'International labour standards: A framework for social security' (1993) 132(2) *International Labour Review* 163, 166; M Olivier, O Dupper & A Govindjee 'Redesigning the South African Unemployment Insurance Fund: Selected key policy and legal perspectives' (2011) 22 *Stell LR* 396, 401.

<sup>22</sup> Section 12 of the UIA states that a contributor or a dependant is entitled to the following benefits: unemployment benefits (Chapter 3: Part B); illness benefits (Chapter 3: Part C); maternity benefits (Chapter 3: Part D); adoption benefits (Chapter 3: Part E) and dependants benefits (Chapter 3: Part F).

<sup>23</sup> International Labour Conference (101st Session) Recommendation concerning National Floors of Social Protection (Geneva, adopted 14 June 2012) (Social Protection Floors Recommendation, 2012).

<sup>24</sup> Ibid par 5(a); MP Olivier & A Govindjee 'A critique of the Unemployment Insurance Amendment Bill, 2015' (2015) 18(7) *PER/PELJ* 2739, 2744.

<sup>25</sup> Section 25 of the Basic Conditions of Employment Act 75 of 1997 (BCEA).

<sup>26</sup> Maternity Protection Convention, 2000 (note 9 above) art 4(1).

<sup>27</sup> Ibid.

employees sixteen weeks of maternity leave.<sup>28</sup> The duration of the leave is four weeks longer than the minimum standard of twelve weeks set out in the *Maternity Protection Convention (Revised), 1952 (No. 103)*,<sup>29</sup> and it is two weeks longer than the fourteen weeks set out by the *Maternity Protection Convention, 2000*.<sup>30</sup> However, the duration of maternity leave set out in the BCEA fails to meet the suggested period of eighteen weeks set out in the *Maternity Protection Recommendation, 2000 (No. 191)*.<sup>31</sup>

The ILO *Maternity Protection Conventions, 1952 and 2000* prescribe six weeks of compulsory postnatal maternity leave.<sup>32</sup> However, the maternity leave offered by the BCEA is unpaid, and the BCEA offers the final ten weeks as non-compulsory maternity leave, which may be taken any time from four weeks before the expected date of birth. Therefore, women may find themselves in a situation where they do not qualify for benefits offered by the UIA and may not be able to afford to take the final non-compulsory weeks of unpaid maternity leave.<sup>33</sup> Employees in this position may forfeit the ten weeks of unpaid maternity leave and claim only the six weeks of compulsory postnatal maternity leave. Therefore, even though the BCEA's provision of four months' maternity leave is adequate, the lack of cash benefits during maternity leave may force employees back to work prematurely, resulting in the forfeiture of the remaining portions of maternity leave.<sup>34</sup>

The ILO maternity protection conventions all state that maternity benefits should not be funded through employer liability, but should be incurred through social insurance or public funding.<sup>35</sup>

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<sup>28</sup> O Dupper 'Maternity protection in South Africa: An international and comparative analysis (Part one)' (2001) 3 *Stell LR* 439, 424; Dancaaster (note 14 above) 179.

<sup>29</sup> International Labour Conference (35th Session) Convention concerning Maternity Protection (Revised 1952) (Geneva, adopted 28 June 1952, entry into force 7 September 1955) (*Maternity Protection Convention, 1952*).

<sup>30</sup> Dupper (note 28 above) 424.

<sup>31</sup> International Labour Conference (88th Session) Recommendation concerning the revision of the Maternity Protection Recommendation, 1952 (Geneva, adopted 15 June 2000) (*Maternity Protection Recommendation, 2000*); Dancaaster (note 14 above) 179.

<sup>32</sup> ILO *Maternity and Paternity at Work* (note above) 12.

<sup>33</sup> Dupper (note 28 above) 425; O Dupper 'Maternity Protection' in EML Strydom et al (eds) *Essential Social Security Law* (2006) 155, 162.

<sup>34</sup> *Ibid.*

<sup>35</sup> International Labour Conference (1st Session) Convention concerning the Employment of Women before and after Childbirth (Washington, adopted 29 November 1919, entry into force: 13 Jun 1921) (*Maternity Protection Convention, 1919*) art 3(c); *Maternity Protection Convention, 1952* (note 29 above) arts 4(4) and 4(8); *Maternity Protection Convention, 2000* (note 9 above) art 6(8); Dancaaster (note 14 above) 182.

Maternity benefits in South Africa are accumulated in and paid out by the Unemployment Insurance Fund (UIF). This is a social security scheme which is established and regulated by the UIA. There is no statutory liability on the employer to pay maternity benefits. Thus, South Africa complies with this aspect of the ILO's maternity protection standards.<sup>36</sup>

The *Social Security (Minimum Standards) Convention, 1952* requires maternity benefits to be paid for a minimum period of twelve weeks.<sup>37</sup> The UIA provides that a pregnant contributor is entitled to maternity benefits for the maximum period of 17.32 weeks.<sup>38</sup> This is a maximum period, and the UIA does not set out a minimum period during which maternity benefits may be claimed.<sup>39</sup> Since benefits accrue at a rate of one day's benefits for every completed five days of employment as a contributor, the contributor may fail to accrue the maximum amount of benefits.<sup>40</sup>

According to the *Maternity Protection Conventions, 1952 and 2000*, a woman on maternity leave is entitled to cash benefits in the amount of two-thirds of her previous earnings.<sup>41</sup> This amounts to 66 per cent of her previous earnings.<sup>42</sup> The graduated scale of benefits set out in the UIA, prior to amendment, stated that the maximum amount of benefits payable is 60 per cent of the lower - income contributor's remuneration earned prior to the period for which the benefits are being claimed.<sup>43</sup> This amount has been amended by the UIAA to 66 per cent of any contributor's earnings, subject to the maximum income threshold.<sup>44</sup> However, the provision in the UIAA specifies that maternity benefits will be payable at a maximum rate of 66 per cent for the first

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<sup>36</sup> Bonthuys (note 15 above) 65; Huysamen (note 4 above) 46, 61; Dancaster (note 14 above) 182.

<sup>37</sup> Social Security (Minimum Standards) Convention, 1952 (note 20 above) art 52; Olivier & Govindjee (note 24 above) 2743.

<sup>38</sup> Section 24(4) of the UIA; CD Field, JJ Bagraim & A Rycroft 'Parental leave rights: Have fathers been forgotten and does it matter?' (2012) 36(2) *SALR* 30, 34; Huysamen (note 4 above) 61; Dancaster (note 14 above) 183.

<sup>39</sup> Olivier & Govindjee (note 24 above) 2742.

<sup>40</sup> Section 5 of the Unemployment Insurance Amendment Act 10 of 2016 (GG 40557 of 19 January 2016) (UIAA); s 13(3) of the UIA previously stated that the contributor's entitlement shall accrue at a rate of one day's benefit for every completed *six* days of employment as a contributor; Van Kerken & Olivier (note 13 above) 451; Huysamen (note 4 above) 62; Dancaster (note 14 above) 182–183; Olivier & Govindjee (note 24 above) 2744; OC Dupper 'Maternity' in MP Olivier et al (eds) *Introduction to Social Security* (2004) 399, 403.

<sup>41</sup> Maternity Protection Convention, 1952 (note 29 above) art 4(6); Maternity Protection Convention, 2000 (note 9 above); Dupper (note 40 above) 405; Olivier, Dupper & Govindjee (note 21 above) 406.

<sup>42</sup> Code on Social Security in the SADC (2008) (SADC Code) art 8; Olivier, Dupper & Govindjee (note 21 above) 406.

<sup>43</sup> Dupper (note 33 above) 157.

<sup>44</sup> Section 4 of the UIAA.

238 days, and the remainder of the days will be paid at a flat rate of twenty per cent.<sup>45</sup> While the percentage has been increased to 66 per cent, any maternity leave which is claimed following the period of 238 days will be paid at 20 per cent of the contributor's remuneration. Therefore, it is submitted that the final amount attached to the period following 238 days of maternity leave fails to meet the *minimum* two-thirds threshold set by the Maternity Protection Conventions, 1952 and 2000.

South Africa meets its obligations in terms of the ICESCR by providing mothers with employment protection during and after childbirth.<sup>46</sup> Although employees are not afforded paid leave, qualifying employees are provided with social security benefits.<sup>47</sup> The ICESCR prescribes the availability of 'adequate social security benefits'.<sup>48</sup> However, it does not specify the meaning of adequate social security benefits.<sup>49</sup> Considering that the ICESCR requires member states to recognise social security as a right to which 'everyone' is entitled, the wide exclusions of employees from maternity benefits in the UIA may be argued as inadequate provision.

The provisions of the LRA together with relevant case law provide South African employees with wide protection against dismissal.<sup>50</sup> The provisions comply with the international standards set out in the *Maternity Protection Convention, 1952*.<sup>51</sup> Since the South African provisions of employment protection cover women during pregnancy, maternity leave, and the period following their return to work, they are also wide enough to cover the standards set out in Article 8(1) of the *Maternity Protection Convention, 2000*.<sup>52</sup> The LRA fails to guarantee the pregnant

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<sup>45</sup> Ibid; Olivier & Govindjee (note 24 above) 2744; Prior to this amendment, s 13 of the UIA provided that a contributor was entitled to one day's benefit for every completed six days of employment as a contributor. The maximum period for which benefits were claimable were 238 days in a four-year period immediately preceding the date of the application for benefits, minus any days of benefits received by the contributor during this period.

<sup>46</sup> ICESCR (note 1 above) art 10(2).

<sup>47</sup> Section 24(1) of the UIA.

<sup>48</sup> ICESCR (note 1 above) art 10(1); Olivier & Govindjee (note 24 above) 2741.

<sup>49</sup> ICESCR (note 1 above) art 10(2).

<sup>50</sup> Grogan *Dismissal, discrimination and Unfair Labour Practice* (2007) 136.

<sup>51</sup> Art 6 of the Maternity Protection Convention, 1952 (note 29 above) states that '[w]hile a woman is absent from work on maternity leave in accordance with the provisions of art 3 of this Convention, it shall not be lawful for her employer to give her notice of dismissal during such absence, or to give her notice of dismissal at such a time that the notice would expire during such absence'.

<sup>52</sup> Art 8(1) of the Maternity Protection Convention, 2000 (note 9 above) states that '[i]t shall be unlawful for an employer to terminate the employment of a woman during her pregnancy or absence on leave referred to in Arts 4 or 5 or during a period following her return to work to be prescribed by national laws or regulations, except on

employee the express right to return at the end of the maternity leave to the same position or an equivalent position which will be paid at the same rate.<sup>53</sup> However, should the employee return from maternity leave to a lower position or a lower rate of pay, this would amount to unfair discrimination on the basis of pregnancy in terms of section 6 of the EEA.<sup>54</sup>

The *Maternity Protection Convention, 2000* envisages the extension of employment protection following the employee's return to work.<sup>55</sup> It must be noted that section 187(1)(e) does not place a time limit on the duration for which a dismissal based on pregnancy, intended pregnancy, or reasons related to the employee's pregnancy will constitute an automatically unfair dismissal.<sup>56</sup> Despite the wide interpretation of the phrase 'reason related to the employee's pregnancy', it appears that the protection is not intended to be indefinite.<sup>57</sup> This may be inferred from the inclusion of family responsibility leave offered in the BCEA, which is intended to provide employees with leave to care for ill family members, and in particular, children.<sup>58</sup>

South Africa is a ratifying member of the *Discrimination (Employment and Occupation) Convention, 1958*.<sup>59</sup> The Convention places obligations on South Africa to adopt national policies which ensure the equal opportunity and treatment of employees with the aim of eliminating workplace discrimination. However, the Convention does not list pregnancy as ground for discrimination.<sup>60</sup> The *Workers with Family Responsibilities Convention, 1981* (No.

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grounds unrelated to the pregnancy or birth of the child and its consequences or nursing. The burden of proving that the reasons for dismissal are unrelated to pregnancy or childbirth and its consequences or nursing shall rest on the employer'.

<sup>53</sup> Maternity Protection Convention, 2000 (note 9 above) art 8(2).

<sup>54</sup> Dupper (note 28 above) 88.

<sup>55</sup> Maternity Protection Convention, 2000 (note 9 above) art 8(1); ILO Maternity & Paternity at Work (note 18 above) 77.

<sup>56</sup> Grogan *Dismissal* (2014) 134.

<sup>57</sup> Grogan *Workplace Law* (2014) 219.

<sup>58</sup> In *De Beer v SA Export Connection t/a Global Paws* (2008) 29 ILJ 347 (LC), the employee's dismissal for requesting an extra month of maternity leave was found to be automatically unfair in terms of s 187(1)(e). However, the employee was granted less maternity leave than she was entitled to in terms of the BCEA and was at a stage where postnatal care for her babies was essential. See Grogan (note 57 above) 219.

<sup>59</sup> South Africa ratified the Convention on 5 March 1997 <http://www.ilo.org/dyn/normlex>, accessed on 15 February 2016.

<sup>60</sup> Art 1(a).

156) (Family Responsibilities Convention, 1981)<sup>61</sup> provides that member states must enable workers with family responsibilities to engage in employment without discrimination.<sup>62</sup> Nonetheless, South Africa has not yet ratified the *Family Responsibilities Convention, 1981*.<sup>63</sup> This Convention is fundamental to work-care reconciliation as it places duties on member states to implement measures aimed towards the reconciliation of work and family responsibilities.<sup>64</sup> Explicit standards regarding the employment protection of pregnant employees may also be found in the *Maternity Protection Convention, 2000*. Yet South Africa has still to ratify the *Maternity Protection Convention, 2000*.<sup>65</sup>

A central area in which South African labour laws fail to comply with ILO standards is the failure to provide paternity leave, parental leave, and adoption leave. The exclusion of adoption leave from the BCEA fails to comply with the *Maternity Protection Recommendation, 2000* which states that at the very least, adoptive parents should be afforded the same employment rights and protections as an employee who is entitled to maternity leave.<sup>66</sup> In addition, South Africa provides no separate leave provision applicable to male employees to take time off from work to care. Employees who have become fathers of newborn babies must rely on family responsibility leave.<sup>67</sup> South African labour law provisions do not provide for parental leave or paternity leave.

The *Resolution on Gender Equality at the Heart of Decent Work*<sup>68</sup> places emphasis on the need to include men in family participation as a means of reconciling work and care, and promoting gender equality in the workplace.<sup>69</sup> The *Recommendation concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities, 1981* (No.

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<sup>61</sup> International Labour Conference (67th Session) Convention concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities (Geneva, adopted 23 June 1981, entry into force: 11 August 1983) (Family Responsibilities Convention, 1981).

<sup>62</sup> *Ibid* art 3(1).

<sup>63</sup> Dancaster & Baird (note 6 above) 26.

<sup>64</sup> *Ibid*.

<sup>65</sup> Huysamen (note 4 above) 57.

<sup>66</sup> Maternity Protection Recommendation, 2000 (note 31 above) art 10(5); ILO Maternity & Paternity at Work (note 18 above) 69; Dancaster (note 14 above) 180.

<sup>67</sup> Section 27 of the BCEA.

<sup>68</sup> International Labour Conference (98th Session, Provisional Record 13 Sixth item on the agenda) Gender equality at the heart of decent work (general discussion), *Report of the Committee on Gender Equality* (Geneva, 2009).

<sup>69</sup> *Ibid*.



165)<sup>70</sup> and the *Maternity Protection Recommendation, 2000* both recommend a period of leave following maternity leave, which is available to both parents for the purposes of care.<sup>71</sup> Family responsibility leave may be relied on for a number of reasons, one of which may be for the purpose of care for an ill child.<sup>72</sup> This purpose, together with the duration of family responsibility leave, is inadequate in meeting the recommendations for a provision of parental leave.<sup>73</sup>

The lack of paternity or parental leave also contravenes article 16(1)(d) of the CEDAW, which places an obligation on state parties to ensure that the men and women in family relations have the same rights and responsibilities as parents, and that effect is given to the best interests of the child.<sup>74</sup> Furthermore, the obligation to extend childcare responsibilities to both parents is set out in the UNCRC.<sup>75</sup> The failure of South African law to provide paternity leave or parental leave is inadequate in light of the UNCRC.

Section 26 of the BCEA provides protection to pregnant or breastfeeding employees for the purposes of health and safety to the mother and child.<sup>76</sup> This provision conforms to standards in the *Maternity Protection Convention, 2000*, which aims to protect pregnant or breastfeeding employees from work which is prejudicial to their health.<sup>77</sup> However, South African labour laws fail to provide adequate rights to breastfeeding at the workplace. The *Maternity Protection Convention, 2000* requires that employees be provided with the right to daily breaks for the purposes of breastfeeding at the workplace.<sup>78</sup> South African labour laws merely provide

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<sup>70</sup> International Labour Conference (67th Session) Recommendation concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities (Geneva, adopted 23 June 1981) (Family Responsibilities Recommendation, 1981).

<sup>71</sup> Field, Bagraim & Rycroft (note 38 above) 37; Dancaster (note 14 above) 187; C Rickard 'Getting off the mommy track: An International model law solution to the global maternity discrimination crisis' (2014) 47 *Vanderbilt Journal of Transitional Law* 1465, 1502; A Behari 'Daddy's home: The promotion of paternity leave and family responsibilities in the South African workplace' (2016) 37(2) *Obiter* 346, 357.

<sup>72</sup> Section 27 of the BCEA.

<sup>73</sup> Field, Bagraim & Rycroft (note 38 above) 37; Rickard (note 71 above) 1502; Behari (note 71 above) 357; Dancaster (note 14 above) 187.

<sup>74</sup> CEDAW (note w above); A Louw 'The constitutionality of a biological father's recognition as a parent' (2010) 13(3) *PER/PELJ* 156.

<sup>75</sup> UNCRC (note 1 above) art 18(1).

<sup>76</sup> Bonthuys (note 15 above) 65; Dupper (note 28 above) 432; Huysamen (note 4 above) 60.

<sup>77</sup> Maternity Protection Convention, 2000 (note 9 above) art 3.

<sup>78</sup> *Ibid* art 10.

guidelines concerning breastfeeding arrangements.<sup>79</sup> The failure to provide statutory rights to breastfeeding arrangements at the workplace is inconsistent with ILO maternity protection standards.<sup>80</sup>

South African labour laws do not provide a separate entitlement to leave for care emergencies. Family responsibility leave has to be utilised as leave for care emergencies. The *Family Responsibilities Convention, 1981* requires the consideration of childcare in the adoption of national conditions aimed at the reconciliation of work and care.<sup>81</sup> Accordingly, the *Family Responsibilities Convention, 1981* calls on countries to develop child-care, family services, and facilities to assist in the reconciliation of work and care. The extent to which South African labour laws provide for childcare arrangements are found in the Code of Good Practice on the Arrangement of Working Time.<sup>82</sup> These provisions are merely guidelines. Despite the constitutional right to family care or parental care, or appropriate alternative care when removed from the family environment, the labour laws of South Africa do not build on this right.<sup>83</sup>

The standards of employment protection in South African law meet the requirements of the CEDAW to protect women against discrimination on the basis of maternity.<sup>84</sup> In line with Article 11(2), South African law provides measures to prohibit dismissal on the grounds of pregnancy or maternity leave, and the protection of pregnant employees against harmful types of work.<sup>85</sup> However, inadequacies may be found in the provisions of paid leave or social benefits and social security services to support working parents, with particular reference to childcare facilities, as prescribed by the CEDAW.<sup>86</sup>

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<sup>79</sup> Item 1.1 of the Code of Good Practice on Pregnancy.

<sup>80</sup> Dupper (note 28 above) 436.

<sup>81</sup> Section 27(2) of the BCEA; Dancaster & Baird (note 6 above) 30; Dancaster (note 14 above) 188–189.

<sup>82</sup> Item 4.2.6 of the Code of Good Practice.

<sup>83</sup> Section 28(1)(b) of the Constitution of the Republic of South Africa 1996.

<sup>84</sup> L Jansen van Rensburg & MP Olivier 'International law and supra-national law' in MP Olivier et al *Introduction to Social Security* 2004 619, 631; Dancaster & Baird (note 6 above) 25; Rickard (note 71 above) 1498.

<sup>85</sup> CEDAW (note 1 above) art 11(2)(a)–(d); Jansen van Rensburg & Olivier (note 84 above) 619, 631; Huysamen (note 4 above) 54.

<sup>86</sup> *Ibid.*

### 6.3 Comparative analyses of regional labour standards

South African labour laws comply with standards set by the AU by providing for the protection of women against discrimination.<sup>87</sup> However, legislative intervention is necessary to ensure compliance with the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa* (Women's Protocol) and the *African Charter on the Rights and Welfare of the Child* (ACRWC).<sup>88</sup> As explained in Chapter Three, the Women's Protocol requires the modification of social and cultural patterns of conduct of women and men so as to achieve the elimination of harmful cultural and traditional practices based on gendered stereotypes.<sup>89</sup> It also requires the adoption of measures to recognise the value of a woman's work at home, and the shared parental responsibilities attached to the upbringing and development of children.<sup>90</sup> The recognition of shared parental responsibilities is also encouraged by the ACRWC.<sup>91</sup>

South African labour laws provide only for maternity leave and family responsibility leave. Maternity leave assists in alleviating the burden of care on women. However, family responsibility leave as set out in the BCEA is inadequate as a measure to support and encourage shared parental responsibilities.<sup>92</sup> The objective to encourage shared parental responsibilities may be attained by providing adequate entitlements to employees for time off from work to attend to care responsibilities, together with social security measures to provide adequate cash benefits over the period of leave.<sup>93</sup> Essentially, shared parental responsibilities cannot be achieved by South African labour laws until measures are taken to provide fathers with leave

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<sup>87</sup> African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) OAU Doc (1982) 21 ILM 58 (African Charter). art 18(3); Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (adopted 10 June 1998, entered into force on 25 January 2004) OAU Doc (AU Women's Protocol) art 13, 13(h) and 13(l); K Stefiszyn 'The African Union and opportunities for women' (2005) 5 *African Human Rights Law Journal* 358, 367.

<sup>88</sup> M Forere & L Stone 'The SADC Protocol on Gender and Development: Duplication or complementarity of the African Union Protocol on Women's Rights' (2009) 9 *African Human Rights Law Journal* 434, 439.

<sup>89</sup> AU Women's Protocol (note 87 above) art 2.

<sup>90</sup> AU Women's Protocol (note 87 above) art 13(h) and 13(l).

<sup>91</sup> AU Women's Protocol (note 87 above) art 20(1)(a); Behari (note 71 above) 359.

<sup>92</sup> Behari (note 71 above) 360.

<sup>93</sup> Solemn Declaration on Gender Equality in Africa (adopted July 2004) OUA Doc (AU Gender Declaration).

provisions to take time off to care for their children.<sup>94</sup> Shared parental responsibility may be encouraged through the introduction of rights to paternity leave or parental responsibility leave.<sup>95</sup>

Furthermore, in terms of the *Solemn Declaration on Gender Equality in Africa* (Declaration), measures must be taken to promote gender-specific economic, social and legal measures to combat the HIV/Aids epidemic.<sup>96</sup> Gender-specific measures are also deemed necessary to increase budgetary allocations in order to alleviate the burden of care placed on women and to expand the employment opportunities of women.<sup>97</sup> The burden of care placed on families as a result of the HIV/Aids epidemic may also be addressed through South African labour laws by adopting a more comprehensive legislative package to provide employees with time off to care for their families.

The SADC has more specific standards directed towards the reconciliation of work and care than the AU.<sup>98</sup> The *Protocol on Gender and Development* (Protocol) places a duty on member states to ease the burden of care placed on women.<sup>99</sup> South African labour law does this by providing maternity leave and benefits. The Protocol further calls for the prohibition on dismissals and denial of recruitment on the grounds of maternity and pregnancy.<sup>100</sup> Once again, South African labour laws comply with this standard.<sup>101</sup> However, the Protocol specifically encourages the provision of protection and benefits attached to maternity and paternity leave.<sup>102</sup> Although South African labour laws comply in terms of maternity leave, the labour laws do not provide for paternity leave.<sup>103</sup>

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<sup>94</sup> Behari (note 71 above) 359.

<sup>95</sup> Ibid.

<sup>96</sup> AU Gender Declaration (note 93 above) art 1.

<sup>97</sup> AU Gender Declaration (note 93 above) art 1.

<sup>98</sup> Nyenti & Mpedi (note 5 above) 249.

<sup>99</sup> SADC Protocol on Gender and Development (adopted on 17 August 2008, entered into force 22 February 2013) (SADC Protocol) art 16; T Cohen 'The efficacy of international standards in countering gender inequality in the workplace' (2012) 33 *ILJ* 19, 21; Forere & Stone (note 88 above) 444.

<sup>100</sup> Cohen (note 99 above) 27.

<sup>101</sup> Labour Relations Act 66 of 1995 (LRA) and Employment Equity Act 55 of 1998 (EEA).

<sup>102</sup> SADC Protocol (note 99 above) art 19(4); Dancaster & Cohen (note 5 above) 2479.

<sup>103</sup> Behari (note 71 above) 347.

The *Charter on Fundamental Social Rights in the SADC* (Charter) requires member states to conform to ILO conventions, and recognises the need to enable men and women to reconcile their occupations and family obligations.<sup>104</sup> Family responsibility leave is not sufficient to provide such rights and protections to men and women employees.

In terms of the *SADC Code on Social Security* (Code), member states should ensure that women enjoy the protection provided for in the *Maternity Protection Convention, 2000*.<sup>105</sup> The Code acts as a guideline on social security measures, including maternity.<sup>106</sup> South Africa has not yet ratified the *Maternity Protection Convention, 2000*, and fails to comply with many of its minimum standards. The Code prescribes maternity leave for the duration of at least fourteen weeks,<sup>107</sup> while the BCEA provides for sixteen weeks of maternity leave.<sup>108</sup> Therefore, South African law complies with this minimum standard.

According to the Code a woman on maternity leave is entitled to cash benefits in the amount of 66 per cent of her previous earnings.<sup>109</sup> This is the equivalent of the amount prescribed by the *Maternity Protection Conventions, 1952 and 2000*.<sup>110</sup> The UIAA provides that maternity benefits are payable at a rate of 66 per cent of any contributor's earnings, subject to the maximum income threshold.<sup>111</sup> However, the final amount attached to the period following 238 days of maternity leave fails to meet the two-thirds threshold set by the *Maternity Protection Conventions, 1952 and 2000*. Therefore, South Africa laws fail to comply with both international and regional

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<sup>104</sup> The SADC Charter of Fundamental Social Rights (2003) (SADC Charter) art 6(a) and (c); Smit (note 5 above) 16; Dancaster & Cohen (note 5 above) 2478.

<sup>105</sup> Code on Social Security in the SADC (2008) (SADC Code) art 8.1.

<sup>106</sup> Nyenti & Mpedi (note 5 above) 255; M Olivier 'Extension of Labour Law and Social Security Protection to the Informal Sector: Developing Country Perspectives, with Specific Reference to Southern Africa' in R Blanpain (ed) *The Modernization of Labour Law and Industrial Relations in a Comparative Perspective* (2009) 241, 267.

<sup>107</sup> SADC Code (note 105 above) art 8.3.

<sup>108</sup> Section 25 of the BCEA.

<sup>109</sup> *Maternity Protection Convention, 1952* (note 29 above) art 4(6); *Maternity Protection Convention, 2000* (note 9 above) art 6(3); Dancaster (note 14 above) 182; Dupper (note 40 above) 405; Olivier, Dupper & Govindjee (note 21 above) 406; Olivier & Govindjee (note 24 above) 2747.

<sup>110</sup> *Maternity Protection Convention, 1952* (note 29 above) art 4(6); *Maternity Protection Convention, 2000* (note 9 above) art 6(3); Dupper (note 40 above) 405; Olivier, Dupper & Govindjee (note 21 above) 406.

<sup>111</sup> Section 4 of the UIAA.

standards relating to the minimum amount of income replacement payable.<sup>112</sup> Income replacement at a flat rate of 20 per cent fails to comply with the prescribed *minimum* amount of two-thirds or 66 per cent of the contributor's previous earning.

The Code also recommends the provision of paternity leave so as to encourage the shared parental responsibility between father and mother, for which South Africa labour laws fail to provide.<sup>113</sup> Commendably, South African labour laws comply with Article 8 of the Code to the extent that they take measures to ensure that women are not discriminated against or dismissed on grounds of maternity.<sup>114</sup>

#### 6.4 Comparative analyses of UK labour laws

Maternity leave is available to employees in both South Africa and the UK through labour legislation. In both countries, maternity benefits over the leave period are available through a separate statutory entitlement. In South Africa, maternity cash benefits may be claimed by employees who have contributed to the UIF in accordance with the UIA.<sup>115</sup> The definition of 'employee' in the UIA is more limited than its definition in the BCEA. Therefore, many employees are excluded from accessing maternity cash benefits.<sup>116</sup> In the UK, statutory maternity pay is also available through social security legislation. The entitlement to statutory maternity pay is set out in the *Statutory Maternity Pay (General) Regulations 1986*, but is governed by the *Social Security Contributions and Benefits Act 1986*.<sup>117</sup> In order to claim maternity pay, the employee must be an 'employed earner' as defined by the Social Security Contributions and Benefits Act 1986.<sup>118</sup> The definition of an 'employed earner' is wide and

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<sup>112</sup> SADC Code (note 5 above) art 8; Maternity Protection Convention, 1952 (note 29 above) art 4(6); Maternity Protection Convention, 2000 (note 9 above) art 6(3); Olivier, Dupper & Govindjee (note 21 above) 406; Dancaster (note 14 above) 182; Dupper (note 40 above) 405.

<sup>113</sup> SADC Code (note 105 above) art 8.1–8.4.

<sup>114</sup> SADC Code (note 105 above) art 8; Olivier & Govindjee (note 24 above) 2745.

<sup>115</sup> Section 24(1) of the UIA.

<sup>116</sup> Dupper, Olivier & Govindjee (note 14 above) 448; Van Kerken & Olivier (note 13 above) 436; Dancaster (note 14 above) 184.

<sup>117</sup> Social Security Social Security Contributions and Benefits Act 1992, c. 4 (U.K.) (Social Security Contributions and Benefits Act); the Statutory Maternity Pay (General) Regulations 1986 (U.K.), SI 1986/1960 (Statutory Maternity Pay Regulations).

<sup>118</sup> Social Security Social Security Contributions and Benefits Act.

inclusive allowing many employees to the benefits of income security over the maternity leave period.<sup>119</sup>

The BCEA provides South African employees with four consecutive months of maternity leave.<sup>120</sup> Maternity leave in the UK has been developed over a number of years. The original duration of fourteen weeks' maternity leave has been extended to a fifty-two week entitlement.<sup>121</sup> This is made up of twenty-six weeks of ordinary maternity leave and twenty-six weeks of additional maternity leave.<sup>122</sup> An employee who takes additional maternity leave will not accrue pension benefits over the leave period, and will have to comply with stricter requirements regarding her return to work. Therefore, unlike South African law, qualifying employees in the UK are provided with the option of extending their maternity leave by using the right to additional maternity leave.<sup>123</sup>

Maternity leave in South Africa is unpaid. Contributing employees may claim maternity benefits in terms of the UIA.<sup>124</sup> Maternity leave in the UK is paid in terms of the *Statutory Maternity Pay (General) Regulations 1986*.<sup>125</sup> Employees are entitled to either statutory maternity pay or maternity allowance. If the employee does not qualify for statutory maternity pay, she may claim the statutory maternity allowance.<sup>126</sup> Statutory maternity pay or maternity allowance is available for thirty-nine weeks of the maximum maternity leave period.<sup>127</sup>

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<sup>119</sup> A Emir *Selwyn's Law of Employment* (2016) 196.

<sup>120</sup> Section 25(1) of the BCEA; Dancaster & Baird (note 6 above) 34.

<sup>121</sup> The Fairness at Work White Paper (Cmnd. 3968), May 1998 at 5.14

<http://www.nationalarchives.gov.uk/webarchive/>, accessed on 18 October 2016; RW Painter & AEM Holmes *Cases and Materials on Employment Law* (2015) 5; Employment Rights Act 1996, c. 18 (U.K.) (Employment Rights Act) s 71(3), substituted by Work and Families Act 2006, c. 18 (U.K.) (Work & Families Act), ss 31 and 32; Caracciolo di Torella (note 7 above) 320; Rickard (note 71 above) 1490; Golyner (note 7 above) 383.

<sup>122</sup> G Pitt *Employment Law* (2007) 153–154; G James *The Legal Regulation of Pregnancy and Parenting in the Labour Market* (2009) 41; Emir (note 119 above) 189; Rickard (note 71 above) 1490.

<sup>123</sup> Emir (note 119 above) 191.

<sup>124</sup> Bonthuys (note 15 above) 272; Grogan (note 57 above) 65; Huysamen (note 4 above) 61.

<sup>125</sup> The Statutory Maternity Pay (General) Regulations 1986 (U.K.), SI 1986/1960.

<sup>126</sup> Social Security Social Security Contributions and Benefits Act, s 165; Statutory Maternity Pay Regulations, reg 2; The Statutory Maternity Pay, Social Security (Maternity Allowance) and Social Security (Overlapping Benefits) (Amendment) Regulations 2006 (U.K.), SI 2009/2379.

<sup>127</sup> *Ibid.*

South Africa's social security system for providing maternity cash benefits is based on a contributory scheme.<sup>128</sup> The maternity cash benefits are paid out of the UIF to which the employee has been contributing.<sup>129</sup> In the UK, the social security system for providing maternity cash benefits is based on a mixed scheme of a non-contributory employer-liability scheme, and a contributory social security scheme.<sup>130</sup> Statutory maternity pay is paid by the employer and then claimed from the income tax and National Insurance contributions of the employee.<sup>131</sup> Maternity allowance involves a contributory scheme and is paid by the National Insurance Fund, which operates in a similar way to the UIA.<sup>132</sup>

While the UK provides a maternity allowance to employees who are not eligible for statutory maternity pay, South African law makes no provision for an alternative form of income security in the event that the employee does not qualify for cash benefits under the UIA.<sup>133</sup> Considering the wide exclusion of employees from the benefits of the UIA, and the vulnerabilities of employed women in South Africa, South African law could be strengthened by adopting an alternative income security scheme for employees on maternity leave.<sup>134</sup>

Contributing employees in South Africa are entitled to maternity benefits for the maximum period of 17.32 weeks.<sup>135</sup> The cash benefits accrue in accordance with the contributor's rate of remuneration.<sup>136</sup> Qualifying employees in the UK are entitled to statutory maternity pay or a

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<sup>128</sup> Bonthuys (note 15 above) 272; Grogan (note 57 above) 65; Huysamen (note 4 above) 61.

<sup>129</sup> Dupper (note 40 above) 403.

<sup>130</sup> M O'Brien & A Koslowski 'UK Country Note' in A Koslowski, S Blum & P Moss (eds) *International Network of Leave Policies and Research 2016: 12th International Review of Leave Policies and Related Research* (2016) 359; [http://www.leavenetwork.org/lp\\_and\\_r\\_reports/](http://www.leavenetwork.org/lp_and_r_reports/), accessed on 20 December 2016; <https://www.gov.uk/government/publications/maternity-benefits-technical-guidance/maternity-benefits-technical-guidance>, accessed on 2 January 2017.

<sup>131</sup> Social Security Social Security Contributions and Benefits Act, s 1; the Statutory Maternity Pay Regulations; Emir (note 119 above) 196; Pitt (note 122 above) 152; O'Brien & Koslowski (note 130 above); <https://www.gov.uk/government/publications/maternity-benefits-technical-guidance/maternity-benefits-technical-guidance>, accessed on 2 January 2017.

<sup>132</sup> Social Security Social Security Contributions and Benefits Act, ss 1(2) and 35.

<sup>133</sup> ILO Maternity & Paternity at Work (note 18 above) 24.

<sup>134</sup> Dancaster (note 14 above) 184.

<sup>135</sup> Ibid 183; s 13(5) of the UIA; Van Kerken & MP Olivier (note 13 above) 451; Dupper (note 40 above) 403; Huysamen (note 4 above) 62; Dancaster & Baird (note 6 above) 34.

<sup>136</sup> Dancaster (note 14 above) 183.



maternity allowance for a period of 39 weeks out of the 52-week maternity leave period.<sup>137</sup> Both countries rely on non-contributory social security schemes to pay maternity benefits. In the UK, statutory maternity pay is paid by the employer, who then claims the amount back in a rebate.<sup>138</sup> The maternity allowance is paid by the Department of Work and Pensions as a social security benefit.<sup>139</sup> In South Africa, maternity benefits are paid out by the UIF, to which the employee has to have been contributing.<sup>140</sup> Reliance on non-contributory schemes in providing maternity benefits correspond with the standards and recommendations of the *Maternity Protection Convention, 2000* and the *Recommendation concerning National Floors of Social Protection, 2012*.<sup>141</sup>

Employees in the UK are awarded income security over maternity leave at a much higher rate than in South Africa. The maximum amount of benefits claimable is 66 per cent of a contributor's remuneration as earned prior to the period for which the benefits are claimed.<sup>142</sup> In the UK, statutory maternity pay is paid at a rate of 90 per cent of the employee's weekly earnings for the first six weeks of maternity leave.<sup>143</sup> Thereafter, it is paid at a prescribed rate of £139.58, or at a rate of 90 per cent of the employee's average weekly earnings, whichever of the amounts is lower.<sup>144</sup> The maternity allowance is paid at a rate of either £139.58, or at a rate of 90 per cent of the employee's average weekly earnings, whichever of the amounts is lower.<sup>145</sup> The rate of payment in South Africa is for a shorter duration and a lower amount than in the UK. Furthermore, it does not meet the threshold for the amount set by ILO and SADC standards. As

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<sup>137</sup> Social Security Social Security Contributions and Benefits Act, s 165; Statutory Maternity Pay Regulations, reg 2; The Statutory Maternity Pay, Social Security (Maternity Allowance) and Social Security (Overlapping Benefits) (Amendment) Regulations 2006 (U.K.), SI 2009/2379.

<sup>138</sup> Social Security Social Security Contributions and Benefits Act, s 1; Statutory Maternity Pay Regulations; Emir (note 119 above) 196; Pitt (note 122 above) 152.

<sup>139</sup> Emir (note 119 above) 196; Pitt (note 122 above) 152; M Leon 'Parental, Maternity and Paternity Leave: European Legal Constructions of Unpaid Care Giving' (2007) 58(3) *Northern Ireland Legal Quarterly* 353, 356.

<sup>140</sup> Section 5 of the UIA; Dupper (note 40 above) 403.

<sup>141</sup> Nyenti & Mpedi (note 5 above) 268; Addati (note 12 above) 89.

<sup>142</sup> Section 4 of the UIAA.

<sup>143</sup> Social Security Social Security Contributions and Benefits Act, s 166; James (note 122 above) 41; Leon (note 139 above) 356.

<sup>144</sup> Emir (note 119 above) 197; Pitt (note 122 above) 153.

<sup>145</sup> Social Security Social Security Contributions and Benefits Act, s 35A.

such, the amounts set by the UIA are inadequate in providing satisfactory income security to employees who take maternity leave.<sup>146</sup>

Both South Africa and the UK have extensive laws on the employment protection and non-discrimination measures which apply to employees who are pregnant, on maternity leave, and returning from maternity leave. The prohibition against the dismissal of pregnant employees in the LRA guarantees the right to return to work following maternity leave.<sup>147</sup> In the UK, employees are provided with an individual right to return to work following maternity leave. The right ensures that the pregnant employee is guaranteed to return to the same or a similar job to the one in which she was employed prior to her absence over the ordinary or additional maternity leave period.<sup>148</sup> This right extends to the entitlement to return to the same position of seniority, pension, and similar rights as if the employee had not been absent, and on terms and conditions not less favourable than those which would have applied had the employee not been absent.<sup>149</sup> Therefore, the right to return to work in the UK offers stronger protection to the employee than the prohibition against dismissal found in South African law.

The LRA also provides that a dismissal on the grounds of pregnancy, intended pregnancy, or any reason related to pregnancy, constitutes an automatically unfair dismissal.<sup>150</sup> In the UK, the dismissal of an employee will be automatically unfair if the employee was dismissed for reasons related to pregnancy, childbirth, or maternity.<sup>151</sup> In both countries, pregnant employees have relied on automatically unfair dismissals by claiming that the reason for their dismissal related to their pregnancies.

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<sup>146</sup> Dancaster (note 14 above) 184.

<sup>147</sup> Section 187(1)(c) of the LRA; O Dupper 'Maternity protection in South Africa: An international and comparative analysis (Part Two)' (2002) *Stell LR* 83; Dupper (note 40 above) 412–413.

<sup>148</sup> Employment Rights Act, ss 71(4), 73(4); the Maternity and Parental Leave etc. (Terms and Conditions of Employment) Regulations 1999 (U.K.), SI 1999/3312 (Maternity and Parental Leave Regulations), reg 18.

<sup>149</sup> Maternity and Parental Leave Regulations, reg 18A.

<sup>150</sup> Section 187(1)(e) of the LRA. J Barnard 'Broadening the rights of women in the workplace: Automatically unfair dismissals and pregnancy – *De Beer v SA Export Connection t/a Global Paws* 2008 (29) ILJ 347 (LC)' (2009) 72 *THRHR* 511; Bonthuys (note 15 above) 271; Huysamen (note 4 above) 58.

<sup>151</sup> Employment Rights Act, a 99(3)(a); James (note 122 above) 55.

In South Africa, the employee will have to prove that the dismissal is causally linked to the employee's pregnancy.<sup>152</sup> In proving the causal link, it will have to be shown that the employer had prior knowledge of the pregnancy. Thus, the pregnancy must be the factual and legal cause of the dismissal.<sup>153</sup> This is similar to the position in the UK, where it must be shown that the employer had prior knowledge of the employee's pregnancy at the time that the decision was taken to dismiss the employee.<sup>154</sup> Therefore, in both countries, the employee will have had to disclose her pregnancy in order to prove the automatically unfair dismissal. The disclosure allows the employee to rely on the employer's knowledge of her pregnancy in proving the automatically unfair dismissal.

In the UK, as set by precedent, prior knowledge is a prerequisite to proving the automatically unfair dismissal.<sup>155</sup> In South Africa, the disclosure of the pregnancy will make the causal link between the pregnancy and the dismissal more obvious, making it more difficult for the employer to prove that the employee was dismissed for a reason other than pregnancy. In the South African cases of *Mnguni v Gumbi*<sup>156</sup> and *Mashava v Cuzen & Woods Attorneys*,<sup>157</sup> each of the employees successfully proved that their dismissals were causally linked to their pregnancies.

Conversely, there have been multiple cases where the causal link was not proved. There is case law in both countries which reflects that disclosure of the pregnancy cannot always assist in protecting the employee if it is proved that the employee had been dismissed for reasons other than pregnancy. For instance, in *Wardlaw v Supreme Mouldings (Pty) Ltd*<sup>158</sup> and *Uys v Imperial Car Rental (Pty) Ltd*,<sup>159</sup> the courts found that the reason for the dismissal was conduct unrelated

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<sup>152</sup> Grogan (note 56 above) 133; B Grant, N Whitear-Nel & A Behari 'Protecting the unwed woman against automatically unfair dismissals for reasons relating to pregnancy: A Discussion of Memela & another v Ekhamanzi Springs (Pty) Ltd (2012) 33 ILJ 2911 (LC)' (2015) 36 ILJ 106, 111.

<sup>153</sup> *SA Chemical Workers Union & Others v Afrox Ltd* (1999) 20 ILJ 1718 (LAC), 1726; *Wardlaw v Supreme Mouldings (Pty) Ltd* (2004) 25 ILJ 1094 (LC) 1100 at par [10.7].

<sup>154</sup> Employment Rights Act, s 99; Maternity and Parental Leave Regulations, reg 20; Emir (note 119 above) 192; Pitt (note 122 above) 155; *Ramdoolar v Bycity Ltd* Case-236/04 UKEAT (2004) I-3007.

<sup>155</sup> *Ramdoolar v Bycity Ltd* Case-236/04 UKEAT (2004) I-3007; James (note 122 above) 59, 117.

<sup>156</sup> *Mnguni v Gumbi* (2004) 25 ILJ 715 (LC).

<sup>157</sup> *Mashava v Cuzen & Woods Attorneys* (2000) 21 ILJ 402 (LC).

<sup>158</sup> *Wardlaw v Supreme Mouldings (Pty) Ltd* (2004) 25 ILJ 1094 (LC).

<sup>159</sup> *Uys v Imperial Car Rental (Pty) Ltd* (2006) 27 ILJ 2701 (LC); Dupper (note 40 above) 411.

to the employee's pregnancy. In *Vorster v Rednave Enterprises CC t/a Cash Converters Queenswood*,<sup>160</sup> the link between the pregnancy and the dismissal was found to be too remote.<sup>161</sup>

In the case of *Ismail v B & B t/a Harvey World Travel Northcliff*,<sup>162</sup> it was held that the employer had no knowledge of the employee's pregnancy at the time that the decision to dismiss the employee was taken.<sup>163</sup> In these instances it was held that the dismissals were not automatically unfair. Likewise, in the UK case of *Ramdoolar v Bycity Ltd*,<sup>164</sup> the employer proved that the decision for the dismissal had been based on reasons other than pregnancy.<sup>165</sup> It was held that the dismissal had not been automatically unfair.<sup>166</sup> As stated in Chapter Two, South African law does not require the disclosure of the pregnancy. Nevertheless, in the interests of preventing the abuse of the right against dismissal, the courts place emphasis on the causal link between the dismissal and the pregnancy.<sup>167</sup> Therefore, the pregnant employee will be better protected against dismissal if she notifies her employer of her pregnancy.

The LRA does not explain the details of the guarantee to return to work following maternity leave as explicitly as is stated in the equivalent UK provision.<sup>168</sup> Both countries have accumulated case law on workplace disputes resulting from claims of dismissal or discrimination for reasons relating to pregnancy or maternity. Similarly, both countries also place emphasis on the employer's awareness of the employee's pregnancy prior to a dismissal of a pregnant employee. Case law has indicated that the disclosure of pregnancy assists the employee in proving that such a dismissal is automatically unfair. However, the exact extent to which the disclosure of the pregnancy will be considered operates on a case-by-case basis, and there is no

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<sup>160</sup> *Vorster v Rednave Enterprises CC t/a Cash Converters Queenswood* (J1093/06) [2008] ZALC 101; [2008] 11 BLLR 1111 (LC); (2009) 30 ILJ 407 (LC) (29 July 2008).

<sup>161</sup> *Ibid* at par [28].

<sup>162</sup> *Ismail v B & B t/a Harvey World Travel Northcliff* (2014) 35 ILJ 696 (LC).

<sup>163</sup> *Ibid* at par [39].

<sup>164</sup> *Ramdoolar v Bycity Ltd* Case-236/04 UKEAT (2004) I-3007.

<sup>165</sup> *Ibid* at par [3].

<sup>166</sup> *Ibid* at par [4].

<sup>167</sup> *Mashava v Cuzen & Woods Attorneys* (2000) 21 ILJ 402 (LC); J Gobind & WI Ukpere. 'Labour Pains: Lessons from South Africa for women employees and their employers' (2012) 6(46) *African Journal of Business Management* 11459, 11552 <http://www.academicjournals.org/AJBM>, accessed on 3 February 2016.

<sup>168</sup> Section 187(1)(c) of the LRA; Dupper (note 147 above) 83; Dupper (note 40 above) 412–413; Maternity and Parental Leave Regulations, reg 18A.

guarantee that the disclosure of the pregnancy will protect the employee against dismissal.<sup>169</sup> This means that even where the employee has disclosed her pregnancy to her employer, she may remain vulnerable to dismissal.

Many women also do not want to disclose their pregnancies too early, in fear that this may jeopardise their career opportunities.<sup>170</sup> Furthermore, most women do not disclose their pregnancies until they pass the threshold of their first trimester, during which they are most at risk of complications such as a miscarriage.<sup>171</sup> Together with possible disclosure by a colleague, or the visible symptoms of pregnancy, such as morning sickness, the employer may become aware of the pregnancy without direct disclosure from the employee herself. Where the employer therefore gains the knowledge from another source and bases the dismissal on another reason, the pregnant employee will not be protected unless she has evidence to show prior knowledge on the part of the employer.<sup>172</sup> Therefore, the requirement of prior knowledge or proof of the causal link limits the scope of the protection against dismissal for women who do not disclose their pregnancies. This may place women at risk of dismissal based on an employer's claim that he or she was unaware of such pregnancies.<sup>173</sup> The issue of disclosure of pregnancy in the workplace limits the protection afforded to pregnant women in both South Africa and the UK.

A major difference in the employment protection offered to pregnant employees in the UK and South Africa is the inclusion of family responsibilities as a ground of discrimination in labour legislation. The EEA prohibits discrimination on the grounds of pregnancy and family responsibility.<sup>174</sup> In the UK, the EA provides protection against discrimination based on pregnancy and maternity.<sup>175</sup> However, the employee is protected against pregnancy-related discrimination only within the protective period constituting the beginning of her pregnancy until the end of her maternity leave period.<sup>176</sup>

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<sup>169</sup> James (note 122 above) 117.

<sup>170</sup> *Ibid* 60.

<sup>171</sup> *Ibid*; G James 'The Law Relating to Pregnancy and Maternity Leave' in T Wright & H Conley *Gower Handbook of Discrimination at Work* (2011) 54.

<sup>172</sup> James (note 122 above) 60.

<sup>173</sup> *Ibid*; James (note 171 above) 54.

<sup>174</sup> Section 6(1) of the EEA.

<sup>175</sup> Equality Act 2010, c. 15 (U.K.) (Equality Act), s 18.

<sup>176</sup> Equality Act, s 18(6); Pitt (note 122 above) 47; Emir (note 119 above) 143; James (note 171 above) 47.

In South African law, the LRA provides that inherent job requirements may act as a specific defence to the allegation of a discriminatory dismissal.<sup>177</sup> Therefore, where an employee is dismissed for reasons of pregnancy, the employer may justify the dismissal on the basis of an inherent job requirement.<sup>178</sup> A comparison may be drawn between the treatment on the dismissal of pregnant employees for inherent job requirements in South African labour law and the treatment of a UK employee returning from maternity leave to a position that has become redundant.<sup>179</sup>

In the UK, if an employee returns to work after a period of two or more consecutive periods of statutory leave, and it is not reasonably practicable for her to return to her same position of work for any reason other than redundancy, the employee must be offered another job that is suitable and appropriate in the circumstances.<sup>180</sup> Therefore, on returning from maternity leave, the employee should be offered an alternative suitable and appropriate job other than the one she had been employed at before her maternity leave.<sup>181</sup> Furthermore, should the employee become redundant over her period of maternity leave, and it is not practicable for the employer to continue to employ her under her existing contract of employment, the employer must offer her a suitable available vacancy.<sup>182</sup> In South African law, the LRA makes no such provisions upon the return from maternity leave, or upon the dismissal of a pregnant employee for the reason of inherent job requirements.<sup>183</sup>

According to the LRA, a dismissal will be automatically unfair if an employer unfairly discriminates against an employee on the basis of family responsibilities.<sup>184</sup> The inclusion of family responsibilities as a ground of discrimination in South African labour legislation extends the protection against discrimination to women who have returned to work from maternity leave

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<sup>177</sup> Section 187(2)(a) of the LRA.

<sup>178</sup> JC Mubangizi 'Too pregnant to work – The dilemma of economic rationality versus equality: Woolworths (Pty) Ltd v Whitehead' (2000) 16 *SAJHR* 690, 701; L Lancaster & T Cohen 'Family responsibility discrimination litigation – a non-starter?' (2009) 2 *Stell LR* 221, 229; Bonthuys (note 15 above) 271.

<sup>179</sup> Emir (note 119 above) 192; Pitt (note 122 above) 155.

<sup>180</sup> The Maternity and Parental Leave Regulations, reg 20(7); Painter & Holmes (note 121 above) 547.

<sup>181</sup> Emir (note 119 above) 192; Pitt (note 122 above) 155.

<sup>182</sup> The Maternity and Parental Leave Regulations, regs 10, 18(4).

<sup>183</sup> Dupper (note 147 above) 94.

<sup>184</sup> Section 187(1)(f) of the LRA.

and continue to experience discriminatory treatment on the basis of family responsibilities.<sup>185</sup> The provision in the LRA provided adequate protection to the employee in *Masondo v Crossway*, where it was found that the dismissal of the employee who had returned from maternity leave was automatically unfair as a result of unfair discrimination on the grounds of family responsibilities.<sup>186</sup>

In the UK, once the employee has returned from maternity leave, she cannot rely on pregnancy or maternity as a ground of discrimination.<sup>187</sup> If the employee experiences discriminatory treatment arising from her pregnancy or maternity leave, she will have to rely on discrimination on the grounds of sex.<sup>188</sup> As explained in Chapter Five, this is far more difficult to prove than discrimination on the grounds of pregnancy and maternity.<sup>189</sup> Therefore, the South African provisions of the prohibiting discrimination on the basis of family responsibilities are far stronger than the protection afforded in the UK as they extend the employment protection of employees with family responsibilities who have returned from maternity leave.<sup>190</sup>

The inclusion of family responsibilities as a ground for discrimination in the EEA is a provision which is supportive of the reconciliation of work and care. However, as explained in Chapter Four of this thesis, there has been little reliance on the ground as a source of protection against discrimination in the workplace.<sup>191</sup> Nevertheless, the provision does offer employees with family responsibilities more protection against discrimination than UK legislation which is limited to the protected period between the beginning of pregnancy and the end of maternity leave.<sup>192</sup>

The labour laws of the UK provide numerous leave entitlements for time off from work to care. For instance, unlike South Africa, the laws of the UK stipulate that an employee who has become

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<sup>185</sup> Dancaster & Cohen (note 178 above) 223, 232.

<sup>186</sup> As discussed in Chapter Two of this thesis. *Masondo v Crossway* (1998) 19 *ILJ* 180 (LC); Grogan (note 57 above) 219; Dancaster & Cohen (note 178 above) 232.

<sup>187</sup> Equality Act, s 18(5); Case-348/13 *Lyons v DWP Jobcentre Plus* [2014] ECR I-1401 at par [31]; Case C-400-95 *Handelsog (acting on behalf of Larsson) v Dansk Handel & Service* [1995] ECR I-02757.

<sup>188</sup> James (note 122 above) 58.

<sup>189</sup> James (note 171 above) 54; James (note 122 above) 60.

<sup>190</sup> *Ibid.*

<sup>191</sup> Dancaster & Cohen (note 178 above) 223, 238.

<sup>192</sup> James (note 122 above) 58.

a new parent through surrogacy is entitled to adoption leave and pay.<sup>193</sup> South African labour laws do not make any provision for adoption leave and pay, let alone leave for employees who have become parents through surrogacy. The laws of the UK also provide pregnant employees with rights to time off from work to attend antenatal appointments, and keep-in-touch days, which allow the employee on maternity leave to work up to ten days during the leave period without losing her rights attached to the leave.<sup>194</sup> Apart from the right to maternity leave and employment protection, South African labour laws do not provide pregnant employees with any other special rights resulting from pregnancy.

In the UK, employees are entitled to adoption leave equivalent to the provision of maternity leave available to a biological mother.<sup>195</sup> As such, the employee is entitled to ordinary adoption leave (the first twenty-six weeks), and additional adoption leave (the last twenty-six weeks). Furthermore, the UK employee is entitled to statutory adoption pay for the duration of thirty-nine weeks, provided the employee meets the qualifying requirements.<sup>196</sup> An employee who has taken adoption leave is entitled to the same rights of employment protection that apply to an employee who has maternity leave.<sup>197</sup> Therefore, the rights to adoption leave and pay in the UK operate as if the adoptive parent was the biological parent of the child. The introduction of such rights to South African labour law is necessary in order to cure the existent gap in the law which denies adoptive parents the right to time off from work to care for their newly-placed adoptive child.<sup>198</sup>

The provisions of South African labour legislation are also lacking in entitlements to paternity leave and parental leave, and the right to request flexible working arrangements. In the UK,

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<sup>193</sup> Children and Families Act 2014, c. 6 (U.K.) (Children and Families Act), s 122; <https://www.gov.uk/rights-for-surrogate-mothers>, accessed on 4 October 2016.; <http://www.acas.org.uk/surrogacy>, accessed on 4 October 2016.

<sup>194</sup> Employment Rights Act, s 55(1); Emir (note 119 above) 185; Maternity and Parental Leave Regulations, reg 9; the Paternity and Adoption Leave (Amendment) Regulations 2006 (U.K.), SI 2006/2014 (Paternity and Adoption Leave Regulations). Regulation 9 inserts regulation 12A into the Maternity and Parental Regulations 1999, and regulation 14 inserts 21A into the Paternity and Adoption Leave Regulations; G James 'Enjoy your leave but 'Keep in touch': Help to maintain parent/workplace relations' (2006) 36 *Industrial Law Journal* 315; James (note 122 above) 42; Emir (note 119 above) 192.

<sup>195</sup> Employment Rights Act, ss 75A & 75B; the Paternity and Adoption Leave Regulations, reg 15.

<sup>196</sup> Social Security Contributions and Benefits Act, s 171ZL(1); Statutory Paternity Pay and Statutory Adoption Pay Regulations 2002 (U.K), SI 2002/2822 (Statutory Paternity Pay and Statutory Adoption Pay Regulations).

<sup>197</sup> The Paternity and Adoption Leave Regulations; Emir (note 119 above) 198.

<sup>198</sup> Dancaaster (note 14 above) 180–181.



employees are entitled to one or two consecutive weeks of paternity leave and pay for the birth or adoption of a child.<sup>199</sup> Employees may also take unpaid parental leave of eighteen weeks, which may be taken at any time from the birth of the child until the child reaches eighteen years of age.<sup>200</sup> A further entitlement to statutory shared parental leave has been included in the UK legislative package of rights to provide time off from work for care.<sup>201</sup> Shared parental leave is effective in encouraging the shared parental responsibility of bringing up children.<sup>202</sup>

South African labour laws do not provide employees with a right to request flexible working arrangements. In the UK, employees have a right to request flexible working arrangements which may rearrange the hours of work required by the employee; the time at which the employee is required to be at work; and where the employee is required to work.<sup>203</sup> Such a provision may be of great benefit to South African employees, particularly in light of the existing care crisis.<sup>204</sup>

Employees in the UK are afforded a separate entitlement to unpaid time off from work to attend to an ill dependant.<sup>205</sup> The right extends to situations where the employee will have to make arrangements for the provision of care for a dependant who is ill or injured, because of the unexpected disruption or termination of arrangements for the care of a dependant; or to deal with an incident which involves a child of the employee and which occurs unexpectedly in a period during which the child is under the responsibility of an educational establishment, among other

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<sup>199</sup> Employment Rights Act, s 80; the Paternity and Adoption Leave Regulations, reg 5(1); James (note 122 above) 43; Emir (note 119 above) 200.

<sup>200</sup> The Maternity and Parental Regulations, regs 14 and 15; European Union (Parental Leave) Regulations 2013, SI 81/2013, reg 4A; Emir (note 119 above) 192.

<sup>201</sup> Employment Rights Act, s 75E; Children and Families, s 117(1); The Shared Parental Leave (Terms and Conditions of Employment) Regulations 2014 (U.K.), SI 2014/3050 (the Shared Parental Leave Regulations) reg 2(1); the Statutory Shared Parental Pay (General) Regulations 2014 (U.K.), SI 2014/3051 (Statutory Shared Parental Pay Regulations), reg 3; Rickard (note 71 above) 1493; Golynger (note 7 above) 384; Mitchell (note 7 above) 123; Emir (note 119 above) 202.

<sup>202</sup> Mitchell (note 7 above) 127.

<sup>203</sup> Employment Rights Act, s 80F(1)(a); Dancaster & Baird (note 6 above) 39; L Dancaster & T Cohen 'Workers with family responsibilities: a comparative analysis to advocate for the legal right to request flexible working arrangements in South Africa' (2010) 34(1) *SALJ* 34(1) 30, 37; JA Durkalski 'Fixing economic flexibilization: A role for flexible work laws in the workplace policy agenda' (2009) 32(2) *Berkley Journal of Employment and Labour Law* 381, 388.

<sup>204</sup> Dancaster & Baird (note 6 above) 41; Dancaster & Cohen (note 203 above) 37; Dancaster (note 14 above) 191.

<sup>205</sup> Employment Rights Act, s 57A(1)(a)–(e).

instances.<sup>206</sup> These are instances which exist in the South African social context. South African employees faced with these situations must rely on family responsibility leave, which is inadequate in addressing these demands.<sup>207</sup>

The laws relating to the health and safety of pregnant employees in South Africa and the UK are fairly similar. In both countries pregnant and breastfeeding employees are protected against hazardous working conditions.<sup>208</sup> In the UK, the risk attached to the workplace environment is assessed in line with regulations.<sup>209</sup> In South Africa, the Code of Good Practice on Pregnancy outlines the methods of assessment attached to these risks.<sup>210</sup> Employees who are at risk are offered suitable alternative employment provided that the employment is reasonably practical.<sup>211</sup> However, in the UK, the employer may alter the employee's working conditions to avoid the risk. If this is not reasonable, the employer may suspend the employee with pay to ensure that the risk is avoided.<sup>212</sup>

The option of suspending the employee's employment in the instance that alternative employment is not practical is a measure which provides the pregnant or breastfeeding employee with significant protection. South African labour law does not make provision for such a measure. The current method of protection against hazardous working conditions, to attempt to find alternative employment for the employee, does not provide the employee with enough support and security for her health and safety in the workplace.<sup>213</sup> A provision for the paid suspension of the employee in the instance of risks may assist in increasing the standard of care placed on the employer.<sup>214</sup>

With regard to breastfeeding arrangements, South African labour laws set out guidelines which specify that employees should be provided with thirty-minute breaks twice a day for the first six

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<sup>206</sup> Ibid s 57A(1)(a)–(e).

<sup>207</sup> Dancaster (note 119 above) 189.

<sup>208</sup> Section 26 of the BCEA; Management of Health and Safety at Work Regulations 1999 (U.K.), SI 1999/3242 (Health and Safety at Work Regulations).

<sup>209</sup> Management of Health and Safety at Work Regulations; Emir (note 119 above) 186.

<sup>210</sup> Item 3 of the Code of Good Practice on Pregnancy.

<sup>211</sup> Section 26(1), (2) of the BCEA.

<sup>212</sup> Management of Health and Safety at Work Regulations, reg 16(2).

<sup>213</sup> Bonthuys (note 15 above) 273.

<sup>214</sup> Ibid.

months of the child's life in order to breastfeed or express milk.<sup>215</sup> These guidelines are commendable, considering that the laws of the UK do not prescribe breaks for breastfeeding.<sup>216</sup> However, the UK does include breastfeeding as a ground of sex discrimination under labour legislation.<sup>217</sup>

## 6.5 Conclusion

South Africa has not ratified any of the Maternity Protection Conventions of the ILO, nor has it ratified the *Family Responsibilities Convention, 1981*.<sup>218</sup> However, South African labour laws do comply with the essential elements of maternity protection set out in the Maternity Protection Convention, 2000.<sup>219</sup> When compared to the ILO standards, major shortcomings within this area of South African law are identified as the following:

- the exclusion of specified categories of employees from receiving maternity cash benefits;<sup>220</sup>
- the lack of guaranteed maternity cash benefits to employees;<sup>221</sup>
- the failure to provide a minimum period for which maternity benefits are payable;<sup>222</sup>
- the failure to provide employees with statutory rights to adoption leave;<sup>223</sup>
- the failure to provide employees with statutory rights to paternity leave and/or parental leave;<sup>224</sup>
- the failure to provide statutory rights to breastfeeding arrangements at the workplace;<sup>225</sup>  
and

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<sup>215</sup> Item 5.13 of the Code of Good Practice on Pregnancy.

<sup>216</sup> Acas *Guide on accommodating breastfeeding employees in the workplace* (January 2014) <http://www.acas.org.uk>, accessed on 11 October 2016.

<sup>217</sup> Emir (note 119 above) 121; Painter & Holmes (note 121 above) 238.

<sup>218</sup> Ratification of ILO Conventions <http://www.ilo.org/dyn/normlex>, accessed on 21 November 2016.

<sup>219</sup> Huysamen (note 4 above) 55; Maternity Protection Convention, 2000 (note 9 above); Maternity Protection Convention 2000 (note 57 above); *Maternity Resource Package: From Aspiration to Reality for All/Module 1: Maternity Protection at Work: What is it?* International Labour Office, Conditions of Work and Employment Programme (TRAVAIL)-Geneva: ILO, 2012, 2 [http://www.ilo.org/global/publications/ilo-bookstore/order-online/books/WCMS\\_193968/lang-en/index.htm](http://www.ilo.org/global/publications/ilo-bookstore/order-online/books/WCMS_193968/lang-en/index.htm), accessed on 30 July 2015.

<sup>220</sup> Dupper, Olivier & Govindjee (note 14 above) 448; Van Kerken & Olivier (note 13 above) 436; Dancaster (note 14 above) 184.

<sup>221</sup> Dupper (note 28 above) 425; Dupper (note 40 above) 162.

<sup>222</sup> Olivier & Govindjee (note 24 above) 2742.

<sup>223</sup> Field, Bagraim & Rycroft (note 38 above) 37; Behari (note 71 above), 357; Dancaster (note 14 above) 187.

<sup>224</sup> *Ibid.*

- the failure to provide employees with a statutory right to request flexible working arrangements.<sup>226</sup>

Paternity leave and parental leave are also required through South Africa's commitment to the CEDAW and the UNCRC.<sup>227</sup>

AU standards are concerned with alleviating burdens of care placed on women and encouraging the shared care-giving responsibilities between parents. The comparative analyses of regional labour standards have reflected that the current labour laws of South Africa are inadequate in meeting these standards. South African labour laws offer maternity leave as the primary right to time off from work for the purpose of care-giving. As such, shared parental responsibilities are not addressed in South African labour laws. The laws comply with SADC standards to an extent. Ultimately, there is a lack of standards aimed at the reconciliation of work and care in the SADC itself.<sup>228</sup>

Prior to the adoption of the UIAA, South African labour laws failed to meet the most crucial standards of the Code, which require compliance with the ILO *Maternity Protection Convention, 2000*, the adoption of paternity leave, and the prescription of minimum cash benefits at a rate of 66 per cent of normal income. While the UIAA provides that the prescribed rate of maximum cash income replacement to employees on maternity leave is 66 per cent, the prescribe flat rate of twenty per cent for maternity leave claimed following the 238-day period is insufficient and may force the employee to return to work for her full salary prematurely, before she is physically and emotionally prepared to leave her newborn baby.<sup>229</sup>

The comparative analyses of South African labour laws against laws of the UK within the area of the reconciliation of work and care have indicated that the legislative framework of South African labour law offers limited rights and protections to employees with care responsibilities.

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<sup>225</sup> Maternity Protection Convention, 2000 (note 9 above) art 10; Dupper (note 28 above) 436.

<sup>226</sup> Field, Bagraim & Rycroft (note 38 above) 37; Behari (note 71 above) 357; Dancaster (note 14 above) 187.

<sup>227</sup> CEDAW (note 1 above) art 16(1)(d); UNCRC (note 1 above) art 18(1); Louw (note 74 above) 156.

<sup>228</sup> Section 3 of the UIA; Dupper, Olivier & Govindjee (note 14 above) 448; Van Kerken & Olivier (note 13 above) 436; Dancaster (note 14 above) 184.

<sup>229</sup> Dupper (note 40 above) 408; Dancaster (note 14 above) 185.

Consideration must be given to the development of the legislative framework in the UK which has taken place through government initiatives since 1997.<sup>230</sup> The legislative framework has progressed from the original limited rights to maternity leave towards a comprehensive legislative framework inclusive of paternity leave, parental leave, shared parental leave, adoption leave, time off to care for dependants, and the right to request flexible working arrangements.<sup>231</sup> Extensive employment protections complement these rights.<sup>232</sup>

The comparative analyses indicate that South African labour laws particularly lag behind in the introduction of adoption leave, paternity leave, and parental leave.<sup>233</sup> The failure of South African labour laws to provide adoption leave is a major gap in the legislative rights of employees.<sup>234</sup> Family responsibility leave is an inadequate right for the support of employees with care responsibilities. Family responsibility leave operates for the duration of only three days per annual leave, is applicable only to qualifying employees, and may be used for a range of purposes including the birth of a child and to care for a sick child.<sup>235</sup> Family responsibility leave cannot operate as a form of paternity leave or parental leave. Compared to the full leave entitlements of paternity leave and parental leave which exist in the UK, family responsibility leave is an unsubstantial and impractical entitlement which does little to aid in the support and accommodation of employees with care responsibilities.<sup>236</sup>

South Africa may follow the lead of the UK in committing itself to the adoption of family-friendly initiatives which will assist in reconciliation of work and care.<sup>237</sup> Although South Africa

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<sup>230</sup> Golyner (note 7 above) 378; Caracciolo di Torella (note 7 above) 318; Mitchell (note 7 above) 123; James (note 119 above) 39; J Conaghan 'Work, family and the discipline of labour law' in J Conaghan & K Rittich (eds) *Labour Law, Work and Family* (2007) 19, 27; J Lewis, T Knijn et al 'Patterns of Development in Work/Family Reconciliation Policies for Parents in France, Germany, the Netherlands, and the UK in the 2000s' (2008) 15(3) *Social Politics: International Studies in Gender, State and Society* 261, 270.

<sup>231</sup> Golyner (note 7 above) 386; Caracciolo di Torella (note 7 above) 323.

<sup>232</sup> Golyner (note 7 above) 386; James (note 122 above) 145; James (note 171 above) 52; Pitt (note 122 above) 47; Painter & Holmes (note 121 above) 182.

<sup>233</sup> Dancaster (note 14 above) 181–191; Dancaster & Baird (note 6 above) 41; Dancaster & Cohen (note 203 above) 37.

<sup>234</sup> Dancaster (note 203 above) 181.

<sup>235</sup> Section 27(2)(a), (b) and (c) of the BCEA; Grogan (note 57 above) 66; Dancaster (note 14 above) 185; Behari (note 71 above) 348.

<sup>236</sup> Field, Bagraim & Rycroft (note 38 above) 39; Behari (note 71 above) 360.

<sup>237</sup> Field, Bagraim & Rycroft (note 38 above) 39; Lewis & Campbell (note 7 above) 21; Dancaster & Baird (note 6 above) 41.

has not ratified any of the ILO Maternity Protection Conventions, or the *Family Responsibilities Convention, 1981*, these international standards do not dictate government commitment towards the reconciliation of work and care.<sup>238</sup> The UK has also neglected to ratify these conventions.<sup>239</sup>

It is submitted that against a background of a different socio-economic and political context, South Africa cannot have been expected to take strides as progressive within the area of work-care reconciliation as those taken by the UK.<sup>240</sup> Work-care reconciliation had fallen within the political agenda of the UK, resulting in its commitment towards family-friendly initiatives.<sup>241</sup> However, there is a need for South African labour law to commit itself and adopt laws which will provide employees with more effective rights and protection to take time off from work to attend to their care responsibilities.<sup>242</sup>

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<sup>238</sup> Ratification of ILO Conventions. <http://www.ilo.org/dyn/normlex>, accessed on 21 November 2016.

<sup>239</sup> Ibid.

<sup>240</sup> Bonthuys (note 15 above) 251; Dancaster & Baird (note 6 above) 22–23; Smit (note 5 above) 20; C Albertyn 'Substantive equality and transformation in South Africa' (2007) 23 *SAJHR* 253, 255, 261.

<sup>241</sup> KL Adams 'A right to request flexible working: What can the UK teach us?' (2014) 1 *Feminism and Legal Theory Project @ 30, Workshop on Labor and Employment* 1, 8; D Wheatley 'Employee satisfaction and use of flexible working arrangements' (2016) *Work, Employment and Society* 1; Golyner (note 7 above) 382.

<sup>242</sup> Field, Bagraim & Rycroft (note 38 above) 30; Dancaster & Baird (note 6 above) 41; Dancaster & Cohen (note 203 above) 33; Dancaster (note 14 above) 178.

## CHAPTER SEVEN RECOMMENDATIONS

### 7.1 Introduction

This thesis has carried out a comparative analysis of international and regional labour standards governing the reconciliation of work and care against the labour laws of South Africa and the UK. The comparative analysis has identified major shortcomings within the labour law regulation of the work–care conflict in South Africa. The increase in care-giving responsibilities of employees across South Africa has necessitated legislative reform in the reconciliation of work and care.<sup>1</sup> This chapter sets out specific recommendations for the introduction of more adequate legislative provisions to provide employees with employment rights and protections to take time off from work to attend to care-giving responsibilities. As such, this chapter calls for amendments to current labour legislation and the introduction of new legislative provisions with the aim of adopting a comprehensive legislative package for the reconciliation of work and care in South Africa.

### 7.2 Maternity leave and protection provisions

It has been concluded by the South African labour court that the purpose of maternity leave is not only to protect the welfare and health of the employee who gave birth, but also to account for the child’s best interests.<sup>2</sup> The length of maternity leave offered to an employee is significant because if the leave is too short, the mother is likely to return to the workplace before she has fully adjusted to motherhood.<sup>3</sup> The duration of four months of maternity leave is shorter than that provided by most developed nations.<sup>4</sup> However, it is submitted that the sixteen-week period of

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<sup>1</sup> CD Field, JJ Bagraim & A Rycroft ‘Parental leave rights: Have fathers been forgotten and does it matter?’ (2012) 36(2) *SALR* 30; L Dancaster & T Cohen ‘Leave for Working Fathers in the SADC Region’ (2015) 36 *ILJ* 2474, 2474; International Labour Conference (60th Session) Report VIII: Report on the Declaration on the Equality of Opportunity and Treatment for Women Workers (Geneva, 1975) 57.

<sup>2</sup> *MIA v State Information Technology Agency (Pty) Ltd* (2015) 6 SA 250 (LC) at par [14]; Dancaster & Cohen (note 1 above) 2491.

<sup>3</sup> As explained in Chapter Two of this thesis. ILO (2014) *Maternity and Paternity at Work: Law and Practice across the World*, International Labour Organisation, Geneva 8 <http://www.ilo.org/maternityprotection>, accessed on 20 January 2015.

<sup>4</sup> *Ibid* 9.

maternity leave offered by the BCEA is adequate.<sup>5</sup> In terms of the UIA, a pregnant contributor is entitled to maternity benefits for the maximum period of 17.32 weeks.<sup>6</sup> Therefore, the length of the maternity leave period corresponds with the maximum period for which maternity benefits may be claimed.

The maternity leave period should not be extended without the extension of the maximum period for which benefits may be claimed in terms of the UIA.<sup>7</sup> This recommendation arises from the consideration that those employees who do not qualify for maternity cash benefits under the UIA may not be able to take the full duration of maternity leave as a result of a lack of financial security over the maternity leave period.<sup>8</sup> Thus, the extension of the maternity leave period will not benefit employees until South African labour law guarantees income security through provisions according a legislative right to paid maternity leave.<sup>9</sup>

It is recommended further that steps should be taken to extend the legislative options which provide employees with care-giving responsibilities with time off from work before the duration of maternity leave may be extended. The duration of maternity leave in South Africa should not be extended without the legislative right providing fathers of newborn babies with the right to time off from work to care for the baby. This recommendation stems from criticisms of the UK labour laws, which provide statutory maternity leave for the duration of 52 weeks and statutory paternity leave for the duration of two weeks.<sup>10</sup> This difference in the leave available to a mother compared to the leave available to a father for the care of a child has been found to strengthen

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<sup>5</sup> O Dupper 'Maternity Protection in South Africa: An international and comparative analysis (Part One)' (2001) 3 *Stell LR* 421, 424; L Dancaster 'State Measures towards Work-Care Integration in South Africa' in Z Mokomane *Work-Family Interface in Sub-Saharan Africa: Challenges and Responses* (2014) 177, 179.

<sup>6</sup> Section 24(4) of the Unemployment Insurance Act 63 of 2001 (UIA); Dancaster (note 5 above) 183; Field, Bagraim & Rycroft (note 1 above) 34; E Huysamen 'Women and Maternity: Is there truly equality in the workplace between men and women, and between women themselves?' in K Malherbe & J Sloth-Nielsen (eds) *Labour Law into the Future: Essays in honour of D'Arcy du Toit* (2012) 46–75, 61.

<sup>7</sup> Dupper (note 5 above) 425; Huysamen (note 6 above) 60; O Dupper 'Maternity Protection' in EML Strydom et al (eds) *Essential Social Security Law* (2006) 155, 162.

<sup>8</sup> *Ibid.*

<sup>9</sup> Dupper (note 5 above) 425; Dupper (note 7 above) 162.

<sup>10</sup> E Caracciolo di Torella 'New labour, new dads – The impact of family friendly legislation on fathers' (2007) 36 *Industrial Law Journal* 318; G James *The Legal Regulation of Pregnancy and Parenting in the Labour Market* (2009) 45; F Deven & P Moss 'Leave arrangements for parents: Overview and future outlook' (2002) 5(3) *Community, Work & Family* 237, 241.



gender inequalities in the workplace.<sup>11</sup> Therefore, the extension of the duration of maternity leave in South African law without the provision of paternity leave or parental leave will merely reinforce the stereotype that women are the primary caregivers within a household and that men are the primary breadwinners, who do not require time off from work to care for a newborn baby.<sup>12</sup>

### 7.2.1 Maternity cash benefits and coverage

The provision of cash benefits over the period of maternity leave is essential for the reconciliation of work and care.<sup>13</sup> Such provision ensures that women are not left vulnerable to financial instabilities over the maternity leave period.<sup>14</sup> Furthermore, it assists women in overcoming the systemic barriers which arise in the workplace from the biological difference between men and women in their capacity to bear children.<sup>15</sup> As such, income security over the period of maternity leave aids the accommodation of pregnancy in the workplace.<sup>16</sup>

The major shortfalls in the coverage of the South African social security system which provide maternity benefits are the lack of guaranteed cash benefits to employees; the failure to provide a minimum period for which maternity benefits may be claimed; the exclusion of employees from the UIA; the limitations in the maternity benefits which may be claimed as a result of the accrual

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<sup>11</sup> Ibid.

<sup>12</sup> Field, Bagraim & Rycroft (note 1 above) 35; R Rapoport et al *Beyond Work-family Balance: Advancing Gender Equity and Workplace Performance* (2002) 25–29; KL Adams ‘The Family Responsibilities Convention reconsidered: The work-family intersection in international law thirty years on’ (2013–2014) 22 *Cardozo Journal of International & Comparative Law* 201, 204, 208; J Conaghan ‘Work, Family and the Discipline of Labour Law’ in J Conaghan & K Rittich (eds) *Labour Law, Work and Family* (2007) 19, 30; A Behari ‘Daddy’s home: The promotion of paternity leave and family responsibilities in the South African workplace’ (2016) 37(2) *Obiter* 346, 348.; B Clarke & B Goldblatt ‘Gender and Family Law’ in E Bonthuys & C Albertyn (eds) *Gender, Law & Justice* (2007) 195, 202.

<sup>13</sup> O Dupper et al ‘The case for increased reform in South African family and maternity benefits’ (2001) 4 *Journal of Law, Democracy & Development* 27–41.

<sup>14</sup> N Smit ‘Maternity’ in MP Olivier et al (eds) *Introduction to Social Security* (2004) 367.

<sup>15</sup> J Kentridge ‘Measure for measure: Weighing up the costs of a feminist standard of equality at work’ (1994) *Acta Juridica* 84; Huysamen (note 5 above) 47–48; E Bonthuys ‘Gender and Work’ in E Bonthuys & C Albertyn (eds) *Gender, Law & Justice* (2007) 273.

<sup>16</sup> R Boswell & B Boswell ‘Motherhood deterred: Access to maternity benefits in South Africa’ (2009) 23(82) *Agenda* 76, 78.

of benefits; and the low rate of income replacement.<sup>17</sup> The comparative analyses carried out by this thesis will propose two alternative approaches to addressing these shortfalls.

Firstly, South Africa could draw from the mixed scheme of contributory and non-contributory funding used in the UK. The legislative structure of the UK provides employees with a statutory right to paid maternity leave. This right is set out in the *Statutory Maternity Pay (General) Regulations 1986*, and the payment is governed by the *Social Security Contributions and Benefits Act 1986*.<sup>18</sup> The statutory maternity pay is paid by the employer as part of the employee's salary (non-contributory, employer liability scheme). The employer then reclaims the amount, which is paid from the employee's National Contributions as a rebate (contributory, social security scheme).<sup>19</sup>

In giving effect to the scheme in accordance with the UK model, South Africa would have to regulate maternity benefits partly through employer liability and partly through the UIA. The employer would have to make contributions to the UIF which could be relied on for payment to employees as maternity cash benefits. The payment of cash benefits would be treated as part of the employee's salary. Employers would then be entitled to recover the amount paid out as maternity cash benefits in a rebate on their income tax and UIF contributions. The rebate would be funded as revenue by the South African Revenue Service. South Africa would have to adopt a separate piece of legislation, setting out the terms, conditions and liabilities attached to maternity cash benefits. This would operate in a manner similar to the *Statutory Maternity Pay (General) Regulations 1986*.<sup>20</sup>

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<sup>17</sup> Dancaster (note 5 above) 184; Dupper (note 5 above) 425; Dupper (note 7 above) 155, 162; O Dupper, M Olivier & A Govindjee 'Extending coverage of the unemployment insurance-system in South Africa' (2010) 21 *Stell LR* 438, 448; ET van Kerken & MP Olivier 'Unemployment insurance' in MP Olivier et al (eds) *Introduction to Social Security* (2004) 415, 436.

<sup>18</sup> Social Security Social Security Contributions and Benefits Act 1992, c. 4 (U.K.) (Social Security Social Security Contributions and Benefits Act); the Statutory Maternity Pay (General) Regulations 1986 (U.K.), SI 1986/1960 (Statutory Maternity Pay Regulations).

<sup>19</sup> M O'Brien & A Koslowski 'United Kingdom Country Note' in A Koslowski, S Blum & P Moss (eds) *International Network of Leave Policies and Research 2016: 12th International Review of Leave Policies and Related Research* (2016) 359 [http://www.leavenetwork.org/lp\\_and\\_r\\_reports/](http://www.leavenetwork.org/lp_and_r_reports/), accessed on 20 December 2016; <https://www.gov.uk/government/publications/maternity-benefits-technical-guidance/maternity-benefits-technical-guidance>, accessed on 2 January 2017.

<sup>20</sup> The Statutory Maternity Pay Regulations.

Another benefit of the UK model of maternity pay is the provision of a maternity allowance to employees who are not eligible for statutory maternity pay.<sup>21</sup> Although there are strict qualifying requirements attached to maternity allowance, the provision widens the coverage of maternity benefits to employees excluded from statutory maternity pay.<sup>22</sup> The *Social Security Contributions and Benefits Act 1986* makes provision for the voluntary payment of contributions towards benefits.<sup>23</sup> Self-employed earners may also contribute to National Insurance in anticipation of building up entitlements to benefits.<sup>24</sup> Therefore, maternity allowance is payable out of the National Insurance Fund to self-employed persons and those persons who contribute voluntarily to National Insurance.<sup>25</sup>

In implementing a form of maternity allowance in South Africa, it is recommended that the UIA be amended to include voluntary participation so as to include those employees who are currently excluded from receiving maternity cash benefits.<sup>26</sup> Maternity cash benefits in the form of a maternity allowance may be made available to contributing employees who do not qualify for the statutory maternity pay form of maternity benefits. Payment in the form of a maternity allowance would be paid directly by the UIF, following the manner in which maternity cash benefits are currently implemented.

By adopting a legislative structure such as that utilised in the UK, South Africa would effectively be able to increase the coverage of maternity benefits to employees. Furthermore, the mixed scheme of contributory and non-contributory funding may provide employees with higher rates of maternity benefits. For instance, in the UK, the rate of statutory maternity pay is income-related for a part of the maternity leave period.<sup>27</sup> However, a maternity allowance is paid at a lower amount of a flat-rate or an income-related rate, depending on whichever is lower.<sup>28</sup>

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<sup>21</sup> A Emir *Selwyn's Law of Employment* (2016) 196; G James 'The Work and Families Act 2006: Legislation to improve choice and flexibility?' (2006) 35(3) *Industrial Law Journal* 272, 273.

<sup>22</sup> James (note 21 above) 273.

<sup>23</sup> Social Security Social Security Contributions and Benefits Act, s 1(2).

<sup>24</sup> *Ibid* s 1(2).

<sup>25</sup> *Ibid* s 35.

<sup>26</sup> Dancaster (note 5 above) 185.

<sup>27</sup> The Statutory Maternity Pay Regulations, reg 6; Emir (note 21 above) 196; James (note 10 above) 41; G Pitt *Employment Law* (2007) 152.

<sup>28</sup> Social Security Contributions and Benefits, sections 35A & 166; M Leon 'Parental, maternity and paternity leave: European legal constructions of unpaid care giving' (2007) 58(3) *Northern Ireland Legal Quarterly* 353, 356;

Considering that the comparative analysis has indicated a need to increase the minimum rate of maternity cash benefits available to employees, the implementation of a mixed scheme of contributory and non-contributory funding may result in an increase of the minimum rate of maternity benefits.<sup>29</sup>

However, one of the downfalls of this social benefit structure is that employers may become reluctant to recruit, retain, or promote women of childbearing age in order to avoid liability for the payment of maternity benefits.<sup>30</sup> Furthermore, minimum international standards dictate that laws should not place a statutory duty on employers to pay maternity benefits.<sup>31</sup> The payment of maternity benefits should thus remain within a social security system.<sup>32</sup> In accordance with these standards, the UIA provides an adequate social security system within which maternity benefits operate. Therefore, the alternative recommendation to address the South African social security system which provides maternity benefits is to retain the current social security system provided by the UIA and make amendments to increase the coverage and the rate of remuneration.<sup>33</sup>

As discussed on Chapter Four of this thesis, the UIAA has made amendments to the provisions of maternity benefits set out in the UIA.<sup>34</sup> However, the provisions of the UIAA are flawed.<sup>35</sup> Firstly, the UIAA limits maternity benefits by setting out a qualifying period of employment as eligibility for maternity benefits without introducing a qualifying period for any other unemployment benefit.<sup>36</sup> It may be argued that the qualifying requirement unfairly discriminates against women.<sup>37</sup> In ensuring the extension of income security to a wide number of employees, it is recommended that the qualifying requirement for maternity benefits set out in the UIAA be

L Addati 'Extending maternity protection to all women: Trends, challenges and opportunities' (2015) 68(1) *International Social Security Review* 88.

<sup>29</sup> Dancaster (note 5 above) 182; Huysamen (note 5 above) 60; OC Dupper 'Maternity' in MP Olivier et al (eds) *Introduction to Social Security* (2004) 399, 405; O Dupper & A Govindjee 'Redesigning the South African Unemployment Insurance Fund: Selected Key Policy and Legal Perspectives' (2011) 22 *Stell LR* 396, 406.

<sup>30</sup> ILO Maternity & Paternity at Work (note 3 above) 22; Dancaster (note 5 above) 184.

<sup>31</sup> ILO Maternity & Paternity at Work (note 3 above) 25; Addati (note 28 above) 80; Dancaster (note 5 above) 184.

<sup>32</sup> Addati (note 28 above) 89.

<sup>33</sup> Dupper, Olivier & Govindjee (note 17 above) 448; Van Kerken & Olivier (note 17 above) 436; Dancaster (note 5 above) 184.

<sup>34</sup> Unemployment Insurance Amendment Act 10 of 2016 (GG 40557 of 19 January 2016) (UIAA).

<sup>35</sup> MP Olivier & A Govindjee 'A critique of the Unemployment Insurance Amendment Bill, 2015' (2015) 18(7) *PER/PELJ* 2739.

<sup>36</sup> *Ibid* 2760; s 9 of the UIAA.

<sup>37</sup> Olivier & Govindjee (note 35 above) 2760.

deleted.<sup>38</sup> It is recommended that the UIA adopt the same definition of the term ‘employee’ as defined in the BCEA.<sup>39</sup> The definition of ‘employee’ in the BCEA is broad and inclusive of atypical forms of employment.<sup>40</sup> In adopting the same definitions of ‘employee’, employees entitled to maternity leave under the BCEA would be entitled to maternity cash benefits under the UIA. This would apply on conditions that the qualifications and eligibility requirements attached to the entitlement are met.

The analysis of the maternity benefits carried out in Chapter Two of this thesis indicated that as a result of the accrual of benefits, an employee might not have contributed to the UIF for a sufficient period of time to allow the employee to claim the maximum entitlement to 17.32 weeks of maternity benefits.<sup>41</sup> A contributor is entitled to one day’s benefit for every completed five days of employment as a contributor. The maximum period for which benefits may be claimed are 238 days in a four-year period immediately preceding the date of the application for benefits.<sup>42</sup> However, an employee may not have contributed to the UIF for a sufficient period of time to allow the employee to claim the maximum entitlement to 17.32 weeks of maternity benefits.<sup>43</sup> It is therefore recommended that the accrual of maternity benefits in the UIA be amended to ensure that the contributor builds enough entitlement to maternity benefits.

The second flaw of the UIAA is that it fails to provide a minimum period for which maternity cash benefits may be claimed.<sup>44</sup> It is recommended that the UIA be amended to introduce a minimum period for which maternity benefits are payable.<sup>45</sup> It is proposed that the UIA introduce a minimum period of twelve weeks, which will comply with the *Social Security*

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<sup>38</sup> Ibid 2747; s 9 of the UIAA.

<sup>39</sup> Bonthuys (note 15 above) 253; MP Olivier & ER Kalula ‘Scope of coverage’ in MP Olivier et al (eds) *Introduction to Social Security* (2004) 123, 132.

<sup>40</sup> Ibid.

<sup>41</sup> Dancaster (note 5 above) 183.

<sup>42</sup> Section 5 of the UIAA; Olivier & Govindjee (note 35 above) 2757.

<sup>43</sup> Dancaster (note 5 above) 183.

<sup>44</sup> Olivier & Govindjee (note 35 above) 2742.

<sup>45</sup> Ibid.

(*Minimum Standards*) Convention, 1952, which states that maternity benefits should be paid for a minimum period of twelve weeks.<sup>46</sup>

Third, the maximum rate of income claimable by a contributor for maternity benefits is limited. The UIAA set out a maximum amount of 66 per cent to be paid for the first 238 days of maternity leave.<sup>47</sup> Thereafter, the payment is prescribed at a flat rate of 20 per cent.<sup>48</sup> According to international and regional standards, the minimum income replacement rate for maternity cash benefits should amount to at least two-thirds of the contributor's previous earnings.<sup>49</sup> It is recommended that the UIA increase the rate of income replacement to which employees are entitled to claim in accordance with international and regional minimum standards.<sup>50</sup> However, South Africa is a developing country. It is not economically able to provide maternity cash benefits equal to the contributor's full remuneration over the entire period of maternity leave.<sup>51</sup> Nevertheless, the 2014 ILO report *Maternity and Paternity at Work: Law and Practice across the World* has found that adequate maternity protection is affordable in the poorest of countries.<sup>52</sup> In light of this finding, it is recommended that the UIA increases the rate of income replacement to a flat-rate of 66 per cent of any contributor's earnings as a minimum throughout the period for which maternity benefits may be claimed. According to this recommendation, even after the first 238 days of benefits, the contributor should be entitled to income replacement at a minimum of 66 per cent of her previous earnings.

Finally, while the UIAA states that the payment of maternity benefits may not affect the payment of unemployment insurance benefits, the wording of this provision fails to clarify whether or not maternity benefits would be reduced should an employee have previously claimed another

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<sup>46</sup> Ibid 2743; International Labour Conference (35<sup>th</sup> Session) Convention concerning Minimum Standards of Social Security (Geneva, adopted 28 June 1952, entry into force 27 April 1955) (Social Security (Minimum Standards) Convention, 1952) art 52.

<sup>47</sup> Section 4 of the UIAA.

<sup>48</sup> Olivier & Govindjee (note 35 above) 2744.

<sup>49</sup> International Labour Conference (88<sup>th</sup> Session) Convention concerning the revision of the Maternity Protection Convention (Revised), 1952 (Geneva, adopted 15 June 2000, entry into force: 7 Feb 2002) (Maternity Protection Convention, 2000) art 6(3); Code on Social Security in the SADC (2008) (SADC Code) art 8.3; Dancaster (note 5 above) 182; Dupper (note 29 above) 405; Dupper & Govindjee (note 29 above) 406.

<sup>50</sup> Maternity Protection Convention, 2000 (note 49 above) art 6(3); SADC Code (note 49 above) art 8.3; Dancaster (note 5 above) 182; Dupper (note 29 above) 405; Dupper & Govindjee (note 29 above) 406.

<sup>51</sup> Huysamen (note 5 above) 74.

<sup>52</sup> ILO *Maternity & Paternity at Work* (note 3 above) 116.

category of unemployment benefits.<sup>53</sup> Therefore, it is recommended that section 5(b) of the UIAA be reworded to state expressly that the payment of any unemployment insurance benefit in terms of the UIA will not deplete the payment of maternity benefits.<sup>54</sup> Such clarification is necessary to ensure that maternity benefits are not placed in competition with other unemployment insurance benefits.<sup>55</sup>

It is proposed that the UIA should be extended to provide access to maternity benefits through the inclusion of a system of voluntary participation.<sup>56</sup> Voluntary participation would allow excluded employees to contribute to the UIF, and build entitlements to benefits in terms of the UIA. In the UK, the *Social Security Contributions and Benefits Act 1986* makes provision for contributions payable by ‘employed earners and others voluntarily with a view to providing entitlements to benefit, or making up entitlement’.<sup>57</sup> Similarly, it provides for self-employed persons to contribute a weekly, flat-rate payment.<sup>58</sup>

These recommendations are aimed at correcting the deficiencies which exist in the provision of maternity cash benefits to employees in South Africa. While international and regional minimum standards direct these proposals, the laws of the UK have also been relied on as a model upon which to base the South African social security structure for the provision of maternity cash benefits. The recommendations are also aimed at ensuring the protection of the employee by preventing the premature return to work for the reason of receiving a full salary, before she is physically and emotionally prepared to leave her baby and return to her workplace responsibilities.<sup>59</sup>

## 7.2.2 Maternity and surrogacy agreements

The failure of South African labour law to make provision for the availability of leave entitlements for the birth of a baby born out of surrogacy led the court in *MIA v State*

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<sup>53</sup> Olivier & Govindjee (note 35 above) 2761.

<sup>54</sup> Section 5(b) of the UIAA; Olivier & Govindjee (note 35 above) 2761.

<sup>55</sup> Dancaster (note 5 above) 184.

<sup>56</sup> Ibid 185.

<sup>57</sup> Social Security Contributions and Benefits Act, s 1(2).

<sup>58</sup> Ibid.

<sup>59</sup> Dupper (note 29 above) 408; Dancaster (note 5 above) 185.

*Information Technology Agency (Pty) Ltd* to award ‘maternity’ leave to a male employee expecting a baby out of a surrogacy agreement.<sup>60</sup> The decision was based on the consideration that the purpose of maternity leave is to account for the best interests of the child.<sup>61</sup> This contention is supported by section 28 of the Constitution, as well as the Children’s Act 38 of 2005.<sup>62</sup> The decision was also based on the recognition of and support for non-traditional family structures such as same-sex unions, through which the gendered stereotype that women are the primary family carers can no longer exist.<sup>63</sup> However, the judgment gave rise to a number of practical uncertainties, as set out in Chapter Four of this thesis. In light of the anomalous decision of the court in *MIA* to award ‘maternity’ leave to a male employee expecting a baby out of a surrogacy agreement, it is clear that South African labour law requires a mechanism to provide leave entitlements for the birth of a baby born out of surrogacy.

In the UK, employees who become new parents through surrogacy are entitled to adoption leave and pay.<sup>64</sup> The co-parent or partner to the parent is entitled to paternity leave and pay, parental leave or shared parental leave.<sup>65</sup> The UK entitlement to adoption leave and pay operates in the same manner as the entitlement to maternity leave and pay, and is applicable only to the child’s adopter.<sup>66</sup> Drawing from the UK model, it is recommended that the BCEA be amended to include a statutory right to surrogacy leave.

While South African law does not provide for adoption leave and pay, a recommendation will be made below for the introduction of adoption leave and pay. Adoption leave and pay should essentially follow the same structure as maternity leave and pay. Therefore, it is recommended that the BCEA provides the right to surrogacy leave and pay equivalent to the right to maternity leave and pay currently provided by South African labour laws. An employee who becomes a

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<sup>60</sup> *MIA* (note 2 above); *Dancaster & Cohen* (note 1 above) 2490; *Behari* (note 12 above) 353.

<sup>61</sup> *MIA* (note 2 above) at par [14]; *Dancaster & Cohen* (note 1 above) 2491; *Behari* (note 12 above) 354.

<sup>62</sup> *MIA* (note 2 above) at par [14]; *Behari* (note 12 above) 354.

<sup>63</sup> A Bauling ‘Maternity, paternity and parental leave and the best interests of the child: *MIA v State Information Technology Agency (Pty) Ltd* [2015] JOL 33060 (LC)’ (2016) 37(1) *Obiter* 158, 163; *Behari* (note 12 above) 355.

<sup>64</sup> Children and Families Act 2014, c. 6 (U.K.) (Children and Families Act), s 122; <https://www.gov.uk/rights-for-surrogate-mothers>, accessed on 4 October 2016; <http://www.acas.org.uk/surrogacy>, accessed on 4 October 2016.

<sup>65</sup> <https://www.gov.uk/rights-for-surrogate-mothers>, accessed on 4 October 2016; <http://www.acas.org.uk/surrogacy>, accessed on 4 October 2016.

<sup>66</sup> Employment Rights Act 1996, c. 18 (U.K.) (Employment Rights Act), ss 75A & 75B; the Paternity and Adoption Leave Regulations 2002 (U.K.), SI 2002/2788 (Paternity and Adoption Leave Regulations), reg 15.



new parent to a baby born out of a surrogacy agreement in accordance with the terms of the Children's Act 38 of 2005 should be entitled to four consecutive months' surrogacy leave afforded by the BCEA. The entitlement should include no qualifying requirements, with the exception of a notice period and evidence of the surrogacy agreement.

The employee must notify the employer in writing of the date on which the employee intends to commence the surrogacy leave and of the date on which the employee intends to return to work after the surrogacy leave. The employee must provide the employer with evidence of a court order confirming the surrogacy agreement, in accordance with section 295 of the Children's Act 38 of 2005.<sup>67</sup> The employee who takes surrogacy leave should be entitled to the same employment rights and protections as an employee who takes maternity leave.

Further recommendations will be made below for the introduction of paternity leave and parental leave, which should be made available to the co-parent or partner of the parent to a child born out of surrogacy. Surrogacy pay will have to be made available to the employee on surrogacy leave in the same manner that maternity pay is made available to the employee on maternity leave. This will require amendments to the UIA to include surrogacy benefits.

### **7.2.3 Time off from work to attend antenatal appointments**

It is recommended that the BCEA should be amended to introduce a right to take time off from work to attend antenatal appointments. This recommendation is aimed at the accommodation of pregnancy at the workplace. As explained in Chapter One of this thesis, workplace policies and labour laws must account for and support the needs of women's reproductive capacities.<sup>68</sup> This is demanded by principles of equality.<sup>69</sup> Pregnancy may involve numerous health concerns which may be aggravated by the stress of employment security.<sup>70</sup> Therefore, the right to time off from

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<sup>67</sup> As set out by Children and Families Act.

<sup>68</sup> Boswell & Boswell (note 16 above) 78.

<sup>69</sup> Kentridge (note 15 above) 89; *Brown v Stockton-on-Tees Borough Council* [1988] IRLR 263; *Botha v A Import Export International CC* (1999) 20 ILJ 2580 (LC) 2584 at par [20]; *Mashava v Cuzen & Woods Attorneys* (2000) 21 ILJ 402 (LC) 405 at par [14].

<sup>69</sup> Kentridge (note 15 above) 89.

<sup>70</sup> Huysamen (note 5 above) 47.

work to attend antenatal appointments should be considered as a supportive mechanism aimed at accommodating pregnancy in the workplace.

This recommendation is drawn from the UK model of time off from work to attend antenatal appointments.<sup>71</sup> The provision should state that an employee who is pregnant and has, on the advice of a registered medical practitioner, registered midwife, or registered nurse, made an appointment to receive antenatal care, is entitled to be permitted by her employer to take time off during working hours to attend the appointment.<sup>72</sup>

Accordingly, there should be no eligibility requirements for the right to time off to attend antenatal care appointments. The employee should be entitled to time off from work for antenatal care irrespective of the number of hours or days worked for the employer, and irrespective of whether she is a permanent or temporary worker. Upon request from her employer, the employee should be required to produce a certificate stating that she is pregnant and an appointment card or some other document showing that the appointment has been made.<sup>73</sup> The employee should be entitled to be paid for her period of absence at the appropriate hourly rate.<sup>74</sup>

#### **7.2.4 Employment protection and non-discrimination**

The employment rights and protections applicable to pregnant employees are fragmented.<sup>75</sup> The LRA provides protection against the dismissal of pregnant employees and employees with family responsibilities.<sup>76</sup> The EEA also provides protection against the discrimination of pregnant employees and employees with family responsibilities.<sup>77</sup> These rights and protections are explained and elaborated upon through a plethora of case law involving individual employee

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<sup>71</sup> Employment Rights Act, s 55(1); Emir (note 21 above) 185.

<sup>72</sup> As set out by the Employment Rights Act, s 55(1).

<sup>73</sup> Ibid s 55(2).

<sup>74</sup> Ibid s 56(1).

<sup>75</sup> O Dupper 'Maternity Protection in South Africa: An international and comparative analysis (Part Two)' (2002) *Stell LR* 83, 96.

<sup>76</sup> Section 186(1)(c), s 187(1)(e) of the LRA; Grogan *Workplace Law* (2009) 189; Huysamen (note 5 above) 58.

<sup>77</sup> Section 186(1)(c), s187(1)(e)–(f) of the Basic Conditions of Employment Act 75 of 1997 (BCEA); s 6 of the Employment Equity Act 55 of 1998 (EEA).

litigation.<sup>78</sup> It is recommended that that these employment rights and protections be harmonised and simplified so as to prevent misinterpretations and workplace conflicts.<sup>79</sup>

There is a need to be cognisant of the impact of challenges against automatically unfair dismissals on the grounds of pregnancy. Pregnancy is recognised as a time when women are most vulnerable at the workplace.<sup>80</sup> Where an employee brings a challenge of automatically unfair dismissal on the grounds of pregnancy, the employee must prove that the pregnancy, intended pregnancy, or reasons related to pregnancy, is causally linked to the dismissal.<sup>81</sup> This involves proving factual and legal causation.<sup>82</sup> Case law has indicated that the employee must show that the pregnancy is the most probable cause of dismissal.<sup>83</sup>

While the court in *Ismail v B & B t/a Harvey World Travel Northcliffe*<sup>84</sup> stated that suspicion alone on the part of the employer cannot prove that pregnancy is the dominant reason for a dismissal, case law has failed to highlight the type of proof necessary to show that the employer had in fact been aware of the pregnancy at the time that the decision to dismiss the employee was taken.<sup>85</sup> It is recommended that cases involving allegations of dismissal for reasons of pregnancy in terms of section 187(1)(e) of the LRA implement a standard of proof which provides greater legal protection to pregnant employees. Accordingly, it is proposed that the standard of proof in such cases should require consideration of essential factors relating to the consequences of dismissal for pregnant employees.<sup>86</sup> Such factors should include the impact of the dismissal on

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<sup>78</sup> L Dancaster & T Cohen 'Workers with family responsibilities: a comparative analysis to advocate for the legal right to request flexible working arrangements in South Africa' (2010) 34(1) *SALJ* 30, 32.

<sup>79</sup> James (note 10 above) 116.

<sup>80</sup> B Grant, N Whitear-Nel & A Behari 'Protecting the unwed woman against automatically unfair dismissals for reasons relating to pregnancy: A Discussion of Memela & another v Ekhamanzi Springs (Pty) Ltd (2012) 33 *ILJ* 2911 (LC)' (2015) 36 *ILJ* 106, 118.

<sup>81</sup> *Ibid* 111; Grogan *Dismissal* (2014) 133.

<sup>82</sup> *SA Chemical Workers Union & others v Afrox Ltd* (1999) 20 *ILJ* 1718 (LAC) 1726; *Wardlaw v Supreme Mouldings (Pty) Ltd* (2004) 25 *ILJ* 1094 (LC) 1100 at par [10.7].

<sup>83</sup> *SA Chemical Workers* (note 82 above) 1726; *Kroukram v SA Airlink (Pty) Ltd* (2005) 26 *ILJ* 2153 (LAC) at par [103]; Grant, Whitear-Nel & Behari (note 80 above) 111.

<sup>84</sup> *Ismail v B & B t/a Harvey World Travel Northcliffe* (2014) 35 *ILJ* 696 (LC).

<sup>85</sup> *Ibid* 708 at par [39].

<sup>86</sup> James (note 10 above) 117–119.

the employee in light of her pregnancy; and the implications of reinstating the employee in light of the knowledge of her pregnancy.<sup>87</sup>

It is further recommended that section 187(1)(f) of the LRA be amended to expressly include ‘pregnancy’ as an arbitrary ground of unfair discrimination, in keeping with the protection extended by section 6 of the EEA.<sup>88</sup> Additionally, regard must be had to the vulnerabilities faced by pregnant employees who are dismissed for inherent job requirements.<sup>89</sup> Inherent job requirements may act as a specific defence to the allegation of a discriminatory dismissal.<sup>90</sup> It is recommended that alternative measures be considered and adopted in instances where an employee who is to be dismissed for inherent job requirements is pregnant at the time that the decision to dismiss is taken.

Such alternative measures may be drawn from the UK laws, which provide mechanisms to ensure the employment of employees who return from maternity leave and cannot continue to be employed in the position which the employees occupied prior to maternity leave.<sup>91</sup> If the employee cannot continue employment for any reason other than redundancy, the employee must be offered another job that is suitable and appropriate in the circumstances.<sup>92</sup> Where the employee becomes redundant while on maternity leave and it is not practicable for the employer to continue to employ her under her existing contract of employment, the employer must offer the employee a suitable available vacancy.<sup>93</sup>

It is therefore recommended that provisions should be adopted to provide that where a pregnant employee can no longer continue employment for reasons of inherent job requirements, the employer must offer the employee alternative employment that is suitable and appropriate in the

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<sup>87</sup> Ibid.

<sup>88</sup> Dupper (note 75 above) 84.

<sup>89</sup> Ibid.

<sup>90</sup> Section 187(2)(a) of the LRA.

<sup>91</sup> Emir (note 21 above) 192; Pitt (note 27 above) 155.

<sup>92</sup> The Maternity and Parental Leave etc. (Terms and Conditions of Employment) Regulations 1999 (U.K.), SI 1999/3312 (Maternity and Parental Leave Regulations), reg 20(7); RW Painter & AEM Holmes *Cases and Materials on Employment Law* (2015) 547.

<sup>93</sup> Maternity and Parental Leave Regulations, regs 10, 18(4).

circumstances. This will protect the employee from the vulnerability of becoming unemployed while pregnant.

With the introduction of alternative entitlements to time off from work for the purposes of care, labour laws will have to be amended to introduce equivalent employment rights and protections.<sup>94</sup> These rights and protections must encompass all legislative rights to time off from work, such as time off from work to attend antenatal appointments; paternity leave, parental leave, adoption leave or flexible working arrangements. Accordingly, employees should be provided with employment security, as well as options to legally challenge employers in the instance of conflict.<sup>95</sup> These provisions may be drawn from the current provisions of the LRA and EEA which protect pregnant employees against dismissal and discrimination.

### 7.3 Paternity leave

It is recommended that South Africa introduce a statutory right to paternity leave. The introduction of paternity leave as a statutory right will promote gender equality in the workplace,<sup>96</sup> promote fatherhood,<sup>97</sup> encourage shared parental responsibilities,<sup>98</sup> account for the best interests of the child,<sup>99</sup> and ensure compliance with international and regional minimum labour standards.<sup>100</sup> Accordingly, the right to use family responsibility leave as time off from work for the birth of a baby should be removed, and a separate right to paternity leave for the birth of a baby or the adoption of a new child should be introduced.<sup>101</sup>

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<sup>94</sup> James (note 10 above) 115.

<sup>95</sup> Ibid.

<sup>96</sup> R Morrell 'Fathers, fatherhood and masculinity in South Africa' in L Richter & R Morrell (eds) *Baba: Men and Fatherhood in South Africa* (2006) 13, 18–21; Dancaster & Cohen (note 1 above) 2474; ILO Maternity & Paternity at Work (note 3 above) 52, 61.

<sup>97</sup> L Richter 'The importance of fathering for children' in L Richter and R Morrell (eds) *Baba: Men and Fatherhood in South Africa* (2006) 53, 58.

<sup>98</sup> Behari (note 12 above) 360.

<sup>99</sup> *MIA* (note 2 above) [14]; Dancaster & Cohen (note 1 above) 2491.

<sup>100</sup> Field, Bagraim & Rycroft (note 1 above) 37; Behari (note 12 above) 357; Dancaster (note 5 above) 187; Convention on the Elimination of all forms of Discrimination against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW) art 16(1)(d); A Louw 'The constitutionality of a biological father's recognition as a parent' (2010) 13(3) *PER/PELJ* 156, 156; L Dancaster & M Baird 'Workers with care responsibilities: Is work-family integration adequately addressed in South African labour law?' (2008) 29 *ILJ* 22, 35.

<sup>101</sup> Behari (note 12 above) 360; Dancaster (note 5 above) 184.

It is recommended that the right to paternity leave provide employees with the entitlement to a choice of one or two consecutive weeks of paternity leave set out by the BCEA. This duration would provide employees with choice and flexibility regarding the duration of their leave entitlement. This recommendation conforms to the UK provisions of paternity leave.<sup>102</sup> The right to paternity leave should extend to male ‘employees’ within the definition of the BCEA.<sup>103</sup> It is recommended that the leave commence on the day the child is born or the day that the adoption order is granted.<sup>104</sup>

The right should expressly state that the leave may be taken for the purpose of caring for a child.<sup>105</sup> The provision should set out that in order to claim paternity leave, the employee must be the father of the child; or if he is not the father of the child, he must be married to or the partner of the mother of the child. If the employee is the father of the child, he must have or expect to have ‘parental responsibilities and right’ over the child as set out in section 18 of the Children’s Act 38 of 2005.<sup>106</sup> In the instance of claiming paternity leave for the adoption of a child, the employee must be either married to or the partner of the child’s adopter, and must have or expect to have the main responsibility for the upbringing of the adopted child together with the child’s adopter.<sup>107</sup>

Regarding eligibility requirements, the provision may retain the qualifying condition of family responsibility leave. As such, the eligibility requirements will require that the employee must have been employed for longer than four months and must work for that employer for at least four days a week.<sup>108</sup> These eligibility requirements will be aimed at ensuring that the right to

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<sup>102</sup> Employment Rights Act, s 80; the Paternity and Adoption Leave Regulations, reg 5(1); James (note 10 above) 43; Emir (note 21 above) 200.

<sup>103</sup> Section 19(1) of the BCEA.

<sup>104</sup> Clause 3 of *Labour Laws Amendment Bill* [PMB6 – 2015] General Notice 1174 of 2015 GG 39445 of 25 November 2015.

<sup>105</sup> The Paternity and Adoption Leave Regulations, reg 4(1).

<sup>106</sup> Section 18(2) of the Children’s Act 38 of 2005 states that ‘the parental rights and responsibilities that a person may have in respect of a child, include the responsibility and the right– (a) to care for the child; (b) to maintain contact of the child; (c) to act as guardian of the child; and (d) to contribute to the maintenance of the child’.

<sup>107</sup> As set out in the Paternity and Adoption Leave Regulations, reg 8(2)(b) and (c).

<sup>108</sup> Section 27(1)(a) and (b) of the BCEA; Grogan *Workplace Law* (2014) 66; Dancaster & Cohen (note 1 above) 2489; Behari (note 12 above) 348.

paternity leave is not abused by employees.<sup>109</sup> In the case of adoption, the provision must state that the adopted child is under the age of eighteen in order for the employee to claim paternity leave.<sup>110</sup> In the instance of claiming paternity leave for the adoption of a child, the eligibility requirement that the employee must have been employed for longer than four months and must work for that employer for at least four days a week will accordingly apply.<sup>111</sup>

In order to take paternity leave, the employee must give his employer notice of his intention to take leave. The employee, if literate, must inform the employer in writing of the dates on which he intends to begin his paternity leave and return to work after his paternity leave.<sup>112</sup> The notifications of the intention to begin paternity leave and return to work must be given within four weeks of the date that the employee intends to commence paternity leave or, if it is not reasonably practicable to do so, as soon as is reasonably practicable.<sup>113</sup>

In the case of adoption, the provision should state that the employee must give notice of the date on which the adopter was notified of having been matched with the child; the date on which the child is expected to be placed with the adopter; the length of the period of leave that the employee has chosen to take; and the date on which the period of leave should begin.<sup>114</sup> The notifications of the intention to begin paternity leave for adoption and return to work must be given within four weeks of the date that the employee intends to commence paternity leave or, if it is not reasonably practicable to do so, as soon as is reasonably practicable.<sup>115</sup>

Cash benefits over the period of paternity leave are essential. Research has indicated lower take up rates for unpaid paternity leave or lowly paid paternity leave. Accordingly, employees would be more likely to rely on paternity leave if it is accompanied by a right to statutory paternity pay.<sup>116</sup> It is therefore recommended that a paternity cash benefit scheme should be adopted and

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<sup>109</sup> ILO Maternity & Paternity at Work (note 3 above) 44.

<sup>110</sup> As set out in the Paternity and Adoption Leave Regulations, reg 8(2)(b) and (c).

<sup>111</sup> Section 27(1)(a) and (b) of the BCEA; Grogan *Workplace Law* (2014) 66; Dancaster & Cohen (note 1 above) 2489; Behari (note 12 above) 348.

<sup>112</sup> As currently provided for in the instance of maternity leave in s 25(5)(a) and (b) of the BCEA.

<sup>113</sup> As currently provided for in the instance of maternity leave in s 25(6)(a) and (b) of the BCEA.

<sup>114</sup> As set out in the Paternity and Adoption Leave Regulations, reg 10(1).

<sup>115</sup> As currently provided for in the instance of maternity leave in s 25(6)(a) and (b) of the BCEA.

<sup>116</sup> Caracciolo di Torella (note 10 above) 324; James (note 10 above) 44; Dancaster (note 5 above) 186.

should operate in the same manner as that of maternity cash benefits.<sup>117</sup> The introduction of paternity leave will require amendment to the LRA and the EEA in order to provide employment protection to an employee on paternity leave. Accordingly, the employment protection provisions should ensure that the employee is entitled to return to the job in which he was employed before his absence. The employee must also be protected against unfair dismissal and unfair discrimination on the basis of paternity.<sup>118</sup> Accordingly, section 187(1)(c) of the LRA should be amended to ensure that the refusal to allow an employee to resume work after he has taken paternity leave amounts to a dismissal. Section 187(1)(f) of the LRA must be amended to state that a dismissal is automatically unfair if an employer unfairly discriminates against an employee on grounds which include paternity.<sup>119</sup> In line with this recommendation, it is submitted that section 6(1) of the EEA be amended to provide that no person may unfairly discriminate, directly or indirectly, against any employee in any employment policy or practice, on grounds of paternity.<sup>120</sup>

#### 7.4 Parental leave

Non-transferable parental leave allows both the mother and the father of the child to exercise a separate and individual entitlement to parental leave.<sup>121</sup> This encourages the sharing of parental responsibilities between parents. As such, parental leave may reduce the stigmatised notion that women are the primary caregivers, and may effectively inhibit gender inequalities in the workplace based on care-giving responsibilities.<sup>122</sup> The extension of the leave provision as an individual entitlement to fathers will also assist in the promotion of fatherhood.<sup>123</sup>

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<sup>117</sup> Dancaster (note 5 above) 186.

<sup>118</sup> This wording is set out in the Paternity and Adoption Leave Regulations, reg 28.

<sup>119</sup> Section 187(1)(f) reads: 'A *dismissal* is automatically unfair if the employer, in dismissing the *employee*, acts contrary to s 5 or, if the reason for the *dismissal* is—  
(f) that the employer unfairly discriminated against an *employee*, directly or indirectly, on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility'.

<sup>120</sup> L Dancaster & T Cohen 'Family responsibility discrimination litigation – a non-starter?' (2009) 2 *Stell LR* 221, 223.

<sup>121</sup> Huysamen (note 5 above) 73.

<sup>122</sup> L Haas 'Parental leave and gender equality: Lessons from the European Union' (2003) 20(1) *Review of Policy Research* 89, 109.

<sup>123</sup> R Morrell & L Richter 'Introduction' in L Richter & R Morrell (eds) *Baba: Men and Fatherhood in South Africa* (2006) 1, 3.



It is recommended that the right to parental leave be introduced to the legislative package of labour laws regulating the work–care conflict as an individual and non-transferable entitlement which exists in addition to maternity leave, paternity leave, and adoption leave. It is submitted that while paid parental leave in addition to paid maternity and paternity leave is advocated, this may not be economically practicable. Therefore, the introduction of unpaid parental leave is encouraged as an essential element of the legislative package of labour laws regulating the work–care conflict.

The UK provides employees with eighteen weeks of unpaid statutory parental leave,<sup>124</sup> and international standards provide that the length of and conditions attached to the leave may be determined by national policy or practice.<sup>125</sup> However, the draft Labour Laws Amendment Bill (LLAB) seeks to introduce at least ten consecutive days of parental leave, to commence on the day the child is born or the day that the adoption order is granted.<sup>126</sup> In light of these considerations and the recommendation to adopt a right to parental leave in addition to maternity leave and paternity leave entitlements, it is recommended that the BCEA be amended to provide employees with two consecutive weeks of non-transferable parental leave.

In order to conform to the *Maternity Protection Recommendation No. 191 (2000)*, the parental leave should commence immediately following the expiry of the maternity leave period.<sup>127</sup> The provision should state that parental leave may be claimed for the purpose of caring for a child.<sup>128</sup> The right to take parental leave should endure from the time the child is born until the child reaches the age of eighteen years.<sup>129</sup> It is submitted that the right to parental leave should extend to ‘employees’ within the definition of the BCEA.<sup>130</sup> It is recommended that in order to be eligible for parental leave, the employee must have been continuously employed for a period of

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<sup>124</sup> The Maternity and Parental Leave Regulations, reg 14; European Union (Parental Leave) Regulations 2013, SI 81/2013, reg 4A; Emir (note 21 above) 192.

<sup>125</sup> International Labour Conference (67th Session) Recommendation concerning Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities (Geneva, adopted 23 June 1981) (Family Responsibilities Recommendation, 1981) art 22(1)–(3).

<sup>126</sup> Clause 3 of *Labour Laws Amendment Bill* [PMB6 – 2015] General Notice 1174 of 2015 GG 39445 of 25 November 2015; Haas (note 122 above) 110.

<sup>127</sup> Dancaster (note 5 above) 187.

<sup>128</sup> The Maternity and Parental Leave Regulations, reg 13.

<sup>129</sup> As set out in the Maternity and Parental Leave Regulations, reg 15.

<sup>130</sup> Section 19(1) of the BCEA.

four months, and must work for that employer for at least four days a week.<sup>131</sup> As with the paternity leave recommendation, the eligibility requirements will be aimed at ensuring that the right to paternity leave is not abused by employees.<sup>132</sup>

The provision must state that an employee who claims parental leave must be responsible for the care of the child. An employee is responsible for the care of a child if he or she has ‘parental rights and responsibilities’ over the child as set out in section 18 of the Children’s Act 38 of 2005.<sup>133</sup> In order to take parental leave, the employee must give the employer notice of his or her intention to take leave. The employee, if literate, must inform the employer in writing of the dates on which he intends to begin the parental leave and return to work after the parental leave.<sup>134</sup> The notifications of the intention to begin parental leave and return to work must be given within four weeks of the date that the employee intends to commence parental leave or, if it is not reasonably practicable to do so, as soon as is reasonably practicable.<sup>135</sup>

The introduction of parental leave will require amendments to the LRA and the EEA to provide employment protection to an employee exercising rights to parental leave. Accordingly, the employment protection provisions should ensure that the employee is entitled to return to the job in which he was employed before his absence. The employee must also be protected against unfair dismissal and unfair discrimination on the basis that he took or sought to take parental leave.<sup>136</sup> Accordingly, section 187(1)(c) of the LRA should be amended to ensure that the refusal to allow an employee to resume work after he has taken parental leave amounts to a dismissal.

Section 187(1)(f) of the LRA must be amended to state that a dismissal is automatically unfair if an employer unfairly discriminates against an employee on grounds which include that the

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<sup>131</sup> As envisioned by s 27(1)(a) and (b) of the BCEA with regard to family responsibility leave; Grogan (note 111 above) 66; Dancaster & Cohen (note 1 above) 2489; Behari (note 12 above) 348.

<sup>132</sup> ILO Maternity & Paternity at Work (note 3 above) 44.

<sup>133</sup> Section 18(2) of the Children’s Act 38 of 2005 states that ‘the parental rights and responsibilities that a person may have in respect of a child, include the responsibility and the right– (a) to care for the child; (b) to maintain contact of the child; (c) to act as guardian of the child; and (d) to contribute to the maintenance of the child’.

<sup>134</sup> As currently provided for in the instance of maternity leave in s 25(5)(a) and (b) of the BCEA.

<sup>135</sup> As currently provided for in the instance of maternity leave in s 25(6)(a) and (b) of the BCEA.

<sup>136</sup> This wording is set out in the Paternity and Adoption Leave Regulations, reg 28.

employee took or sought to take parental leave.<sup>137</sup> In line with this recommendation, it is submitted that section 6(1) of the EEA be amended to provide that no person may unfairly discriminate, directly or indirectly, against any employee in any employment policy or practice, on grounds which include that the employee took or sought to take parental leave.<sup>138</sup>

## 7.5 Adoption leave

One of the main deficiencies of South African labour laws regulating the work–care conflict is the failure to provide employees with a right to adoption leave.<sup>139</sup> The failure to provide a statutory right to adoption leave is particularly anomalous since the UIA makes provision for adoption benefits which are available to qualifying adoptive parents.<sup>140</sup> In light of this deficiency, it is recommended that the BCEA introduces a right to adoption leave which will be available to qualifying adoptive parents. It is recommended that the entitlement to adoption leave provide equal rights to the adoptive parents as the right to maternity leave provides to a biological mother of a newborn baby.

The reason for this recommendation is that the objective of maternity leave in South Africa is not intended only to protect the welfare and health of the employee who gave birth, but also to account for the child’s best interests.<sup>141</sup> Therefore, adoption leave should be provided for adoptive parents to take time off from work to care for their adopted children as this is equally in the best interests of the child.<sup>142</sup> It is recommended that the right to adoption leave should not be attached to any limitation based on the age of the adopted child.<sup>143</sup> The leave should be made available to the adoptive parent of an adopted child of any age, in accordance with the Children’s Act 38 of 2005.<sup>144</sup>

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<sup>137</sup> Section 187(1)(f) reads: ‘A *dismissal* is automatically unfair if the employer, in dismissing the *employee*, acts contrary to s 5 or, if the reason for the *dismissal* is–

(f) that the employer unfairly discriminated against an *employee*, directly or indirectly, on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility.’

<sup>138</sup> Dancaster & Cohen (note 120) 223.

<sup>139</sup> Huysamen (note 5 above) 67–72; Dancaster (note 5 above) 180.

<sup>140</sup> Field, Bagraim & Rycroft (note 1 above) 34; Dancaster (note 5 above) 180.

<sup>141</sup> *MIA* (note 2 above) at par [14]; Dancaster & Cohen (note 1 above) 2491.

<sup>142</sup> Behari (note 12 above) 355.

<sup>143</sup> Dancaster (note 5 above) 182.

<sup>144</sup> Section 231 of the Children’s Act 38 of 2005.

According to the Children's Act 38 of 2005, a child may be adopted jointly by a husband and wife; partners in a permanent domestic life-partnership; or persons sharing a common household and forming a permanent family unit.<sup>145</sup> A child may be adopted by a single parent who is a widowed, divorced, or unmarried person; by a married person whose spouse is the parent of the child or by a person whose permanent domestic life-partner is the parent of the child; by the biological father of a child born out of wedlock; or by the foster parent of the child.<sup>146</sup> It is recommended that where two people have been matched jointly as the adoptive parents, the couple must decide which of them will be considered the primary adopter for the purposes of the right to adoption leave.<sup>147</sup> Therefore, only the primary adopter may claim adoption leave. In line with these recommendations, the spouse or partner may claim paternity leave and pay, or parental leave.

The entitlement should include no qualifying requirements, with the exception of a notice period and evidence of the adoption. It is recommended that the employee, if literate, must inform the employer in writing of the dates on which the child is expected to be placed for adoption and the employee intends to begin the adoption leave, as well as the date the employee intends to return to work after the adoption leave.<sup>148</sup> The notifications of the intention to begin adoption leave and return to work must be given within four weeks of the date that the employee intends to commence adoption leave, or, if it is not reasonably practicable to do so, as soon as is reasonably practicable.<sup>149</sup> In order to claim the leave, the employee should also provide his employer with evidence, in the form of one or more documents issued for the adoption in accordance with the Children's Act 38 of 2005, at the employer's request.<sup>150</sup>

Provision must be made for instances where the employee has begun a period of adoption leave in respect of the child, and is subsequently notified that the placement will not be made, or if the child dies or is returned to the agency.<sup>151</sup> In such circumstances, it is suggested that the adoption

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<sup>145</sup> *Ibid.*

<sup>146</sup> *Ibid.*

<sup>147</sup> As set out in the Paternity and Adoption Leave Regulations, reg 2.

<sup>148</sup> As currently provided for in the instance of maternity leave in s 25(5)(a) and (b) of the BCEA.

<sup>149</sup> As currently provided for in the instance of maternity leave in s 25(6)(a) and (b) of the BCEA.

<sup>150</sup> As set out in the Paternity and Adoption Leave Regulations, reg 17(3).

<sup>151</sup> *Ibid* reg 22(1).

leave should end prematurely.<sup>152</sup> The employee who takes adoption leave should be entitled to the same employment rights and protections as an employee who takes maternity leave. While the UIA currently makes provision for adoption benefits to qualifying employees, it is recommended that adoption benefits should be made available to the employee on adoption leave in the same manner that maternity pay is made available to the employee on maternity leave.

## **7.6 Health and safety of pregnant, postnatal, or breastfeeding employees**

While section 26 of the BCEA and the Code of Good Practice on Pregnancy operate together to recognise the employer's duty to protect the reproductive health of employees, it is recommended that these provisions be reorganised and set out in health and safety legislation which will apply exclusively to pregnant employees, employees who have given birth within the preceding six months, or who are breastfeeding, women employees in their childbearing years, and the protection of men and women employees from reproductive hazards in the workplace.<sup>153</sup>

It is recommended further that South African labour legislation adopt the protection set out in UK law to suspend an employee with pay if the employee is at risk of workplace hazards because of her pregnancy, and alternative employment is not possible.<sup>154</sup> This measure will provide the pregnant or breastfeeding employee with support and security for her health and safety at work.<sup>155</sup> In addition, it will increase the standard of care placed on the employer for the health and safety of pregnant and breastfeeding employees.<sup>156</sup>

## **7.7 Breastfeeding at the workplace**

The Code of Good Practice on Pregnancy sets out as a guideline that arrangements should be made for employees who are breastfeeding to have breaks of 30 minutes twice per day for breastfeeding or expressing milk at the workplace for the first six months of the child's life.<sup>157</sup>

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<sup>152</sup> Ibid.

<sup>153</sup> Dupper (note 5 above) 430.

<sup>154</sup> Management of Health and Safety at Work Regulations 1999 (U.K.), SI 1999/3242, reg 16(3); Employment Rights Act, s 66.

<sup>155</sup> Bonthuys (note 15 above) 273.

<sup>156</sup> Ibid.

<sup>157</sup> Item 5.13 of the Code of Good Practice on Pregnancy; Dupper (note 5 above) 436.

However, it is recommended that these guidelines be adopted as a legislative provision providing employees with a statutory right to such breaks.<sup>158</sup>

## **7.8 Childcare arrangements (including leave for care emergencies) and flexible working arrangements**

### **7.8.1 Childcare arrangements (including leave for care emergencies)**

It is recommended that there should be a provision which entitles employees to take time off from work to attend to care emergencies such as the sudden illness of a child, the unexpected unavailability of a substitute caregiver, or unexpected disruption to care giving caused by unreliable public transport.<sup>159</sup> It is submitted that the current provision of family responsibility leave cannot account for these emergency circumstances.<sup>160</sup> Accordingly, it is recommended that the family responsibility provision in section 27 of the BCEA be deleted and a separate right to leave for care emergencies should be introduced.<sup>161</sup>

In accordance with the comparative analysis carried out by this thesis, the right to leave for care emergencies may be modelled on the UK entitlement to unpaid time off to care for dependants.<sup>162</sup> Therefore, the right should provide that an employee is entitled to take a reasonable amount of time off during working hours in order to take necessary action to provide assistance when a dependant falls ill; to make arrangements for the provision of care for a dependant who is ill or injured because of the unexpected disruption or termination of arrangements for the care of a dependant; or to deal with an incident which involves a child of the employee and which occurs unexpectedly in a period during which an educational establishment which the child attends is responsible for him or her, among other instances.<sup>163</sup> The legislation should specify that the term ‘dependant’ includes a child.<sup>164</sup> The right should encompass a notification requirement that the employee must notify the employer of the reason

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<sup>158</sup> Maternity Protection Convention, 2000 (note 49 above) art 10; Dupper (note 5 above) 436.

<sup>159</sup> Dancaster (note 5 above) 189.

<sup>160</sup> Dancaster & Baird (note 100 above) 29, 30; Dancaster (note 5 above) 188–189.

<sup>161</sup> *Ibid.*

<sup>162</sup> As set out in the Employment Rights Act, s 57A.

<sup>163</sup> *Ibid* s 57A(1)(a)–(e).

<sup>164</sup> *Ibid* s 57A(3); Dancaster & Baird (note 100 above) 30.

for the absence and how long the employee expects to be absent.<sup>165</sup> Therefore, the right may be used in emergency situations to provide the employee with time to arrange alternative care for the child.<sup>166</sup>

### 7.8.2 Flexible working arrangements

It is recommended that South African legislation take measures to introduce a statutory right to request flexible working arrangements.<sup>167</sup> The right to request flexible working arrangements will be aimed at providing support to employees with responsibilities of ongoing care during the early stages of child development.<sup>168</sup> The right may prevent employees from voluntarily terminating their employment for the purposes of caring for children.<sup>169</sup>

In the UK, flexible working arrangements may involve a change in working arrangements, the hours of work required, the times at and between which the employee is required to be at work, or where the employee is required to work, for example, between the employee's home and the place of business of the employer.<sup>170</sup> Types of flexible working arrangements include job sharing, part-time work, flexitime, compressed hours of work, annualised hours, staggered hours, phased retirement, and working from home. The UK right to request flexible working arrangements may be relied on as a model upon which to develop the South African right to request flexible working arrangements. However, while this thesis has explored the UK right to request flexible working arrangements, it has not carried out an extensive examination of the types of flexible working arrangements which may best suit employees of the South African workplace. It is therefore submitted that specific research aimed at an examination of comparable models providing rights to flexible work arrangements is necessary to determine a model that would best be able to be accommodated within South African law.<sup>171</sup>

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<sup>165</sup> As set out in the Employment Rights Act, s 57A(2).

<sup>166</sup> Dancaster & Baird (note 100 above) 31.

<sup>167</sup> Ibid 41; Dancaster & Cohen (note 78 above) 37; Dancaster (note 5 above) 191.

<sup>168</sup> Dancaster & Baird (note 100 above) 37–38; Dancaster (note 5 above) 188.

<sup>169</sup> Dancaster & Baird (note 100 above) 37–38; Dancaster (note 5 above) 188.

<sup>170</sup> Employment Rights Act, s 80 F(1)(a); Dancaster & Baird (note 100 above) 39; Dancaster & Cohen (note 78 above) 37; JA Durkalski 'Fixing economic flexibilization: A role for flexible work laws in the workplace policy agenda' (2009) 32(2) *Berkley Journal of Employment and Labour Law* 381, 388.

<sup>171</sup> Dancaster (note 5 above) 188.

## 7.9 Conclusion

This chapter outlines recommendations for the adoption of a comprehensive legislative package of employment rights and protections. The recommendations are aimed at providing South African employees with adequate choices for time off from work to attend to their care-giving responsibilities. It is submitted that the adoption of a comprehensive legislative package aimed at work–family reconciliation requires the presentation of legislative options. The legislative options must provide employees with choices of entitlement to take time off from work in accordance with their specific financial and family needs.<sup>172</sup> As such, the recommendations are also aimed at ensuring that employees do not have to rely on their own resources or employer goodwill to provide them with the time off to attend to their care-giving responsibilities.<sup>173</sup>

The current legislative framework of South African labour laws, providing employees with time off to care, is limited to maternity leave and family responsibility leave.<sup>174</sup> The recommendations set out in this chapter aim to address the gaps which exist in the legislative framework by recommending the introduction of rights to adoption leave, surrogacy leave, paternity leave, parental leave and flexible working arrangements. A recommendation is also made for the deletion of family responsibility leave and the introduction of a right to leave for care emergencies. These recommendations are coupled with suggestions to ensure that the scope and coverage of these employment rights are wide and inclusive. Further proposals are made to cure accompanying deficiencies of law highlighted by this thesis. These recommendations include the amendment to the maternity benefits scheme set out in the UIA; more effective measures aimed at the protection of pregnant employees against dismissal and discrimination at the workplace; more effective health and safety measures for pregnant and breastfeeding employees; and the introduction of the statutory right to nurse at the workplace.

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<sup>172</sup> Dancaster & Baird (note 100 above) 41; Dancaster & Cohen (note 78 above) 33; Dancaster (note 5 above) 178; J Lewis 'Employment and care: The policy problem, gender equality and the issue of choice' (2006) 8(2) *Journal of Comparative Policy Analysis* 103, 111.

<sup>173</sup> Dancaster & Cohen (note 120 above) 239; Dancaster & Cohen (note 78 above) 42.

<sup>174</sup> Field, Bagraim & Rycroft (note 1 above) 39; Dancaster & Cohen (note 120 above) 239; Dancaster 'Work-life balance and the legal right to request flexible working arrangements' (2006) 2 *South African Journal of Economic & Management Sciences* NS 175–186.



It is submitted that the recommendations set out in this Chapter are extensive and cannot be accomplished without a commitment to the development of a comprehensive legislative package aimed at reconciliation of work and care. The adoption of these recommendations will also require the introduction of practical initiatives, such as the provision of technical guidance to employers and employees on how to comply with the provisions.<sup>175</sup> Measures must also be taken to ensure that employees have access to a reliable judicial system which is also accessible and efficient.<sup>176</sup> It is submitted that a business case will have to be carried out to determine the negative impact of exercising leave entitlements on employment opportunities.<sup>177</sup>

The recommendations have been drawn from comparative analysis of international and regional standards, and the laws of the UK which have been developed over a number of years.<sup>178</sup> The UK has had to make multiple amendments and introduce numerous provisions to existing legislation through a period of ‘substantial policy continuity’ to enable a comprehensive legislative package aimed at work–family reconciliation.<sup>179</sup> A similar commitment will be required of South Africa in adopting these recommendations, as well as the acknowledgement that it will require time and frequent legislative amendments.<sup>180</sup>

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<sup>175</sup> ILO Maternity & Paternity at Work (note 3 above) 117.

<sup>176</sup> Ibid.

<sup>177</sup> Haas (note 122 above) 110.

<sup>178</sup> Caracciolo di Torella (note 5 above) 318; Conaghan (note 12 above) 27; J Lewis & M Campbell ‘UK Work/Family Balance Policies and Gender Equality, 1997–2005’ (2007) 14(1) *Social Politics: International Studies in Gender, State and Society* 4, 21; Golynger ‘Family-friendly reform of employment law in the UK: an overstretched flexibility’ (2015) 37(3) *Journal of Social Welfare and Family Law* 378, 378; J Lewis et al ‘Patterns of Development in Work/Family Reconciliation Policies for Parents in France, Germany, the Netherlands, and the UK in the 2000s’ (2008) 15(3) *Social Politics: International Studies in Gender, State and Society* 261, 270; Mitchell ‘Encouraging Fathers to Care: The Children and Families Act 2014 and Shared Parental Leave’ (2015) 44(1) *Industrial Labour Journal* 123, 123.

<sup>179</sup> Dancaster (note 5 above) 192; Lewis & Campbell (note 178 above) 21; R Smit ‘Family-related policies in Southern African countries: Are working parents reaping any benefits?’ (2011) 42(1) *Journal of Comparative Family Studies* 15, 32.

<sup>180</sup> Lewis & Campbell (note 178 above) 21; Lewis et al (note 178 above) 270.

## CHAPTER EIGHT

### CONCLUSION

This thesis has argued for legislative reform in the labour laws of South Africa in order to provide employees with a comprehensive legislative package aimed at the reconciliation of work and care. A comparative analysis of international and regional minimum standards, against an analysis of the laws of South Africa and the UK, has indicated that the labour legislation of South Africa which provides employees with employment rights and protections to take time off from work to attend to care-giving responsibilities is inadequate. In accordance with this finding, recommendations have been made for the adoption of statutory rights to provide employees with leave entitlements, social security benefits, and employment protections. The recommendations propose amendments to current labour legislation and the introduction of new legislative provisions with the aim of adopting a comprehensive legislative package for the reconciliation of work and care in South Africa.

This thesis has shown that South Africa has numerous international obligations to adopt measures which relieve the burden of care placed on employees.<sup>1</sup> International obligations were consulted in accordance with section 39(1) and section 231 of the Constitution, which provide that South Africa must consider international labour standards to ensure that the laws are consistent with international law.<sup>2</sup> Therefore, international obligations may be relied upon as incentives to initiate legislative reform in the reconciliation of work and care.<sup>3</sup> The comparative

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<sup>1</sup> CD Field, JJ Bagraim & A Rycroft 'Parental leave rights: Have fathers been forgotten and does it matter?' (2012) 36(2) *SALR* 30, 37; T Cohen 'The Efficacy of International Standards in Countering Gender Inequalities in the Workplace' (2012) 33 *ILJ* 19; L Dancaster & T Cohen 'Leave for working fathers in the SADC region' (2015) 36 *ILJ* 2474.

<sup>2</sup> Section 39(1)(b) of the Constitution of the Republic of South Africa 1996 (Constitution); C Botha 'Statutory interpretation: An introduction for students' (2012) 155; L Jansen van Rensburg & MP Olivier 'International law and supra-national law' in MP Olivier et al (eds) *Introduction to Social Security* (2004) 619, 620; M Olivier, O Dupper & A Govindjee 'Redesigning the South African Unemployment Insurance Fund: Selected Key Policy and Legal Perspectives' (2011) 22 *Stell LR* 396, 400.

<sup>3</sup> Cohen (note 1 above) 29; ILO (2014) *Maternity and Paternity at Work: Law and practice across the world*, international labour organisation, Geneva <http://www.ilo.org/maternityprotection>, accessed on 20 January 2015 (ILO *Maternity & Paternity at Work*); L Dancaster & M Baird 'Workers with care responsibilities: Is work-family integration adequately addressed in South African labour law?' (2008) 29 *ILJ* 22, 26; C Rickard 'Getting off the mommy track: An international model law solution to the global maternity discrimination crisis' (2014) 47 *Vanderbilt Journal of Transitional Law* 1465, 1502.

analysis carried out in this thesis has indicated that South Africa's failure to ratify fundamental international instruments does not prevent the achievement of a comprehensive legislative package aimed at the reconciliation of work and care.<sup>4</sup> However, the adoption of a comprehensive legislative package which fulfils international and regional minimum labour standards will essentially depend on the commitment of the government to implement initiatives aimed at legislative reform.<sup>5</sup>

For instance, this thesis has reflected the commitment of the UK government to adopting family-friendly rights through legislative reform.<sup>6</sup> The regulation of employee work–care conflicts has become a key aspect of national legislation in the UK.<sup>7</sup> These reforms have relied on the direction of the EU when establishing new and extended leave entitlements.<sup>8</sup> As mentioned in Chapter Six of this thesis, the UK has not ratified the ILO conventions aimed at the reconciliation of work and family. However, the directives of the EU have played a substantial role in UK legislative reform, particularly with regard to maternity protection, parental leave, health and safety provisions and the adoption of flexible working arrangements.<sup>9</sup> The EU has also had the benefit of developing its minimum standards according to case law decided by the ECJ.<sup>10</sup>

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<sup>4</sup> Ratification of ILO Conventions. <http://www.ilo.org/dyn/normlex>, accessed on 21 November 2016.

<sup>5</sup> Cohen (note 1 above) 35.

<sup>6</sup> D Wheatley 'Employee satisfaction and use of flexible working arrangements' (2016) *Work, Employment and Society* 1; O Golyner 'Family-friendly reform of employment law in the UK: an overstretched flexibility' (2015) 37(3) *Journal of Social Welfare and Family Law* 378, 382.

<sup>7</sup> G Mitchell 'Encouraging fathers to care: The Children and Families Act 2014 and Shared Parental Leave' (2015) 44(1) *ILJ* 123, 125; J Lewis & M Campbell 'UK work/family balance policies and gender equality, 1997–2005' (2007) 14(1) *Social Politics: International Studies in Gender, State and Society* 4, 15.

<sup>8</sup> Golyner (note 6 above) 382; E Caracciolo di Torella 'New labour, new dads – The Impact of family friendly legislation on fathers' (2007) 36 *Industrial Law Journal* 318, 320; G James 'The Work and Families Act 2006: Legislation to improve choice and flexibility?' (2006) 35(3) *ILJ* 272, 273; M Leon 'Parental, maternity and paternity leave: European legal constructions of unpaid care giving' (2007) 58(3) *Northern Ireland Legal Quarterly* 353, 355.

<sup>9</sup> The Fairness at Work White Paper (Cmnd. 3968), May 1998 (the Fairness at Work White Paper) at 1.9 <http://www.nationalarchives.gov.uk/webarchive/>, accessed on 18 October 2016; RW Painter & AEM Holmes *Cases and Materials on Employment Law* (2015) 5; EC Landau & Y Beigbeder *From ILO Standards to EU Law: The case of equality between men and women at work* (2008) 99, 138–140, R Blanpain *European Labour Law* (2008) 475; Golyner (note 6 above) 380 & 386; Council Directive 92/85/EEC of 19 October 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breastfeeding (tenth individual Directive within the meaning of Article 16 (1) of Directive 89/391/EEC) [1992] OJ L348/1 (Pregnant Workers Directive).

<sup>10</sup> Dancaster & Baird (note 3 above) 23.

It would be advantageous if South Africa were able to rely on the regional labour standards for the support and promotion of the reconciliation of work and care in employment as set out by the SADC and the AU. However, as set out in Chapter Three of this thesis, the AU and the SADC have not developed minimum standards to regulate the work–care conflict to the extent of those established by the EU.<sup>11</sup> The EU has developed directives which address maternity protection; employment protection, and anti-discrimination applicable to pregnant employees; paternity leave; parental leave; adoption leave; the promotion of flexible working arrangements; standards relating to the health and care of pregnant employees; breastfeeding arrangements at the workplace; leave for emergency care; and childcare services at the workplace.<sup>12</sup>

Conversely, the AU standards are far more committed to gender equality.<sup>13</sup> While the ACRWC is aimed at protecting the needs of the African child and emphasis is placed on the best interest of the child, there is little mention of the need to reconcile employment responsibilities with unpaid care-giving.<sup>14</sup> The SADC attempts to set out measures to relieve the burden of care placed on employees but these provisions are limited. Most of the standards are vague, with mention of easing the burden on the multiple roles placed on women, and the isolated acknowledgements of maternity and paternity leave.<sup>15</sup> The most considerable standard aimed at the reconciliation of work and care by the SADC is the *Code on Social Security (Code)* which elaborates on maternity protection. However, the Code is a non-binding instrument.<sup>16</sup>

While South Africa may not be able to rely on regional standards to set out a framework for labour laws aimed at relieving the burden of care placed on employees, the current laws of South

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<sup>11</sup> Cohen (note 1 above) 31.

<sup>12</sup> As set out in Chapter Three of this thesis.

<sup>13</sup> M Forere & L Stone 'The SADC Protocol on Gender and Development: Duplication or complementarity of the African Union Protocol on Women's Rights' (2009) 9 *African Human Rights Law Journal* 434, 439.

<sup>14</sup> The AU Solemn Declaration on Gender Equality in Africa mentions the need to strengthen initiatives to reduce the workload placed on women, African Union. Solemn Declaration on Gender Equality in Africa (adopted July 2004) OUA Doc (AU Gender Declaration) art 1.

<sup>15</sup> SADC Protocol on Gender and Development (adopted on 17 August 2008, entered into force 22 February 2013) (SADC Protocol) art 16; Cohen (note 1 above) 21; Forere & Stone (note 13 above) 444; Dancaster & Cohen (note 1 above) 2479.

<sup>16</sup> M Nyenti & LG Mpedi 'The impact of the SADC Social Protection Instruments on the setting up of a minimum social protection floor in Southern African countries' (2012) 15(1) *PER/PELJ* 243,247–248; M Olivier 'Extension of Labour Law and Social Security Protection to the Informal Sector: Developing Country Perspectives, with Specific Reference to Southern Africa' in R Blanpain (ed) *The Modernization of Labour Law and Industrial Relations in a Comparative Perspective* (2009) 241, 256.

Africa may form the basis upon which legislative reform may occur. Current work–care reconciliation provisions of South African labour legislation comprise of maternity leave and pay, family responsibility leave, and respective employment protections attached to the leave entitlements.<sup>17</sup> As set out in Chapter Four, this thesis has identified numerous deficiencies in these legislative provisions.

It has been concluded that legislative efforts must be made to ensure that the scope and coverage of maternity protection is provided to the majority of women employees in South Africa.<sup>18</sup> As set out in section 27(1)(c) of the Constitution, everyone has the right to access to social security, including if they are unable to support themselves and their dependants.<sup>19</sup> While the right to maternity leave in South Africa does extend to atypical employees, the legislative reform must ensure that maternity cash benefits may be claimed by atypical employees, self-employed employees, and employees on non-standard employment contracts.<sup>20</sup>

An inclusive social security system applicable to pregnant employees will ensure that reproduction-related risks are addressed.<sup>21</sup> Legislative reform is necessary to ensure that pregnant employees are afforded wide and inclusive social security. The adoption of an inclusive social security system will ensure that the care-giving responsibilities of employees are recognised, valued, and supported by the law.<sup>22</sup> These measures have the potential to relieve the burden of care placed on pregnant employees.<sup>23</sup> The recommendations have called for the introduction of a statutory right to guaranteed maternity cash benefits applicable to a widened coverage of employees, at the current or higher rate of two-thirds of the employee’s previous earnings and provided through an adequate social security scheme.<sup>24</sup> This may be done by the

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<sup>17</sup> L Dancaster ‘State Measures towards Work-Care Integration in South Africa’ in Z Mokomane *Work-Family Interface in Sub-Saharan Africa: Challenges and Responses* (2014) 177, 192.

<sup>18</sup> ILO Maternity & Paternity at Work (note 3 above) 115.

<sup>19</sup> Section 27(1)(c) of the Constitution; MP Olivier & ER Kalula ‘Scope of coverage’ in MP Olivier et al *Introduction to Social Security* 2004 123, 124.

<sup>20</sup> ILO Maternity & Paternity at Work (note 3 above) 115.

<sup>21</sup> Ibid 119.

<sup>22</sup> Ibid; Cohen (note 1 above) 33.

<sup>23</sup> Cohen (note 1 above) 33.

<sup>24</sup> International Labour Conference (88th Session) Convention concerning the revision of the Maternity Protection Convention (Revised), 1952 (Geneva, adopted 15 June 2000, entry into force: 7 Feb 2002) (Maternity Protection Convention, 2000) art6(3); Code on Social Security in the SADC (2008) (SADC Code) art 8.3; Dancaster (note 17

adoption of separate legislation, setting out the rights of employees to maternity cash benefits, or by the amendment of relevant provisions of the UIA.<sup>25</sup>

Although South African labour law provides rights to maternity leave, it does not provide employees with the statutory right to adoption leave.<sup>26</sup> However, the UIA provides employees with adoption pay. In order to consolidate the provision of the UIA with labour law, and to redress the gap in the law created by the exclusion of the right to adoption leave, this thesis has made recommendations for the introduction of a right to adoption leave. Requirements for leave to care for children born out of surrogacy agreements are not set out in the 2014 ILO report *Maternity and Paternity at Work: Law and Practice across the World* as an essential element of work–care reconciliation.<sup>27</sup> However, case law has indicated that there is a need for the introduction of surrogacy leave in South Africa.<sup>28</sup> Using the best interests of the child as a basis for the argument, this thesis has made a proposal for the introduction of a right to surrogacy leave.<sup>29</sup>

The recommendations for the introduction of adoption leave and surrogacy leave correspond to the constitutional rights to equality and fair labour practice.<sup>30</sup> Equality demands that the mothers of adopted children and children born out of surrogacy be entitled to the same treatment as mothers who have given birth to their biological children.<sup>31</sup> Therefore, it is submitted that the

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above) 182; Olivier, Dupper & Govindjee (note 2 above) 406; OC Dupper ‘Maternity’ in MP Olivier et al (eds) *Introduction to Social Security* (2004) 399, 405.

<sup>25</sup> Dancaster (note 17 above) 184; O Dupper; M Olivier & A Govindjee ‘Extending coverage of the unemployment insurance-system in South Africa’ (2010) 21 *Stell LR* 438, 448; ET van Kerken & MP Olivier ‘Unemployment insurance’ in MP Olivier et al (eds) *Introduction to Social Security* (2004) 415, 436.

<sup>26</sup> E Huysamen ‘Women and Maternity: Is there truly equality in the workplace between men and women, and between women themselves?’ in K Malherbe & J Sloth-Nielsen (eds) *Labour Law into the Future: Essays in honour of D’Arcy du Toit* (2012) 46–75, 66; O Dupper ‘Maternity protection in South Africa: An international and comparative analysis (Part Two)’ (2002) *Stell LR* 83, 93; Field, Bagraim & Rycroft (note 1 above) 34; Dancaster (note 17 above) 180.

<sup>27</sup> ILO *Maternity & Paternity at Work* (note 3 above) 3–6.

<sup>28</sup> Dancaster & Cohen (note 1 above) 2490; *MIA v State Information Technology Agency (Pty) Ltd* (2015) 6 SA 250 (LC); A Behari ‘Daddy’s home: The promotion of paternity leave and family responsibilities in the South African workplace’ (2016) 37(2) *Obiter* 346, 353.

<sup>29</sup> *MIA* (note 28 above) at par [14]; Dancaster & Cohen (note 1 above) 2491; Behari (note 28 above) 354.

<sup>30</sup> Sections 9 and 23(1) of the Constitution.

<sup>31</sup> Huysamen (note 26 above) 71.

recommendations for adoption leave and surrogacy leave provide rights equivalent to maternity leave and pay.

A primary premise of this thesis is that the right to family responsibility leave provided by section 27 of the BCEA is inadequate.<sup>32</sup> The duration of family responsibility leave and the purposes for which family responsibility leave may be used are limited.<sup>33</sup> The recommendations call for the deletion of family responsibility leave, and the adoption of separate leave entitlements, being paternity leave, parental leave, and leave for care emergencies. Providing maternity leave without a corresponding period of paternity leave creates an imbalance in family dynamics.<sup>34</sup>

The exclusion of paternity leave fuels the stigmatised notion of women as homemakers and caregivers.<sup>35</sup> It leads to the perception that women are provided with maternity leave because the primary responsibility of women is to care for children, whereas men need not be afforded paternity leave because their primary responsibility is to thrive in the workplace.<sup>36</sup> This perception is reinforced by the lack of adequate leave for care emergencies.<sup>37</sup> Paternity leave and parental leave entitlements actively encourage men's participation in childcare.<sup>38</sup> Parental leave also assists in maintaining the labour participation of women. Women employees will be able to return to work from maternity leave with the security that should they require more time off to care for their babies, they will be able to claim parental leave.<sup>39</sup>

It is apparent from the reflection of the laws on family responsibility that greater legislative intervention is required for the promotion of work-care reconciliation. Without paternity or parental leave upon which fathers can rely, legislation should at least provide for flexible work arrangements which may be requested by those employees who are burdened with the extra

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<sup>32</sup> *Dancaster & Baird* (note 3 above) 29, 30; *Dancaster* (note 17 above) 189.

<sup>33</sup> *Dancaster* (note 17 above) 189.

<sup>34</sup> *Behari* (note 26 above) 348.

<sup>35</sup> *Ibid.*

<sup>36</sup> *Dancaster & Baird* (note 3 above) 35.

<sup>37</sup> *Ibid.* 32.

<sup>38</sup> ILO *Maternity & Paternity at Work* (note 3 above) 118.

<sup>39</sup> *Ibid.*

demands of family duties.<sup>40</sup> A legislated provision to this effect would give employees the option of alternate work arrangements and will set out the procedure necessary to claim such arrangements from the employer – thereby allowing access to flexible work arrangements.<sup>41</sup>

It has also been concluded that there is a need for a separate right of entitlement to allow employees to take time off from work to attend to care emergencies such as the sudden illness of a child, the unexpected unavailability of a substitute caregiver, or unexpected disruption to care-giving caused by unreliable public transport.<sup>42</sup> This provision is also a long-term support measure for employees with care-giving responsibilities. The right ensures that employees are able to take time off from work to attend to care emergencies, without the risks of loss of employment or disciplinary action.<sup>43</sup>

In addition, this thesis has also shown that South African labour legislation providing employees with employment rights and protections to take time off from work to attend to care-giving responsibilities are limited and fragmented.<sup>44</sup> The provisions of leave and the provisions of benefits over the period of leave are divided between labour legislation and social security legislation. The corresponding benefit to maternity leave provided by the BCEA operates through the UIA.<sup>45</sup> There are therefore two pieces of legislative authority which must be consulted when considering maternity leave and benefits. While the BCEA does not provide adoption leave, the UIA sets out the provision of adoption benefits.<sup>46</sup> The failure to include adoption leave in the BCEA further fragments the legislation and creates a gap in the legislation.<sup>47</sup>

Within labour legislation, employment protection afforded to employees who have relied on maternity leave and family responsibility leave is split between the LRA and the EEA. The LRA

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<sup>40</sup> Behari (note 28 above) 360.

<sup>41</sup> L Dancaster & T Cohen 'Family responsibility discrimination litigation – a non-starter?' (2009) 2 *Stell LR* 221, 222.

<sup>42</sup> Dancaster (note 17 above) 189.

<sup>43</sup> Dancaster & Baird (note 6 above) 29.

<sup>44</sup> Dupper (note 26 above) 96.

<sup>45</sup> Section 25 of the Basic Conditions of Employment Act 75 of 1997 (BCEA); s 25 of the Unemployment Insurance Act 63 of 2001 (UIA).

<sup>46</sup> Section 27 of the UIA.

<sup>47</sup> Huysamen (note 26 above) 66.



sets out employment protections against the dismissal of employees on the grounds of pregnancy and family responsibilities.<sup>48</sup> The EEA prohibits policies and practices which discriminate against employees on the basis of pregnancy or family responsibilities.<sup>49</sup> These protective rights are further disorganised by judicial interpretation of the provisions concluded through cases of individual litigation.<sup>50</sup> Legislative labour rights must incorporate an adequate employment protection and non-discrimination framework, with a reliable system of implementation.<sup>51</sup>

The final fragments of South Africa labour legislation providing working parents with time off from work in order to care for their family are the Codes of Good Practice, which provide guidelines on the health and safety of pregnant employees during pregnancy, after the birth of a child, and while breast-feeding.<sup>52</sup> Thus, the limited provisions of employment rights and protection for time off from work to attend to care-giving responsibilities are scattered among multiple legal sources.<sup>53</sup>

A comprehensive legislative package of laws providing the reconciliation of work and care is necessary to cure the limitation of rights and protections and the fragmentation of relevant legal provisions. Therefore, recommendations have been made for the legislative consolidation of the employment rights and protections provided by labour laws to pregnant employees and employees with family responsibilities. Further recommendations have been made to strengthen the accompanying rights to employment protection and non-discrimination of these employees.<sup>54</sup>

An additional right to maternity protection has been identified and recommended as the right to time off from work to attend antenatal appointments.<sup>55</sup> The recommended adoption of time off from work to attend antenatal appointment is not set out in the 2014 ILO report *Maternity and Paternity at Work: Law and Practice across the World* as an essential element of work–care

<sup>48</sup> Grogan *Workplace Law* (2009) 189; Huysamen (note 26 above) 58.

<sup>49</sup> Section 186(1)(c); s187(1)(e) and (f) of the BCEA; and s 6 of the Employment Equity Act 55 of 1998 (EEA).

<sup>50</sup> L Lancaster & T Cohen 'Workers with family responsibilities: a comparative analysis to advocate for the legal right to request flexible working arrangements in South Africa' (2010) 34(1) *SALJ* 30, 32.

<sup>51</sup> ILO *Maternity & Paternity at Work* (note 3 above).

<sup>52</sup> Code of Good Practice on Pregnancy; O Dupper 'Maternity protection in South Africa: An international and comparative analysis (Part one)' (2001) 3 *Stell LR* 421, 434.

<sup>53</sup> Dupper (note 26 above) 96.

<sup>54</sup> *Ibid* 84; G James *The Legal Regulation of Pregnancy and Parenting in the Labour Market* (2009) 115.

<sup>55</sup> Employment Rights Act 1996, c. 18 (U.K.) (Employment Rights Act), s 55(1); Emir (note 21 above) 185.

reconciliation.<sup>56</sup> However, it is proposed as a support measure to protect the employee against reproduction-related risks, as well as employment risks.<sup>57</sup> As such, the employee will be entitled to attend antenatal appointments without the threat of disciplinary action or loss of employment.

Recommendations have been made for the health and safety of pregnant employees, as well as the right to breastfeed at the workplace.<sup>58</sup> This thesis carried out an analysis of flexible working arrangements as part of the work–care package. However, while it has been made clear that there is a need for the adoption of flexible working arrangements in South Africa, it has been recommended that additional research in the area of flexible working arrangements would benefit the adoption of such a legislative right in South Africa.<sup>59</sup>

In summary, this thesis has recommended the introduction of the following legislative leave rights to ease the burden of care on employees and develop a comprehensive legislative package for the reconciliation of work and care:

- a choice of one or two weeks of paid paternity leave;<sup>60</sup>
- two consecutive weeks of parental leave, of which the right to paid leave will depend on economic considerations;<sup>61</sup>
- adoption leave and pay equivalent to the rights to maternity leave and pay which are available to a biological mother of a newborn baby;<sup>62</sup>
- surrogacy leave and pay equivalent to the rights to maternity leave and pay which are available to a biological mother of a newborn baby;<sup>63</sup>
- leave for care emergencies;<sup>64</sup> and
- the right to time off from work to attend antenatal appointments.<sup>65</sup>

<sup>56</sup> ILO Maternity & Paternity at Work (note 3 above) 3–6.

<sup>57</sup> Ibid 119.

<sup>58</sup> Dupper (note 52 above) 430; as set out in Management of Health and Safety at Work Regulations 1999 (U.K.), SI 1999/3242, reg 16(3); Employment Rights Act 1996, c. 18 (U.K.) (Employment Rights Act), s 66.

<sup>59</sup> Dancaster (note 17 above) 188.

<sup>60</sup> Ibid 184; Behari (note 28 above) 360; James (note 56 above) 43; Employment Rights Act, s 80; the Paternity and Adoption Leave Regulations 2002 (U.K.), SI 2002/2788, reg 5(1); A Emir *Selwyn's Law of Employment* (2016) 200.

<sup>61</sup> Section 3 of *Labour Laws Amendment Bill* [PMB6 – 2015] General Notice 1174 of 2015 GG 39445 of 25 November 2015; Dancaster (note 17 above) 187.

<sup>62</sup> Huysamen (note 26 above) 67–72; Dancaster (note 17 above) 180.

<sup>63</sup> A Bauling 'Maternity, paternity and parental leave and the best interests of the child: *MIA v State Information Technology Agency (Pty) Ltd* [2015] JOL 33060 (LC)' (2016) 37(1) *Obiter* 158, 163; Behari (note 28 above) 355.

<sup>64</sup> Dancaster & Baird (note 3 above) 30; Dancaster (note 17 above) 188–189.

In accordance with the evaluation of UK laws, this thesis concludes that employees with care-giving responsibilities must be provided with options of leave entitlements which accommodate their individual needs according to affordability and family structure.<sup>66</sup> This is necessary because the affordability of taking leave will depend on the rate of income replacement which is available, if at all available, over the duration of the leave.<sup>67</sup> Certain leave options will appeal to certain employees based on their family structure and the reason attached to the need to take leave.<sup>68</sup> By providing employees with leave options for time off to care, the employee will have choices.<sup>69</sup>

The eligibility requirements recommended for each leave provision have been drawn from the comparative analyses with the UK and correspond to ILO minimum labour standards.<sup>70</sup> According to the minimum standards, and as set out in Chapter Two of this thesis, copious eligibility requirements result in the exclusion of many employees who cannot meet such qualifications.<sup>71</sup> The recommendations are also inclusive of diverse family structures. The proposed legislative reform accommodates the mother and the father of a child, as well as a co-partner, the partner of the child's adopter, or the partner of the parent to a child born out of surrogacy. Therefore, the recommendations ensure that leave entitlements extend to married and unmarried couples, couples in same-sex relationships and marriages, couples in cohabitation, or single-parent families.<sup>72</sup>

Furthermore, a comprehensive legislative package aimed at the reconciliation of work and care is essential for conformity with section 28(1)(b) of the Constitution, which provides that every child has the right to family care or parental care, or to appropriate alternative care when

<sup>65</sup> As set out by the Employment Rights Act, s 55(1).

<sup>66</sup> Dancaster (note 17 above) 178; R Smit 'Family-related policies in Southern African countries: Are working parents reaping any benefits?' (2011) 42(1) *Journal of Comparative Family Studies* 15, 32.

<sup>67</sup> Dancaster (note 17 above) 178.

<sup>68</sup> Ibid.

<sup>69</sup> Smit (note 66 above) 32; Dancaster (note 17 above) 178.

<sup>70</sup> Maternity Protection Convention, 2000 (note 24 above) art 4(1); ILO Maternity & Paternity at Work (note 3 above) 116.

<sup>71</sup> L Addati 'Extending maternity protection to all women: Trends, challenges and opportunities' (2015) 68(1) *International Social Security Review* 89.

<sup>72</sup> Huysamen (note 26 above) 47; Department of Social Development Republic of South Africa. *White Paper on Families in South Africa* October 2012 (The White Paper on Families) 16.

removed from the family. The decision of the South African Labour Court in *MIA v State Information Technology Agency (Pty) Ltd*<sup>73</sup> concluded that maternity leave was provided by the BCEA for the purposes of attending to the best interests of the child.<sup>74</sup> In light of the constitutional rights of a child, as well the decision of *MIA v State Information Technology Agency (Pty) Ltd*,<sup>75</sup> it is submitted that a comprehensive legislative package aimed at the reconciliation of work and care must be developed to ensure that effect is given to the rights of the child and the best interests of the child through family care or parental care, or to appropriate alternative care when removed from the family.

The introduction of paternity leave and parental leave, together with the provisions of maternity leave, would ensure that laws aimed at the reconciliation of work and care are directed at both men and women.<sup>76</sup> The extension of care-giving leave entitlements to men may close the gap between men and women's leave entitlements.<sup>77</sup> As such, the entitlements encourage the shared parental responsibilities between women and men.<sup>78</sup> Therefore, the introduction of the recommended legislative leave rights may have the potential to effect change to traditional assumptions.<sup>79</sup> Since pregnancy-related discrimination is often found to occur for reasons that pregnant women require maternity leave and pay, the adoption of paternity leave and parental leave to men employees would promote the equal access of men and women to employment positions, and employment quality.<sup>80</sup>

As such, the introduction of such leave entitlements may assist in redressing occupational segregation of women.<sup>81</sup> It is for these reasons that the introduction of a comprehensive legislative package aimed at the reconciliation of work and care may achieve gender equality in

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<sup>73</sup> *MIA* (note 28 above); Dancaster & Cohen (note 1 above) 2490; Behari (note 28 above) 353.

<sup>74</sup> *MIA* (note 28 above) at par [14]; Dancaster & Cohen (note 1 above) 2491.

<sup>75</sup> *MIA* (note 28 above); Dancaster & Cohen (note 1 above) 2490; Behari (note 28 above) 353.

<sup>76</sup> ILO Maternity & Paternity at Work (note 3 above) 116; Cohen (note 1 above) 33.

<sup>77</sup> ILO Maternity & Paternity at Work (note 3 above) 117; Cohen (note 1 above) 33.

<sup>78</sup> ILO Maternity & Paternity at Work (note 3 above) 118.

<sup>79</sup> *Ibid.*

<sup>80</sup> *Ibid* 116; Huysamen (note 26 above) 47–48; *Woolworths (Pty) Ltd v Whitehead* 2000 (12) BCLR 1340 (LAC) at paras [145]–[149].

<sup>81</sup> Cohen (note 1 above) 33.

the workplace.<sup>82</sup> The introduction of paternity leave and parental leave to national legislation will also show that the government and employers value the role of men as fathers.<sup>83</sup>

If the South African government fails to initiate legislative reform in the area of work–care reconciliation, employees will have to continue to rely on employers and trade unions to provide entitlements to time off from work to care.<sup>84</sup> Accordingly, the government must prioritise the adoption and implementation of a comprehensive legislative package aimed at the reconciliation of work and care.<sup>85</sup> The ILO report suggests that this be done through engagement in social dialogue and the encouragement of collective bargaining aimed at resolving the conflict between work and care.<sup>86</sup> This requires the involvement of government and employers to give consideration to the needs and concerns of working parents.<sup>87</sup>

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<sup>82</sup> R Morrell 'Fathers, fatherhood and masculinity in South Africa' in L Richter & R Morrell (eds) *Baba: Men and Fatherhood in South Africa* (2006) 13, 18–21; Dancaster & Cohen (note 1 above) 2474; ILO Maternity & Paternity at Work (note 3 above) 52, 61.

<sup>83</sup> ILO Maternity & Paternity at Work (note 3 above) 118.

<sup>84</sup> Dancaster & Cohen (note 1 above) 192.

<sup>85</sup> ILO Maternity & Paternity at Work (note 3 above) 116.

<sup>86</sup> *Ibid.*

<sup>87</sup> *Ibid.* 117.

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