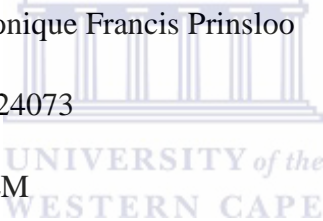




UNIVERSITY of the  
WESTERN CAPE



A mini-thesis to be submitted in partial fulfilment of the requirements for the LLM degree:  
Labour Law in the Department of Mercantile and Labour Law in the Faculty of Law of the  
University of the Western Cape.



Name : Monique Francis Prinsloo  
Student number : 2924073  
Degree : LLM  
Department : Mercantile and Labour Law  
Title : Protection of Pregnant Employees in the South  
African Workplace: A Labour Law Perspective  
Supervisor : Mrs E Huysamen

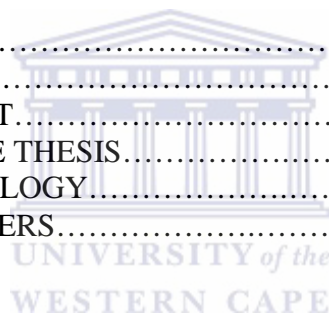
## **TABLE OF CONTENTS**

	Page no.
Plagiarism declaration.....	i
Dedication.....	ii
Keywords.....	iii
Abstract.....	iv
Abbreviations/Acronyms.....	v

### **CHAPTER 1**

#### **INTRODUCTION**

1.1. BACKGROUND.....	1
1.2. AIMS OF THE THESIS.....	2
1.3. PROBLEM STATEMENT.....	3
1.4. SIGNIFICANCE OF THE THESIS.....	4
1.5. RESEARCH METHODOLOGY.....	6
1.6. OVERVIEW OF CHAPTERS.....	6



### **CHAPTER 2**

#### **THE DEVELOPMENT OF EMPLOYMENT RIGHTS OF WOMEN IN SOUTH AFRICA IN DEALING WITH ISSUES OF PREGNANCY**

2.1. INTRODUCTION.....	9
2.2. CHANGING TIMES FOR WOMEN IN THE WORKPLACE.....	9
2.3. LEGAL PROTECTION AFFORDED TO WOMEN AND PREGNANT EMPLOYEES IN SOUTH AFRICA RELATING TO ISSUES OF PREGNANCY.....	12
2.3.1. THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996.....	12
2.3.2. THE LABOUR RELATIONS ACT 66 OF 1995.....	13
2.3.3. THE BASIC CONDITIONS OF EMPLOYMENT ACT 75 OF 1997.....	16
2.3.4. THE EMPLOYMENT EQUITY ACT 55 OF 1998.....	18
2.4. WOMEN AND PREGNANCY IN THE WORKPLACE: A DISCUSSION AND ANALYSIS OF CASE LAW.....	18
2.4.1. TRUE REASON FOR DISMISSAL.....	18
2.4.2. EMPLOYERS PREVENTING EMPLOYEES FROM FALLING PREGNANT.....	22

2.4.3.	THE EMPLOYERS DUTY TO PROTECT A PREGNANT EMPLOYEE.....	22
2.4.4.	MATERNITY LEAVE.....	23
2.4.5.	DUTY TO DISCLOSE PREGNANCY STATUS.....	24
2.4.6.	FAMILY RESPONSIBILITY.....	26
2.4.7.	REASONS RELATED TO PREGNANCY.....	27
2.5.	EMPLOYMENT RIGHTS OF WOMEN AND PREGNANT EMPLOYEES IN LIGHT OF INTERNATIONAL TREATIES.....	29
2.5.1.	INTERNATIONAL TREATIES THAT HAS NOT BEEN RATIFIED BY SOUTH AFRICA.....	29
2.5.2.	INTERNATIONAL TREATIES THAT HAS BEEN RATIFIED BY SOUTH AFRICA.....	31
2.6.	CONCLUSION.....	32

### **CHAPTER 3**

#### **DISCRIMINATION AS A SPECIFIC FORM OF LESS FAVOURABLE TREATMENT OF WOMEN AND PREGNANT EMPLOYEES WITHIN THE WORKPLACE**

3.1.	INTRODUCTION.....	34
3.2.	DISCRIMINATION: A GENERAL DISCUSSION.....	35
3.2.1.	INTRODUCTION.....	35
3.2.2.	FORMAL VERSUS SUBSTANTIVE EQUALITY.....	36
3.2.3.	DIRECT VERSUS INDIRECT DISCRIMINATION.....	37
3.3.	DISCRIMINATION CLAIMS WITHIN AN EMPLOYMENT CONTEXT	
3.3.1.	TEST FOR DISCRIMINATION.....	38
3.3.2.	HARKSEN V LANE: CONSTITUTIONAL LAW TEST FOR DISCRIMINATION.....	39
3.3.3.	SECTION 11: EMPLOYMENT EQUITY ACT TEST FOR DISCRIMINATION.....	40
3.4.	DEFENCES FOR UNFAIR DISCRIMINATION IN THE EMPLOYMENT CONTEXT.....	41
3.4.1.	AFFIRMATIVE ACTION.....	41
3.4.2.	INHERENT REQUIREMENTS OF THE JOB.....	42
3.4.3.	WOOLWORTHS V WHITEHEAD.....	44
3.5.	PREGNANCY DISCRIMINATION IN EMPLOYMENT.....	46
3.5.1.	LISTED GROUNDS.....	47
3.5.2.	ARBITRARY GROUNDS.....	47
3.5.3.	CONSTITUTIONAL V EMPLOYMENT DISCRIMINATION LAW.....	49
3.6.	PREGNANCY DISCRIMINATION AT SCHOOL: AN ANALOGY.....	49
3.7.	PREGNANCY VERSUS SEX DISCRIMINATION.....	51
3.8.	CONCLUSION.....	52

## **CHAPTER 4**

### **THE DEVELOPMENT OF EMPLOYMENT RIGHTS OF WOMEN IN DEALING WITH ISSUES OF PREGNANCY WITHIN THE UNITED KINGDOM (UK)**

4.1.	INTRODUCTION.....	54
4.2.	BACKGROUND: WOMEN AND PREGNANCY IN THE UK WORKPLACE.....	54
4.3.	LEGISLATION PROTECTING WOMEN AND PREGNANT EMPLOYEES WITHIN THE UK.....	55
4.3.1.	PREGNANCY/SEX DISCRIMINATION AND EQUALITY LEGISLATION.....	56
4.3.1.1.	THE SEX DISCRIMINATION ACT 1975.....	56
	I.    SEX DISCRIMINATION AGAINST WOMEN AND PREGNANT EMPLOYEES.....	57
	II.   COMPARING MEN TO WOMEN: PREGNANCY.....	58
	III.  GENDER RIGHTS APPROACH.....	61
4.3.1.2.	THE EQUALITY ACT 2010.....	62
4.3.2.	LABOUR AND SOCIAL SECURITY LEGISLATION.....	64
4.3.2.1.	THE EMPLOYMENT PROTECTION (CONSOLIDATION) ACT 1978.....	64
4.3.2.2.	THE EMPLOYMENT RIGHTS ACT 1996.....	67
4.3.2.3.	THE PREGNANT WORKERS DIRECTIVE.....	68
4.3.2.4.	THE MANAGEMENT OF HEALTH AND SAFETY AT WORK REGULATIONS 1999.....	69
4.4.	SELECTED ISSUES REGARDING PREGNANCY IN THE UK CONTEXT	
4.4.1.	LESS FAVOURABLE TREATMENT OF WOMEN AND PREGNANT EMPLOYEES.....	69
4.4.2.	AWARENESS OF PREGNANCY.....	71
4.4.3.	EMPLOYERS' BUSINESS UNDERTAKINGS.....	72
4.5.	CONCLUSION.....	74

## **CHAPTER 5**

### **CONCLUSION AND RECOMMENDATIONS**

5.1.	INTRODUCTION.....	75
5.2.	SUMMARY OF EXISTING LEGISLATIVE MEASURES IN SOUTH AFRICA.....	75
5.3.	RECOMMENDATIONS.....	77
5.3.1.	THE SOUTH AFRICAN GOVERNMENT.....	77
5.3.1.1.	PERCEPTION CHANGE.....	77
5.3.1.2.	PROCEDURAL GUIDELINES.....	79
5.3.1.3.	POLICY-MAKING REFORM.....	80
5.3.1.4.	TRAINING IN EMPLOYMENT LAW.....	82
5.3.2.	THE EMPLOYER.....	82
5.3.3.	EDUCATING WOMEN AND PREGNANT EMPLOYEES IN THE WORKPLACE.....	84
5.4.	CONCLUDING REMARKS.....	85

<b><u>BIBLIOGRAPHY</u></b> .....	87
----------------------------------	----

## **PLAGIARISM DECLARATION**

I declare that *Protection of Pregnant Employees in the South African workplace: A Labour Law Perspective* is my own work, that is has not been submitted before for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete reference.

Signed:

MF Prinsloo

---

E Huysamen

---



21 December 2015

## **DEDICATION**

I dedicate this mini-thesis to my late daddy, Mr Matthews Johannes Prinsloo.



## **KEYWORDS**

Protection of women and pregnant employees

Pregnant women's rights

Employer's legal accommodation

Constitution

Labour law

Implementation of the law

Women employees/ pregnant employees

Less favourable treatment/unfavourable treatment



## **ABSTRACT**

The Constitution of South Africa lists pregnancy as a prohibited ground for discrimination. The South African labour law regime likewise makes provision for the protection of women and pregnant employees in the workplace. This protection is against less favourable treatment, through measures that prohibits dismissal and discrimination based on pregnancy. In defiance of these laws, the recent trend indicates that the less favourable treatment of women and pregnant employees in the South African workplace environment has become more prevalent and this has become a contentious issue.

Thus, this study will firstly, in view of relevant constitutional guarantees, focus on labour legalisation (and where relevant, related legislation outside the labour law arena) that has been enacted to provide for the protection of pregnant women in the workplace.

Secondly, this study will demonstrate that despite these provisions that affords for formal protection of pregnant women in the workplace, practically many pregnant women continue to be treated unjustly because of their pregnancies or reasons related thereto. It is therefore clear that there is a setback with regard to the practical implementation of the laws protecting pregnant employees.

Finally, this study will clearly highlight that measures need to be established where the law protects pregnant employees in the workplace, so that these laws serve its purpose and that they are implemented in the correct manner that it is intended to serve. This will be done through tabling recommendations concerning how labour law should be implemented so that the employment rights of women and pregnant employees are comprehensively protected.



## ABBREVIATIONS/ACRONYMS

AJ	: Acting Judge
AJP	: Acting Judge President
BCEA	: Basic Conditions of Employment Act 75 of 1997
CC	: Constitutional Court
CCMA	: Commission for Conciliation Mediation and Arbitration
CEDAW	: The Convention on the Elimination of all Forms of Discrimination Against Women
DOL	: Department of Labour
EA	: Employment Act 1980
EA	: Equality Act 2010
EAT	: Employment Appeal Tribunal
EC	: European Court
ECJ	: European Court of Justice
EEA	: Employment Equity Act 55 of 1998
EOC	: Equal Opportunities Commission
EPCA	: Employment Protection (Consolidation) Act 1978
ERA	: Employment Rights Act 1996
ERA	: Employment Rights Act 1996
EU	: European Union
FSAW/FEDSAW	: Federation of South African Women
GG	: Government Gazette
GN	: Government Notice
HR	: Human Resources
IC	: Industrial Court
ILO	: International Labour Organisation
IT	: Industrial Tribunal
J	: Judge
JA	: Judge of Appeal
LAC	: Labour Appeal Court
LC	: Labour Court
LJ	: Lord of Justice
LRA	: Labour Relations Act 66 of 1995

MHSWR	: Management of Health and Safety at Work Regulations 1999
OHSA	: Occupational Health and Safety Act 85 of 1993
PEPUDA	: Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000
SA	: South Africa
SANDF	: South African National Defence Force
SDA	: Sex Discrimination Act 1975
SMP	: Statutory Maternity Pay
TURER	: Trade Union Reform & Employment Rights Act 1993
UIA	: Unemployment Insurance Act 63 of 2001
UIF	: Unemployment Insurance Fund
UK	: United Kingdom



## **CHAPTER 1**

### **INTRODUCTION**

#### **1.1. BACKGROUND**

The Constitution of South Africa<sup>1</sup> (the Constitution) stipulates that everyone has the right to equality.<sup>2</sup> Equality is compromised when someone is treated unfavourably due to certain characteristics that a particular person might possess.<sup>3</sup> When equality is compromised, it might conceivably amount to unfair discrimination.<sup>4</sup> Section 9(3) of the Constitution and section 6(1) of the Employment Equity Act<sup>5</sup> (the EEA) specifically identifies reasons that amount to unfair discrimination.<sup>6</sup> For the purposes of this thesis, the focus will be on pregnancy as a ground for unfavourable treatment.<sup>7</sup> Pregnancy is defined as ‘intended pregnancy, termination of pregnancy and any medical circumstances related to pregnancy.’<sup>8</sup>

In giving effect to the constitutional right to equality, South African labour law sets out to protect women and pregnant employees from unfavourable treatment in the workplace. Accordingly, a host of labour statutes have been enacted to protect women and pregnant employees. These statutes are the Labour Relations Act<sup>9</sup> (the LRA), the Employment Equity Act (the EEA), the Basic Conditions of Employment Act<sup>10</sup> (the BCEA), the Unemployment Insurance Act<sup>11</sup> (the UIA) and the Occupational Health and Safety Act<sup>12</sup> (the OHSA).

As a point of departure, it must be noted that South Africa has come a long way since apartheid in relation to women’s rights.<sup>13</sup> South Africa has also become more progressive with regard to women’s rights, particularly pregnant women in the workplace. In light of this,

---

<sup>1</sup> Constitution of the Republic of South Africa, 1996 (hereafter the Constitution).

<sup>2</sup> Constitution, section 9(1). Equality dictates that individuals should be treated in a just and equal manner. Upholding the notion of equality should ultimately eradicate discrimination. Chapter 3 of this thesis will specifically focus on the issue of discrimination as a specific form of less favourable treatment.

<sup>3</sup> Constitution, section 9(3).

<sup>4</sup> Currie I & de Waal J *The Bill of Rights Handbook* 5 ed (2005) 244. Discrimination means differentiating between people on illegal grounds such as race, gender or sex. Discrimination can either be direct or indirect.

<sup>5</sup> Employment Equity Act 55 of 1998 (hereafter the EEA).

<sup>6</sup> Discrimination can amount to fair or unfair discrimination. See chapter 3 of this thesis, para 3.2.1.

<sup>7</sup> Pregnancy is a listed ground in the Constitution, section 9(3) as well as in the EEA, section 6(1).

<sup>8</sup> As defined in the EEA, definition section.

<sup>9</sup> Labour Relations Act 66 of 1995 (hereafter the LRA).

<sup>10</sup> Basic Conditions of Employment Act 75 of 1997 (hereafter the BCEA).

<sup>11</sup> Unemployment Insurance Act 63 of 2001 (hereafter the UIA).

<sup>12</sup> Occupational Health and Safety Act 85 of 1993 (hereafter the OHSA).

<sup>13</sup> Anonymous ‘South African History Online: Towards a People’s History’ <http://www.sahistory.org.za/topic/womens-charter> (accessed 25 August 2014).

the recent trend confirms that over the last few years more women have been joining the labour market and many of these women are of childbearing age.<sup>14</sup> Notwithstanding, it has transpired that employers have a tendency to become resentful towards women employees who indicate an intention to start a family and employees who eventually become pregnant.<sup>15</sup>

Regardless of South Africa's developments in the constitutional and labour law sphere, many women who communicate an intention to become pregnant and pregnant employees are continuing to experience detrimental treatment.<sup>16</sup> Women and pregnant employees therefore find themselves in positions where they have to be concerned about their economic standing, the future of their employment and the health of their baby as well as their own health.<sup>17</sup> As a result, many women employees are not employed due to pregnancy or their intention to become pregnant in future, dismissed and/or discriminated against on the announcement of their pregnancy, or dismissed and/or discriminated against after returning to work from maternity leave.<sup>18</sup>



## 1.2. AIMS OF THE THESIS

This thesis will firstly aim to illustrate that South African labour law and further relevant legislation affords for the protection against less favourable treatment of women and pregnant

<sup>14</sup> Mdaka A 'Pregnancy and Employment' *Labour Watch* December 2007 10 available at [www.ccma.org.za/UploadedMedia/CCMAil-December2007\(2\).doc](http://www.ccma.org.za/UploadedMedia/CCMAil-December2007(2).doc) (accessed 8 August 2014). See further, Kohl J *et al* 'Recent Trends in Pregnancy Discrimination Law' (2005) 48 *Business Horizons* 421 421 & 427.

<sup>15</sup> Steinem G 'Too Pregnant to Work – The Dilemma of Economic Rationality versus Equality' (2000) 16 *SAJHR* 690 690. See further, Hastie L 'Dismissed for Being Pregnant' available at <http://www.polity.org.za/article/dismissed-for-being-pregnant-2011-04-20> (accessed 7 August 2014).

<sup>16</sup> Throughout this thesis, a host of case law will be discussed to corroborate the statement that women and pregnant employees are treated unfairly in the workplace on the bases of pregnancy and pregnancy related matters. The cases that will be discussed are inter alia *Lukie v Rural Alliance CC t/a Rural Developments Specialists* (2004) 25 *ILJ* 1445 (LC), where the employer refused to permit the pregnant employee maternity leave. *Mnguni v Gumbi* (2004) 25 *ILJ* 715 (LC), where the employer dismissed the employee due to her exhaustion related to her pregnancy. *Wallace v Du Toit* (2006) 27 *ILJ* 1754 (LC), where the employee was dismissed when the employer realised that the employee was pregnant. *De Beer v SA Export Connection CC t/a Golden Paws* (2008) 29 *ILJ* 347 (LC), where an employer entered into an agreement with the employee that she would only take maternity leave for one month. Mtyala, Q 'Pregnant fire-fighter takes city to CCMA' *The Times Live* 9 July 2013 available at <http://www.timeslive.co.za/thetimes/2013/07/09/pregnant-firefighter-takes-city-to-ccma> (accessed 7 August 2014), where the employer cut the pregnant woman's monthly salary by 23 per cent.

<sup>17</sup> Queneau H & Marmot M 'Tensions Between Employment and Pregnancy: A Workable Balance' (2001) 50:1 *Family Relations* 59 59.

<sup>18</sup> Boucher L 'Fired for Being Pregnant?' available at <http://www.retrenchmentassist.co.za/index.php/ra-newsletters/80-fired-for-being-pregnant> (accessed 7 August 2014). See also, Anonymous 'Pregnancy in the Workplace' available at <http://www.inc.com/encyclopedia/pregnancy-in-the-workplace.html> (accessed 7 August 2014).

employees in the workplace. Secondly, this thesis will demonstrate that despite the formal protection afforded through legislation, the practical implementation of relevant provisions remain problematic.<sup>19</sup> Finally, this thesis will aim to recommend potential solutions on how existing legislation should be implemented more successfully by employers. Additionally, how the South African government can intercede to successfully interpret and apply existing legislative measures and to ensure that employers abide by the law.

### **1.3. PROBLEM STATEMENT**

Women and specifically pregnant employees are seen as liabilities to the employers business.<sup>20</sup> This situation as described above places women and pregnant employees in an adverse position in the workplace. Men and women live in one society. Notwithstanding, women are saddled with the burden of removing social differences that exists between men and women. This social indifference has the result of maintaining the inferior (women) versus superior (men) notion amongst the South African workplace culture.<sup>21</sup>

Irrespective of the current situation, employers have a legal obligation towards protecting women and pregnant employees in the workplace against unfair treatment based on pregnancy and matters related thereto. Employers are not fulfilling their obligation towards women and pregnant women.<sup>22</sup> They are also not abiding to the laws that protect women and pregnant employees against dismissal and/or discrimination. This non-compliance by employers is problematic and is thus one of the motives for this thesis.

The non-compliance issue directly stems from the poor implementation of the law. This is a shortcoming that needs to be addressed, as women and pregnant employees in the workplace continue to be prejudiced due to the failure of the employer to practically comply with the law.

The conclusion that can be drawn is that labour laws are inadequate. The problem is compounded by the fact that no guidelines exist that ensures the proper execution and

---

<sup>19</sup> South African Labour Guide 'Pregnancy and the Employer' available at <http://www.labourguide.co.za/pregnancy-and-the-employer> (accessed 15 September 2014).

<sup>20</sup> Smit N & Olivier M 'Discrimination Based on Pregnancy in Employment Law' (2002) 4 *TSAR* 783-794.

<sup>21</sup> Anonymous, 'The Turbulent 1950's – Women as Defiant Activists' <http://www.sahistory.org.za/topic/womens-charter> (accessed 18 August 2014).

<sup>22</sup> As can be seen from case law, see chapters 2 & 3 of this thesis.

fulfilment of pregnancy protection laws in South African labour law.<sup>23</sup> In the military sector for instance, ‘members had recently been called a “disgrace” and “humiliated in the presence of colleagues and threatened with summary transfers for being pregnant”’.<sup>24</sup> Therefore, a practical guideline is needed to ensure that the laws providing for the formal protection of women and pregnant employment in the labour law context are implemented correctly and abided by.

Thus, the problem that will be addressed in this thesis is that, notwithstanding these progressive laws, these laws mean very little if provision is not made for the proper implementation of employment rights of women and pregnant employees.<sup>25</sup>

It is for these reasons that the question that this thesis seeks to answer is the following: How should existing legislative provisions, providing for the formal protection of women and pregnant employees in the workplace, be implemented in such a way that the protection practically provided conforms to the formal protection available?

#### 1.4. **SIGNIFICANCE OF THE THESIS**

While labour legislation and related legislation exists to provide for the protection of women and pregnant employees in the workplace,<sup>26</sup> practically,<sup>27</sup> however, these laws are not being fully and/or properly implemented by employers. Implementation measures are lacking. Hence, this thesis will consider how the appropriate laws should be implemented in such a

<sup>23</sup> Sapa ‘Pregnant SANDF women humiliated at Oudtshoorn military base’ *Mail & Guardian* 29 January 2013 available at <http://mg.co.za/article/2013-01-29-pregnant-women-humiliated-at-oudtshoorn-military-base> (accessed 8 August 2014). See further, Mtyala Q ‘Pregnant firefighter takes city to CCMA’ *The Times Live* 9 July 2013 available at <http://www.timeslive.co.za/thetimes/2013/07/09/pregnant-firefighter-takes-city-to-ccma> (accessed 7 August 2014).

<sup>24</sup> Citizen Reporter ‘Army Abuses Pregnant Women’ *The Citizen* available at <http://www.security.co.za/fullStory.asp?NewsId=23550> (accessed 17 September 2014).

<sup>25</sup> A critique of the case of *Woolworths v Whitehead* (2000) 21 ILJ 571 (LAC) will be discussed where, in my view, the Labour Appeal Court (LAC) erred in interpreting the relevant labour legislation.

<sup>26</sup> Gobind J & Ukpere WI ‘Labour pains: Lessons from South Africa for Women Employees and their Employers’ (2012) 6:46 *Africa Journal of Business Management* 11549 11549.

<sup>27</sup> No empirical data has been collected to serve as evidence. But case law verifies that in practice, the law is not being implemented correctly. As in a matter concerning the South African National Defence Force (SANDF), women were ‘heavily’ criticised for falling pregnant. Seven women at the base were told that they were not welcomed at the force and that they have shamed the SANDF for falling pregnant. This resulted in one women committing suicide. (Sapa ‘Pregnant SANDF women humiliated at Oudtshoorn military base’ *Mail & Guardian* 29 January 2013 available at <http://mg.co.za/article/2013-01-29-pregnant-women-humiliated-at-oudtshoorn-military-base> (accessed 8 August 2014)).

manner that it practically provides adequate and sufficient protection to women and pregnant employees.

It has been established that the current South African legislation provides for the protection of pregnant employees in the workplace.<sup>28</sup> As indicated above there are however concerns about the value of protection afforded to women and pregnant employees against unfair treatment based on pregnancy and issues related to pregnancy. Working women might furthermore not be aware that there are laws that afford them protection against discriminatory treatment due to pregnancy. Moreover, pregnant employees might not be attentive to the fact that their employer's behaviour towards them might amount to pregnancy discrimination. Consequently, this thesis is significant as it will be scrutinising legislation with regard to pregnancy and laws that protects women and pregnant employees against unjust treatment in the South African workplace.

This thesis anticipates assisting to shape employers perspective on the topic of pregnancy. In other words, employers should come to the realisation that pregnancy is not a hindrance to their business.<sup>29</sup> There are manners in which both employers and employees rights and interests can be reconciled. This thesis will therefore attempt to guide employers on how to implement the relevant legislation to ensure they safeguard women and pregnant employee's rights in the workplace. In effect, this thesis will also assist employers to remain within the parameters of the law when dealing with a pregnancy or pregnancy related issue.

This thesis is also significant as it will compare and contrast South Africa's framework and position on the protection of women and pregnant employees in labour law with the United Kingdom (UK).<sup>30</sup> South Africa will gain insight into the manner in which the UK manages this contentious topic and hopefully similar approaches can be adopted into the South African labour law system. Therefore, this is an area of labour law that needs to be studied as it will make a considerable contribution to the advancement of labour law in South Africa.

---

<sup>28</sup> The LRA, the EEA, the BCEA, the UIA & the OHSA.

<sup>29</sup> Smit N & Olivier M 'Discrimination Based on Pregnancy in Employment Law' (2002) 4 *TSAR* 783-794.

<sup>30</sup> The UK has enacted various statutes, regulations and directives that specifically protect the rights of women and pregnant employees against discriminatory treatment within the workplace. These various frameworks and the contribution it has made to the substantial progress of UK law that is one of the reasons why the UK has been chosen to be the jurisdiction for the comparative study component to this study.

## **1.5. RESEARCH METHODOLOGY**

This thesis will be conducted by reviewing South African literature published by various primary and secondary sources. As a background, it will be vital to conduct a historical analysis of women's rights in South Africa. This will greatly assist in understanding why labour law goes to such a great extent in protecting women and especially pregnant employees in the workplace. This thesis will explore how women's rights have evolved and how it has developed in labour law through the years with particular reference to South Africa's judiciary and legislature. Journal articles, textbooks, newspaper articles, magazine articles and Internet sources will be utilised to conduct this historical analysis.

Furthermore, this thesis will be making considerable use of literature reviews. This will mostly be qualitative research as this thesis will analyse and interpret South African case law, commentaries of writers in journal articles, textbooks and newspaper articles. Legislation will more importantly be examined as it pertains to the protection of women and pregnant employees based on pregnancy.

A comparative analysis will be conducted to examine how the UK supports women and pregnant employees in the workplace. This thesis will be comparing and contrasting South African and UK legislation and case law. This will be done by examining how these respective jurisdictions apply and implement legislation providing for the protection of women and pregnant employees. As part of this comparative analysis, this thesis will review what South Africa can learn from the UK system. UK journal articles, textbooks, legislation, case law and Internet sources will likewise be evaluated.

Finally, this thesis will seek to develop arguments and recommendations on how best to confront the pervasive pregnancy discrimination issue in the South African workplace.

## **1.6. OVERVIEW OF CHAPTERS**

Chapter one will set out the introduction. This includes but is not limited to the background to the thesis, the aims, the problem that will be addressed, the significance of researching this area of the law, the research method and the outline of the thesis.

Chapter two will briefly explore the history and origin of the rights of women, with specific reference to women's rights in the South African workplace. This historical perspective will



provide a point of departure for further deliberations relating to pregnancy discrimination. In addition, this thesis will review the laws that provide for the protection of women and pregnant employees in the South African constitutional law context. More specifically, this thesis will review laws providing for the protection of women and pregnant employees<sup>31</sup> in the South African employment context. Chapter two will also provide an extensive case law discussion pertaining to women and pregnancy. Finally, chapter two will briefly discuss relevant international treaties dealing with the protection of women and pregnant employees in the international arena.<sup>32</sup>

Chapter three will concentrate on the issue of discrimination, specifically as it relates to the less favourable treatment of pregnant employees in the workplace. This chapter will define discrimination, particularly unfair discrimination. Chapter three will likewise include a discussion on the test for discrimination, the defences against unfair discrimination in employment and a specific examination regarding pregnancy discrimination in the employment environment.

Following the analysis of the South African framework relating to laws providing for the protection of women and pregnant employees, this thesis will proceed by considering the UK framework. Chapter four will comprehensively analyse, through the use of a comparative study, how the UK has developed and utilised their laws and policies that provides for the protection of women and pregnant employees in the workplace. An account of case law will also be given. This thesis aims to compare and contrast the similarities and differences of South Africa's and the UK's laws that provides for the protection of women and pregnant employees. This will be utilised as a stepping-stone to the lessons that South Africa can learn from the UK.

---

<sup>31</sup> This thesis will only focus on the protection of *employees* for the purposes of labour legislation. In terms of the LRA, section 200A contains a presumption as to who is an employee. '1) Until the contrary is provided, a person who works for, or renders services to, any other person is presumed, regardless of the form of the contract, to be an employee, if any one or more of the following factors are present: a) The manner in which the person works is subject to the control or direction of another; b) the person's hours of work are subject to the control of direction of another person; c) in the case of a person who works for an organisation, the person forms part of that organisation; d) the person has worked for that person for an average of at least 40 hours per month over the last three months; e) the person is economically dependent on the other person for whom he or she works or renders services; f) the person is provided; or g) the person only works for or renders services to one person.'

<sup>32</sup> International treaties include conventions and recommendations that have been ratified by South Africa. Conventions that have not been ratified will likewise be discussed and recommendations will be made to ratify these conventions, as it could be adopted into South Africa's domestic law to enhance the protection of women and pregnant employees in the workplace.

Chapter five will conclude with a summary of the protection of women and pregnant employees' in the workplace discussion. Additionally, it will contain concluding remarks and recommendations. This will include suggested solutions as to how the law can be better implemented to resolve the issue of unfavourable treatment of women and pregnant employees in the South Africa workplace.



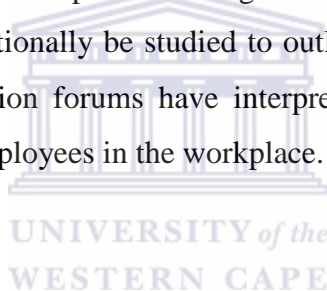
## **CHAPTER 2**

### **THE DEVELOPMENT OF EMPLOYMENT RIGHTS OF WOMEN IN SOUTH AFRICA IN DEALING WITH ISSUES OF PREGNANCY**

#### **2.1. INTRODUCTION**

Historically women have always been subjected to less favourable treatment in the workplace when compared to their male counterparts. This is especially true where issues of pregnancy came into play, whether it is the intention to start a family or actually being pregnant. Presently, unfavourable treatment of women and pregnant employees remains widespread in the workforce.<sup>1</sup>

This chapter will explore the development and advancement of employment rights of women, with specific reference to pregnancy issues. Constitutional law, labour law and international treaties that have been promulgated to protect the rights of women in this regard will briefly be examined. Case law will additionally be studied to outline how the South African courts and other labour dispute resolution forums have interpreted and applied the employment rights of women and pregnant employees in the workplace.



#### **2.2. CHANGING TIMES FOR WOMEN IN THE WORKPLACE**

In the late nineteenth century, and throughout most of the twentieth century, women were generally not permitted to work.<sup>2</sup> Rather, women were expected to run the household, to raise and care for children.<sup>3</sup> Where they were permitted to work, work would consist of menial tasks for low remuneration.<sup>4</sup> Consequently women enjoyed very little, if any, financial freedom. They were not able to own property, to freely spend their income, and were generally afforded insufficient protection against abuse and exploitation.<sup>5</sup> Job segregation

<sup>1</sup> Smit N & Olivier M 'Discrimination Based on Pregnancy in Employment Law' (2002) 4 *TSAR* 783.

<sup>2</sup> Fredman S *Women and the Law* (1997) 104.

<sup>3</sup> Fredman S *Women and the Law* (1997) 104. See further, McDonald P *et al* 'Expecting the Worst: Circumstances Surrounding Pregnancy Discrimination at Work and Progress to Formal Redress' (2008) 29:3 *Industrial Relations Journal* 229-230.

<sup>4</sup> Fredman S *Women and the Law* (1997) 104, 107 & 109.

<sup>5</sup> Fredman S *Women and the Law* (1997) 104-105.

resulted in very few women entering professional occupations, which continued until the beginning of the twenty first century.<sup>6</sup>

For those few women who found themselves in the workplace, family responsibility obligations resulted in them rarely being able to further their careers.<sup>7</sup> Additionally, due to misconceptions regarding women's reproductive roles, women were viewed as unstable employees who lacked determination.<sup>8</sup> During 1954, women in South Africa professed that they:

‘[W]ant shared responsibility and decision-making in the home and effective equality in politics, the law, and in the economy. For too long women have been marginalised, ignored, exploited and are the poorest and most disadvantaged of South Africans. If democracy and human rights are to be meaningful for women, they must address our historic subordination and oppression. Women must participate in, and shape the nature and form of our democracy’.<sup>9</sup>

Despite the above, and despite the role that women played in the liberation of South Africa from apartheid, women did not receive equal treatment to men.<sup>10</sup> Moreover, women were continuously subjected to discrimination in all areas, including the employment environment.<sup>11</sup> It is no secret that men were innately more valuable to society than women.<sup>12</sup> Fortunately this unfortunate state of affairs started to change with the democratisation of

<sup>6</sup> Fredman S *Women and the Law* (1997) 111.

<sup>7</sup> Fredman S *Women and the Law* (1997) 101.

<sup>8</sup> Fredman S *Women and the Law* (1997) 110.

<sup>9</sup> The Women's Charter for Effective Equality available at <http://www.anc.org.za/show.php?id=233> (accessed 17 February 2015). The women's charter was adopted at the launch of the Federation of South African Women (FSAW or FEDSAW) in 1954. This charter was drawn up to unite women against political, social, legal and economic injustices (hereafter the Women's Charter for Effective Equality).

<sup>10</sup> Banda F *Women, Law and Human Rights: An African Perspective* (2005) 26-27.

<sup>11</sup> Banda F *Women, Law and Human Rights: An African Perspective* (2005) 26-27.

<sup>12</sup> Pannick D *Sex Discrimination Law* (1985) 1. According to a 2014 survey by Grant Thornton's, women occupy only 26 per cent of South Africa's senior management positions. Results also show that company's offer 63 per cent unpaid leave and 56 per cent offer flexible working hours. Moreover, 45 per cent of company's afford working mothers professional development whilst on maternity leave. They also receive paid maternity leave and secure women employees' jobs after returning from maternity leave. 'However, schemes that really help alleviate the childcare burden, such as crèches at work, are much less common,' notes Hern. 'In SA only seven per cent of companies offer on-site childcare facilities while the global percentage is six per cent.' (Osterberger L 'Still only a quarter of senior business positions filled by women in SA – Grant Thornton survey' available at <http://www.gt.co.za/news/2014/03/still-only-a-quarter-of-senior-business-positions-filled-by-women-in-sa-grant-thornton-survey/> (accessed 24 February 2015)). A manner in which companies can provide a working structure that is accommodating to women is to introduce flexible working hours, flexi time, flexi leave and the like. More relevant to this discussion is introducing child care facilities at work (Hern J, 'Not enough women in senior management positions in South Africa' available at <http://www.gt.co.za/news/2013/03/not-enough-women-in-senior-management-positions-in-south-africa/> (accessed 18 August 2014)).

South Africa and the enactment of the final Constitution of 1996.<sup>13</sup> In a progressive, and ‘open and democratic’<sup>14</sup> society such as South Africa, women should be on an equal footing with men. Equality is now specifically provided for in section 9 (the ‘equality clause’) of the Constitution.<sup>15</sup> Due to the equality clause, the position women find themselves in at the moment in the workplace, although still not ideal, is considerably more favourable than it used to be. This more favourable position is also as a result of progress that has been made in terms of legislation, which legislation has been enacted to uphold Constitutional values.<sup>16</sup> Whether sufficient progress has been made thus far however remains debatable, especially as far as the employment rights of pregnant employees and those women who intend to fall pregnant in the workplace are concerned.

In *Lukie v Rural Alliance*,<sup>17</sup> Francis J was of the opinion that ‘it is totally unacceptable that despite our Constitution and the advancement of women's rights in the workplace that some employers still dismiss women for having fallen pregnant. Women are still being discriminated against in the workplace’.<sup>18</sup> As women continue to face less favourable treatment because of pregnancy, or a pregnancy related reason, the South African government during 2013 adopted the Women Empowerment and Gender Equality Bill.<sup>19</sup> This Bill seeks to further advance equality of women, in general.<sup>20</sup> One of the objectives of the Bill is to eliminate unfair discrimination, in general.<sup>21</sup> The Bill has not been without criticism though. Arguments have been made that the Bill is a mere replication of other statutes and that it has nothing new to offer women.<sup>22</sup>

---

<sup>13</sup> Constitution of the Republic of South Africa, 1996 (hereafter the Constitution).

<sup>14</sup> Constitution, section 36.

<sup>15</sup> Refer to discussion under para 2.3.1. below where the Constitution in general, and section 9 in particular, will be discussed further.

<sup>16</sup> Sections 186 & 187 of the Labour Relations Act 66 of 1995 make provision for unfair dismissals and automatically unfair dismissals respectively. Additionally, the Employment Equity Act 55 of 1998 makes provision for anti-discrimination in the workplace. Chapter 3 of this thesis will specifically focus on pregnancy discrimination legislation within employment.

<sup>17</sup> *Lukie v Rural Alliance CC t/a Rural Developments Specialists* (2004) 25 ILJ 1445 (LC) (hereafter *Lukie v Rural Alliance*).

<sup>18</sup> *Lukie v Rural Alliance* para 19.

<sup>19</sup> The Women Empowerment and Gender Equality Bill, published in the GG 37005 of 6 November 2013 (hereafter the Bill).

<sup>20</sup> The Bill, section 3.

<sup>21</sup> The Bill, section 3.

<sup>22</sup> Sapa ‘Gender Equity Bill Passed Amid Criticism’ *The Mail & Guardian* 05 March 2014 available at <http://mg.co.za/article/2014-03-05-women-equity-bill-passed> (accessed 12 April 2015).

### **2.3. LEGAL PROTECTION AFFORDED TO WOMEN AND PREGNANT EMPLOYEES IN SOUTH AFRICA RELATING TO ISSUES OF PREGNANCY**

Women are increasingly participating in employment in South Africa.<sup>23</sup> Hence Fredman's question on '[w]hat role, then can the law play in protecting women's detrimental treatment on grounds of pregnancy and maternity; and dismantling the systematic barriers to advancement facing women with child-care responsibilities?'<sup>24</sup> is significant.

What follows below is an overview of the progress that South Africa has made concerning women's employment rights as it relates to pregnancy and issues related to pregnancy. First, the Constitution will be examined, followed by a discussion on the provisions of the Labour Relations Act 66 of 1995 (the LRA), the Basic Conditions of Employment Act 75 of 1997 (the BCEA) and the Employment Equity Act 55 of 1998 (the EEA) which afford women and pregnant employees protection in the workplace.

#### **2.3.1. THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996**

Before the dawn of South Africa's democracy and the final Constitution, pregnant employees were not afforded much protection in South Africa against unfair treatment in the workplace.<sup>25</sup> Currently, South African law provides an abundance of legislation that aim to protect women and pregnant employees in the place of work. Relevant legislation was predominantly enacted due to the equality clause of the Constitution.

Two fundamental rights in the Bill of Rights (chapter 2 in the Constitution) are the right to equality<sup>26</sup> and the right to human dignity.<sup>27</sup> With regard to equality, section 9(3) of the Constitution states that, 'The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including...pregnancy...'.<sup>28</sup> If an employer displays prejudicial treatment against a woman due to her pregnancy or against a woman who might

<sup>23</sup> Mdaka A 'Pregnancy and Employment' *Labour Watch* December 2007 10 available at [www.ccma.org.za/UploadedMedia/CCMAil-December2007\(2\).doc](http://www.ccma.org.za/UploadedMedia/CCMAil-December2007(2).doc) (accessed 8 August 2014).

<sup>24</sup> Fredman S *Women and the Law* (1997) 181.

<sup>25</sup> *Sheridan v The Original Mary-Ann's at the Colony (Pty) Ltd* (1999) 20 *ILJ* (LC) para 21.

<sup>26</sup> Constitution, section 9.

<sup>27</sup> Constitution, section 10.

<sup>28</sup> Constitution, section 9(3).

want to become pregnant, that is, any aspect that is related to pregnancy, it could possibly amount to unfair discrimination.<sup>29</sup>

In addition, section 9(4) of the Constitution states that direct and indirect unfair discrimination should not be tolerated under any circumstances. Thus, women have a constitutional right not to be discriminated against because of their status regarding pregnancy, or any pregnancy related issue. With regard to human dignity, human dignity is a notion that should be upheld under all circumstances, including therefore in the workplace. This topic, and how it relates to the protection of women and pregnancy in the place of employment, will be discussed in greater detail in chapter 3 of this thesis.

### **2.3.2. THE LABOUR RELATIONS ACT 66 OF 1995**

Before the advent of the old Labour Relations Act 27 of 1956, women and pregnant employees were afforded very little, if any, protection against unfair treatment in the workplace.<sup>30</sup> Common law prescribed that women who were absent from work to give birth were in danger of being dismissed, especially where the employer failed to agree to such absence.<sup>31</sup> With the enactment of the aforesaid old Labour Relations Act however, the Industrial Court (IC) started holding such dismissals to be unfair.<sup>32</sup>

The current Labour Relations Act 66 of 1995 (the LRA) now expressly states that no employee may be unfairly dismissed and subjected to unfair labour practices.<sup>33</sup> Section 186(1) defines the term 'dismissal' in great detail. Section 186(1)(c)(i) of the recently amended LRA<sup>34</sup> specifically refers to a dismissal where the employer does not allow the employee to return to work after she has been on maternity leave.

Additionally, section 186(1)(c)(ii) holds that a dismissal also occurs where an employer rejects a woman employee to continue to work if she was absent from work prior to her giving birth and/or after giving birth. Section 186(1)(c) of the LRA has a critical meaning in that an employer cannot, under any circumstances, assert that an employee's extended

<sup>29</sup> See chapter 3 of this thesis, discussion on employers' defences against unfair discrimination claims.

<sup>30</sup> Grogan J *Workplace Law* 11 ed (2014) 218 (hereafter Grogan J *Workplace Law*).

<sup>31</sup> Grogan J *Workplace Law* 218.

<sup>32</sup> Grogan J *Workplace Law* 218.

<sup>33</sup> LRA, sections 185-187.

<sup>34</sup> Labour Relations Amendment Act 6 of 2014, commencement date 01 January 2015 as published in the GN 594 GG 38317 of 19 December 2014.

absence, which is associated with the birth of her new-born baby, has led to the automatic dissolution of the employment contract.<sup>35</sup>

The LRA also protects women and pregnant employees by stating that no employee should be subjected to an unfair labour practices.<sup>36</sup> Section 186(2) defines the term ‘unfair labour practice’.<sup>37</sup> Additionally, section 23 of the Constitution states that, ‘Everyone has the right to fair labour practices.’ The word ‘everyone’ as contained in the Constitution includes non-employees. Therefore, the Constitution has a broader purpose as opposed to the LRA. The unfair labour practice provision in section 186(2) of the LRA protects ‘employees’ only. What is ‘fair’ will be decided on a case by case basis and all circumstances will have to be taken into account when a decision is made. For this reason, it is imperative that pregnant women understand that if they are not being treated fairly, such treatment might potentially amount to an unfair labour practice. Thus, an unfair labour practice because of pregnancy could not only result in an unfair labour practice claim, but also potentially an unfair discrimination claim in terms of the EEA.<sup>38</sup>

Moreover, section 187 of the LRA explicitly lists the various types of dismissals that are automatically unfair. An automatically unfair dismissal means that the employee who claims that the dismissal is unfair does not have to prove the unfairness of the dismissal.<sup>39</sup> The dismissal is deemed to be unfair from the outset.<sup>40</sup> Section 187(1)(e) of the LRA distinctly provides that it is automatically unfair for the employer to dismiss a woman employee on grounds of ‘pregnancy, intended pregnancy, or any reason related to her pregnancy.’

In the judgement of *Mashaba v Cuzen and Woods Attorneys*,<sup>41</sup> Landman J declared that ‘the purpose of protecting female employees from dismissal for reasons of pregnancy, intended

<sup>35</sup> Grogan J *Workplace Law* 173.

<sup>36</sup> LRA, sections 185 – 187.

<sup>37</sup> ‘Unfair labour practice’ means an unfair act or omission that arises between an employer and an employee involving – (a) unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissals for a reason relating to probation) or training of an employee or relating to the provision of benefits to an employee; (b) the unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee; (c) a failure or refusal by an employer to reinstate or re-employ a former employee in terms of any agreement; and (d) an occupational detriment, other than dismissal, in contravention of the Protected Disclosures Act, 2000 (Act No. 26 of 2000), on account of the employee having made a protected disclosure defined in that Act.

<sup>38</sup> See para 2.3.4. below.

<sup>39</sup> Du Toit D, Godfrey S *et al Labour Relations Law: A Comprehensive Guide* 6 ed (2015) 433 (hereafter Du Toit D *Labour Relations Law*).

<sup>40</sup> Du Toit D *Labour Relations Law* 433.

<sup>41</sup> *Mashava v Cuzen and Woods Attorneys* (2000) 21 ILJ 402 (LC) (hereafter *Mashava v Cuzen and Woods Attorneys*).



pregnancy or reasons related to pregnancy, is to ensure as far as possible that female employees are not disadvantaged, as they traditionally have been, by virtue of them being women and the child-bearing member of the human race.’<sup>42</sup>

Grant further emphasises that a dismissal in terms of section 187(1)(e) of the LRA is broad in that secondary reasons to the pregnancy of the employee can be considered as a constructive reason for the dismissal.<sup>43</sup> A constructive dismissal is where the employee terminates the employment contract because the employer has made the employment relationship intolerable.<sup>44</sup> Essentially the employer’s behaviour has driven the employee to end the employment relationship.<sup>45</sup> For example, if the secondary reason to the pregnancy is not allowing the pregnant employee to attend antenatal appointments<sup>46</sup> or limiting the employee’s maternity leave to four weeks, this might possibly drive the employee to resign. In *Victor v Finro Cash & Carry*,<sup>47</sup> the pregnant employee claimed that she was constructively dismissed. After she fell pregnant, her employer made the working environment unbearable for her, this he done by giving her a job of lower income. The employer also altered her job description. Landman J averred that the employer had demoted her and it was a form of punishment for having fallen pregnant.<sup>48</sup> The reason for the constructive dismissal was linked to her pregnancy.

A dismissal can likewise be automatically unfair if the reason for the dismissal is based on family responsibility. In accordance with section 187(1)(f) of the LRA, an employer unfairly discriminates against an employee if the basis for the dismissal is family responsibility. The issue of family responsibility leave is a factor that is connected to pregnancy; and will be discussed later in this chapter when discussing case law.<sup>49</sup>

---

<sup>42</sup> *Mashava v Cuzen and Woods Attorneys* para 14.

<sup>43</sup> Whitear-Nel N, Grant B & Behari A ‘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* 106 106 & 110.

<sup>44</sup> LRA, section 186(1)(e).

<sup>45</sup> Du Toit D *Labour Relations Law* 430.

<sup>46</sup> See discussion on *Ndlovu v Pather* (2006) 27 *ILJ* 2671 (LC), para 2.4.7. of this thesis.

<sup>47</sup> *Victor v Finro Cash & Carry* (2000) 21 *ILJ* 2489 (LC) (hereafter *Victor v Finro Cash & Carry*).

<sup>48</sup> *Victor v Finro Cash & Carry* para 14.

<sup>49</sup> See para 2.4.6. below.

### **2.3.3. THE BASIC CONDITIONS OF EMPLOYMENT ACT 75 OF 1997**

The previous Basic Conditions of Employment Act 3 of 1983 provided no protection to pregnant employees. Moreover, pregnant employees were prohibited from the employment environment from four weeks before giving birth and eight weeks after giving birth.<sup>50</sup>

This position has dramatically changed under the current Basic Conditions of Employment Act 75 of 1997 (the BCEA). The current BCEA provides for minimum conditions of employment. Part of these conditions is that pregnant employees are entitled to four consecutive months of maternity leave.<sup>51</sup> The leave is on an unpaid basis however.

Maternity leave may commence from four weeks before the expected birth of the baby.<sup>52</sup> Alternatively, maternity leave can be taken at a time when a medical practitioner confirms that maternity leave is essential due to health and safety reasons of the mother and/or baby.<sup>53</sup> If an employee has a miscarriage in the third trimester of her pregnancy, or if she gives birth to a stillborn baby, she is still entitled to maternity leave for up to six weeks.<sup>54</sup>

As specified by the BCEA, a pregnant employee must inform the employer in writing when she will commence maternity leave.<sup>55</sup> An employee must notify her employer at least four weeks before the commencement of maternity leave, or when it is reasonably practicable to give such notice.<sup>56</sup> The pregnant employee must also inform her employer when she will return to work, after her maternity leave has expired.<sup>57</sup> An employee may not however return to the place of work for a minimum period of six weeks after having given birth.<sup>58</sup>

During the maternity leave period, women are entitled to claim maternity benefits from the Unemployment Insurance Fund (the UIF), where they qualify to do so, in terms of the Unemployment Insurance Act 63 of 2001 (the UIA).<sup>59</sup> Maternity benefits can be claimed as soon as the pregnant employee commences maternity leave.<sup>60</sup> Maternity benefits can be

---

<sup>50</sup> Grogan J *Employment Rights* (2010) 82.

<sup>51</sup> BCEA, section 25(1).

<sup>52</sup> BCEA, section 25(2)(a).

<sup>53</sup> BCEA, section 25(2)(b).

<sup>54</sup> BCEA, section 25(4).

<sup>55</sup> BCEA, section 25(5)(a).

<sup>56</sup> BCEA, section 25(6)(a) & (b).

<sup>57</sup> BCEA, section 25(5)(b).

<sup>58</sup> BCEA, section 25(3).

<sup>59</sup> BCEA, section 25(7).

<sup>60</sup> Unemployment Insurance Act 63 of 2001, section 25 (hereafter the UIA).

claimed for a maximum of 17.32 weeks by employees who have given birth.<sup>61</sup> Employees who miscarry in their third trimester or who had a stillborn baby can claim six weeks of maternity benefits.<sup>62</sup> Du Toit contends that not permitting an employee to return to work after maternity leave is an automatically unfair dismissal.<sup>63</sup>

Regarding working conditions, no pregnant employee or nursing employee should be expected or allowed to work in hazardous conditions.<sup>64</sup> It would be unfair to be forced to work in conditions that are hazardous to the health and safety of the pregnant employee and/or her baby. Furthermore, where the pregnant employee is contracted to work night shifts and where conditions might be dangerous to the pregnant employee, alternative employment should be arranged that would be more appropriate to the health and well-being of the pregnant employee and her baby.<sup>65</sup>

Additionally, by virtue of section 26 of the BCEA, the Code of Good Practice on the Protection of Employees During Pregnancy and After the Birth of a Child<sup>66</sup> (the Code of Good Practice on Pregnancy) was enacted. The aim of this code is to guide employers and employees regarding the protection of women against potential risks in the workplace whilst pregnant, after child birth and while breast-feeding.<sup>67</sup> The Code of Good Practice on Pregnancy confirms that no employee should be treated less favourably on the basis of her pregnancy.<sup>68</sup> Essentially, the Code of Good Practice on Pregnancy articulates that employers are obliged to ensure that pregnant employees work in a safe and risk free working environment.<sup>69</sup>

Shifting focus to family responsibility leave, an employee has the right to paid family responsibility leave of three days for every annual leave cycle.<sup>70</sup> However, the employee must have worked for the employer for longer than four months and should work at least four

---

<sup>61</sup> UIA, section 24(4).

<sup>62</sup> UIA, section 24(5).

<sup>63</sup> Du Toit *D Labour Relations Law* 429.

<sup>64</sup> BCEA, section 26(1).

<sup>65</sup> BCEA, section 26(2)(a) & (b). See further, BCEA, Code of Good Practice on the Arrangement of Working Time published in GN 1440 in GG 19453 of 13 November 1998, para 5.6.

<sup>66</sup> BCEA, Code of Good Practice on the Protection of Employees During Pregnancy and After the Birth of a Child in GN R1441 in GG 19453 of 13 November 1998 (hereafter the Code of Good Practice on Pregnancy).

<sup>67</sup> Code of Good Practice on Pregnancy, para 1.2.

<sup>68</sup> Code of Good Practice on Pregnancy, para 4.2.

<sup>69</sup> Code of Good Practice on Pregnancy, para 4.3. The obligation also stems from the Occupational Health and Safety Act 85 of 1993 as well as the Mine Health and Safety Act 27 of 1996.

<sup>70</sup> BCEA, section 27(2).

days a week for that particular employer in order to qualify for family responsibility leave.<sup>71</sup> Such leave can be taken when a child is born or when the child is ill.<sup>72</sup> Since South African labour laws make no provision for paternity leave (leave for fathers on the birth of a child), this is of particular relevance to men.

#### **2.3.4. THE EMPLOYMENT EQUITY ACT 55 OF 1998**

The Employment Equity Act 55 of 1998 (the EEA) provides for the prohibition against unfair discrimination, and the enactment of affirmative action measures. As such, the EEA is the predominant statute concerning equality in the employment context. Section 6(1) of the EEA provides that ‘No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including... pregnancy...’. Chapter 3 of this thesis will comprehensively discuss the EEA and the protection that it affords to women and pregnant employees in the workplace.

### **2.4. WOMEN AND PREGNANCY IN THE WORKPLACE: A DISCUSSION AND ANALYSIS OF CASE LAW**

Case law will now be examined to better understand the meaning and application of the above-mentioned provisions of the Constitution, the LRA and the BCEA.

#### **2.4.1. TRUE REASON FOR DISMISSAL**

All women employees are afforded protection under section 187(1)(e) of the LRA. This was established in the case of *Hunt v ICC Car Importers Services Co (Pty) Ltd*<sup>73</sup> where the applicant fell pregnant and the respondent company terminated her employment contract. The applicant believed that the termination of her contract was based on her pregnancy. The employer however argued that the relationship that existed was not one of employer and employee, and therefore there had been no dismissal. According to the employer the ‘dismissal’ was merely a termination of a contract of someone who was an independent

<sup>71</sup> BCEA, section 27(1)(a) & (b).

<sup>72</sup> BCEA, section 27(2)(a) & (b).

<sup>73</sup> *Hunt v ICC Car Importers Services Co (Pty) Ltd* (1999) 20 ILJ 364 (LC).

contractor. Landman J held that the contract was a hoax and concluded that the applicant was in fact an employee. The dismissal was held to be as a result of the employee's pregnancy and was consequently automatically unfair as per section 187(1)(e) of the LRA.

In *Solidarity obo McCabe v SA Institute for Medical Research*,<sup>74</sup> the employee was employed on a fixed-term contract with the employer. Her employer advised her to apply for a permanent post. After notifying her employer that she was pregnant she was informed that her application for the permanent post had been unsuccessful. The employee claimed that she had been dismissed and that it was automatically unfair. The issue was whether the employee was dismissed in terms of section 186(1)(b) of the LRA.<sup>75</sup> If the employee was dismissed due to the non-renewal of her fixed term contract, the question would be whether the dismissal was automatically unfair as per section 187(1)(e) of the LRA. The Labour Court (LC) noted that the employer's attitude towards the employee changed once the employer became aware of the employee's pregnancy. Additionally, the employer contended that the pregnant employee was not qualified for the position, but her qualification was never an issue before. The LC held that the termination of the employment contract amounted to an automatically unfair dismissal as per section 187(1)(e) of the LRA.

Pregnant women should also not abuse the protection that they are afforded when they are pregnant. In *Uys v Imperial Care Rental*<sup>76</sup> the pregnant applicant was called to a disciplinary hearing less than a month after her appointment. The pregnant employee was alleged to have been dishonest and to have been performing poorly at work. Subsequently she was dismissed for misconduct. The applicant deemed the dismissal to be automatically unfair. She reckoned that she was dismissed due to her pregnancy. However, the LC was of the view that the dismissal was not related to the applicant's pregnancy. Her dismissal stemmed from her misconduct at work.

Similarly, in *Wardlaw v Supreme Mouldings*,<sup>77</sup> the question was whether the applicant employee was dismissed due to her pregnancy or misconduct. The employee alleged that she was dismissed due to her pregnancy. After the employee returned to work from maternity

<sup>74</sup> *Solidarity obo McCabe v SA Institute for Medical Research* [2003] 9 BLLR 927 (LC).

<sup>75</sup> LRA, section 186(1)(b) states that if an employee reasonably expected the renewal of a fixed term contract, but the contract was not renewed, the non-renewal of the fixed term contract would conceivably amount to a dismissal.

<sup>76</sup> *Uys v Imperial Car Rental (Pty) Ltd* (2006) 27 ILJ 2702 (LC) (hereafter *Uys v Imperial Car Rental (Pty) Ltd*).

<sup>77</sup> *Wardlaw v Supreme Mouldings (Pty) Ltd* (2004) 25 ILJ 1094 (LC) (hereafter *Wardlaw v Supreme Mouldings*).

leave, she was charged with gross negligence for failing to produce and maintain correct company records and failing to complete certain administrative functions. Furthermore, she was accused of breaching the duty of good faith that she had towards her employer. She was the general financial manager who failed to adhere to tax regulations. This strained the company financially. Consequently, the employer had to prove that the reason for the employee's dismissal was not based on the employee's pregnancy. Rather, it was based on the employee's 'dereliction of duties.'<sup>78</sup> The allegations against the employee proved to be true. Thus, the LC held that the reason for the applicant's dismissal was not connected to her pregnancy.

The *Wardlaw v Supreme Mouldings* and *Uys v Imperial Care Rental* cases demonstrate how employees could potentially abuse the protection afforded by section 187(1)(e) of the LRA.<sup>79</sup> Ms Wardlaw and Ms Uys were aware of their wrongdoings. However, they utilised pregnancy as a shield. Case law has manifested that employees have a tendency to utilise section 187(1)(e) of the LRA as a defence at their will.<sup>80</sup> Even though the genuine reason for their dismissals are misconduct, incapacity or the company's operational requirements.<sup>81</sup> Pregnant employees are not insusceptible to dismissal if the dismissal is for a genuine reason, such as misconduct.<sup>82</sup>

Employers can expect to be probed in court if the reason for the dismissal is not certain.<sup>83</sup> Additionally, if there is corroboration that the dismissal might be based on pregnancy or reasons linked to pregnancy, they will also be probed.<sup>84</sup> Labour courts will be harsh with employers who dismiss employees in terms of section 187(1)(e) of the LRA.<sup>85</sup> This was demonstrated in the recent case of *Heath v A & N Paneelkloppers*.<sup>86</sup> Snyman AJ indicated

<sup>78</sup> *Wardlaw v Supreme Mouldings* page 1098.

<sup>79</sup> Gobind J & W Ukpere 'Labour Pains: Employees and their Employers' (2012) 6:46 *African Journal of Business Management* 11549 11552.

<sup>80</sup> Gobind J & W Ukpere 'Labour Pains: Employees and their Employers' (2012) 6:46 *African Journal of Business Management* 11549 11557.

<sup>81</sup> Fair reasons for dismissing an employee, see Du Toit D *Labour Relations Law* 442 - 498.

<sup>82</sup> Grogan J *Workplace Law* 219.

<sup>83</sup> Gobind J & W Ukpere 'Labour Pains: Employees and their Employers' (2012) 6:46 *African Journal of Business Management* 11549 11555.

<sup>84</sup> Gobind J & W Ukpere 'Labour Pains: Employees and their Employers' (2012) 6:46 *African Journal of Business Management* 11549 11555.

<sup>85</sup> Boucher L 'Fired For Being Pregnant' available at <http://www.retrenchmentassist.co.za/index.php/ra-newsletters/80-fired-for-being-pregnant> (accessed 7 August 2014).

<sup>86</sup> *Heath v A & N Paneelkloppers* (2015) 36 ILJ 1301 (LC).

that there simply has to be a sufficient link between the pregnancy and the dismissal of the employee. If the link is present, it would be an automatically unfair dismissal.

In the much debated case of *Woolworths v Whitehead*,<sup>87</sup> the employer, Woolworths, was in need of a human resource generalist. Ms Whitehead applied for the position and was thereafter interviewed by Woolworths. During the interview it transpired that she was pregnant. Via a telephonic discussion, Ms Whitehead was notified by a representative from Woolworths that the position was hers, although, certain formalities had to be finalised first. Following this discussion, it emerged that the offer was for a fixed-term contract only. A permanent position could not be offered to her due to her pregnancy.

The issue in the *Woolworths v Whitehead* case was whether Ms Whitehead had been dismissed. If this question was answered in the affirmative, the next question was whether this dismissal was as a result of her pregnancy. The majority decision delivered by Zondo AJP and Willis JA, reasoned that because the company took Ms Whitehead's pregnancy into account, it did not prejudice her position in the company. Zondo AJP acknowledged that in a company continuity is needed for at least 12 months. As a result, Ms Whitehead would not have satisfied this prerequisite. The employer's decision was rational and it was acceptable to consider the commercial factor. For this reason section 187(1)(e) of the LRA was not contravened. Ultimately, there was no relation between Ms Whitehead's non-appointment and her pregnancy.

After *Woolworths v Whitehead* it seems as if employers are extremely hesitant to employ pregnant women as this might have an impact on the day-to-day running of their businesses.<sup>88</sup> Mdaka contends a balance should be struck in accommodating and protecting both parties' rights.<sup>89</sup>

---

<sup>87</sup> *Woolworths v Whitehead* (2000) 21 ILJ 571 (LAC) (hereafter *Woolworths v Whitehead*).

<sup>88</sup> Mdaka A 'Pregnancy and Employment' *Labour Watch* December 2007 11 available at [www.ccma.org.za/UploadedMedia/CCMAil-December2007\(2\).doc](http://www.ccma.org.za/UploadedMedia/CCMAil-December2007(2).doc) (accessed 8 August 2014). See further, Barnard J '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 510 512.

<sup>89</sup> Mdaka A 'Pregnancy and Employment' *Labour Watch* December 2007 11 available at [www.ccma.org.za/UploadedMedia/CCMAil-December2007\(2\).doc](http://www.ccma.org.za/UploadedMedia/CCMAil-December2007(2).doc) (accessed 8 August 2014).

### **2.4.2. EMPLOYERS PREVENTING EMPLOYEES FROM FALLING PREGNANT**

In *Wallace v Du Toit*,<sup>90</sup> it was claimed that a contract was entered into between the employer and employee whereby the employee would not bear children. The applicant was an au pair who cared for the employer's daughter. The employer expressed concern that the employee would not devote much time to his daughter if the employee had a child of her own. Later the employee announced her pregnancy subsequently she was dismissed.

Pillemer AJ stated that, '[t]he respondent's justification that this was an inherent requirement of the job, even if it was sustainable, which in my view it is not, cannot in law provide a legal justification. The section is clear. A dismissal where the reason is related to the pregnancy of the employee is automatically unfair and cannot be justified.'<sup>91</sup> The LC concluded that the dismissal was based on the employee's pregnancy, hence the dismissal was automatically unfair in terms of section 187(1)(e) of the LRA.

### **2.4.3. THE EMPLOYER'S DUTY TO PROTECT A PREGNANT EMPLOYEE**

In *Memela & another v Ekhamanzi Springs (Pty) Ltd*<sup>92</sup> it was noted that an employer has a duty to protect pregnant employees. Two unmarried pregnant employees were prohibited from entering the workplace premises. This was due to a code adopted by the owner of the work premises (not the employer) that stated that unmarried pregnant women who worked on the property could not gain access to the workplace. As a result, these women could not fulfil their duties and were dismissed.

The LC held that the employer had a responsibility towards these pregnant employees. The employer should have clarified the code with the owner of the property in order to protect the rights of the pregnant employees. In the case of *Memela*, the LC therefore confirmed that an employer has rights and duties towards protecting pregnant employees.

<sup>90</sup> *Wallace v Du Toit* (2006) 27 ILJ 1754 (LC) (hereafter *Wallace v Du Toit*).

<sup>91</sup> *Wallace v Du Toit* para 17.

<sup>92</sup> *Memela & another v Ekhamanzi Springs (Pty) Ltd* (2012) 33 ILJ 2911 (LC) (hereafter *Memela*).



#### **2.4.4. MATERNITY LEAVE**

Front page headlines such as ‘Working moms get a raw deal’ has been a debatable topic. In the afore-mentioned newspaper article, the issue pertained to a woman who took maternity leave only to return to work and discover that her position was given to someone else.<sup>93</sup> The LRA makes it clear that an employee cannot be dismissed during her maternity leave, or upon her return to work.<sup>94</sup> The employee has the right to come back to her same job.<sup>95</sup>

Yet, despite labour legislation prohibiting such dismissals, it has become a trend in South Africa where companies are compelling women employees to leave their jobs after maternity leave.<sup>96</sup> In the following three cases, this subject is exemplified. These cases manifest that some employers still have no regard for women’s maternity rights.

In *Randall v Progress Knitting Textiles Ltd*<sup>97</sup> a matter decided before the advent of the LRA, the employer’s inconsistency in applying company policy was displayed. An employee requested to take three months maternity leave. The employer said that it would look into the company’s policy regarding maternity leave. The employer contended that an employee’s contract of employment would automatically terminate when she became pregnant. Moreover, the employer averred that the company did not permit maternity leave. Prior to this incident however, the company had permitted another employee to take maternity leave and to return to work. The IC held that a precedent had been set by the company and that not granting the employee maternity leave and the opportunity to return to work constituted an unfair labour practice.<sup>98</sup> The employee’s situation was declared to be an unfair labour practice, additionally her dismissal was held to be both substantively and procedurally unfair.<sup>99</sup>

---

<sup>93</sup> Kalideen N ‘Working Moms Get a Raw Deal’ *The Star* 24 January 2005 available at <http://www.iol.co.za/news/south-africa/working-moms-get-a-raw-deal-1.232194#.VOdjjSymErg> (accessed 20 February 2015).

<sup>94</sup> LRA, section 186(1)(c).

<sup>95</sup> Anonymous ‘Pregnancy and Contracts’ available at <http://www.mywage.co.za/main/decent-work/employment-security/pregnancy-contracts> (accessed 04 August 2014).

<sup>96</sup> Kalideen N ‘Working Moms Get a Raw Deal’ *The Star* 24 January 2005 available at <http://www.iol.co.za/news/south-africa/working-moms-get-a-raw-deal-1.232194#.VOdjjSymErg> (accessed 20 February 2015).

<sup>97</sup> *Randall v Progress Knitting Textiles Ltd* (1992) 13 ILJ 200 (IC) D.

<sup>98</sup> See footnote 37.

<sup>99</sup> LRA, section 188(1)(a) & (b). Substantive fairness means that there must be a fair reason for the dismissal. Procedural fairness means that a fair procedure should be followed when the employee is dismissed.

The case of *Lukie v Rural Alliance CC*,<sup>100</sup> a case decided after the advent of the LRA, illustrates the difficulty pregnant employees experience with their employers when the issue of maternity leave arises. In this case the employee was told that she should take maternity leave and return to work after the baby was born. Succeeding this conversation, the employer advised the employee not to return to work after the birth of her baby. This communication constituted a dismissal. The issue was whether this dismissal was connected to the employee's pregnancy. The LC interpreted and applied section 186(1)(c) of the LRA<sup>101</sup> and concluded that the dismissal was automatically unfair on the basis of pregnancy.

Finally, in *De Beer v SA Export Connection CC*,<sup>102</sup> the employee fell pregnant and had settled to only take one month's maternity leave after the birth of her twins. The employee's sister who worked for the same company was also pregnant and received four months maternity leave. According to the BCEA, employees are entitled to four months maternity leave.<sup>103</sup> Therefore, the agreed period of one month's maternity leave was not enforceable.

It is evident from the preceding case law discussions that women in South Africa have maternity rights in the workplace. The LC's interprets the right to maternity leave broadly.<sup>104</sup> It is also clear that receiving maternity leave is a right and not a privilege. Notwithstanding, women and pregnant employees continue to face challenges relating to unfair treatment concerning maternity leave and maternity benefits.<sup>105</sup>

#### **2.4.5. DUTY TO DISCLOSE PREGNANCY STATUS**

A pregnant employee does not have a duty to disclose to her employer that she is pregnant. However, women employees are urged to inform their employers about their pregnancy

<sup>100</sup> *Lukie v Rural Alliance CC t/a Rural Developments Specialists* (2004) 25 ILJ 1445 (LC).

<sup>101</sup> This in effect also amounts to an automatically unfair dismissal in terms of section 187(1)(e) as maternity leave is a concept and subject that is directly linked to pregnancy.

<sup>102</sup> *De Beer v SA Export Connection CC t/a Golden Paws* (2008) 29 ILJ 347 (LC) (hereafter *De Beer v SA Export Connection*).

<sup>103</sup> BCEA, section 25(1).

<sup>104</sup> Barnard J 'Broadening the Rights of Women in the Workplace: Automatically Unfair Dismissals and Pregnancy- *De Beer v SA Export Connection t/a Golden Paws* 2008 (29) ILJ 347 (LC) 2009 (72) THRHR 510 514.

<sup>105</sup> Gobind J & W Ukpere 'Labour pains: Employees and their Employers' (2012) 6:46 *African Journal of Business Management* 11549 11550.

status.<sup>106</sup> This is so that employers can minimise the potential risks that pregnant women might be exposed to in the workplace environment.<sup>107</sup>

In the decision of *Mashava v Cuzen and Woods Attorneys*,<sup>108</sup> the employee was employed by the respondent law firm on a probationary basis. Thereafter she was to register her articles of clerkship with the respective law firm. The law firm terminated her contract of employment when they discovered that the employee was pregnant. The law firm claimed that the employee was dishonest as she did not disclose the fact that she was pregnant, and for this reason the employee was dismissed. The LC noted that the rule of law does not specify that the employee has an obligation to disclose her pregnancy status, except in terms of the BCEA with regard to maternity leave.<sup>109</sup> For this reason Landman J concluded that the employee had not been dishonest as she did not have a duty to disclose her pregnancy. The main reason for her dismissal was because she was pregnant. Hence the dismissal was automatically unfair as per section 187(1)(e) of the LRA.

On the one hand, the *Mashava* case demonstrates that if the dismissal is truly based on the employee's pregnancy, then the employer may not rely on a reason that is secondary to the pregnancy. On the other hand, an employer should not claim an automatically unfair dismissal based on pregnancy where there was a valid reason for dismissal, for instance, incapacity or misconduct while being pregnant.

The non-disclosure principle was also deliberated on in the case of *Swart v Greenmachine Horticultural Services* case.<sup>110</sup> The employer attempted to create the impression that the reason for the pregnant employee's dismissal was misconduct, but it was evident that the dismissal was due to the employee's non-disclosure of her pregnancy. 'In this instance the respondent is not able to refute this and its case is that the applicant was charged with misconduct constituting non-disclosure of her pregnancy at the time of her appointment, and dismissed, inter alia, as a result of this.'<sup>111</sup> The employer has not proven that the motive for dismissing the employee fell outside the ambit of section 187(1)(e).' The LC held that the

---

<sup>106</sup> Code of Good Practice on Pregnancy, para 5.5.

<sup>107</sup> Code of Good Practice on Pregnancy, para 5.5.

<sup>108</sup> *Mashava v Cuzen and Woods Attorneys* (2000) 21 ILJ 402 (LC) (hereafter *Mashava*).

<sup>109</sup> BCEA, section 25(5)(a).

<sup>110</sup> *Swart v Greenmachine Horticultural Services (A Division of Sterikleen (Pty) Ltd* (2010) 31 ILJ 180 (LC) (hereafter *Swart v Greenmachine Horticultural Service*).

<sup>111</sup> *Swart v Greenmachine Horticultural Services* para 64.

employee was dismissed on the basis of a pregnancy-related matter. The LC once again highlighted that no obligation rests on a pregnant employee to disclose her pregnancy.

#### **2.4.6. FAMILY RESPONSIBILITY**

A factor that is also related to pregnancy is family responsibility. In the case of *Masondo v Crossway*<sup>112</sup> the employee returned to work after maternity leave and was assigned the night shift. She found this to be unmanageable since she had just given birth, and she therefore resigned. It was found that employees who did not have children were not assigned to the night shift. Ultimately, the decision to assign the employee to night shift was a personal preference and not a business decision. At the Commission for Conciliation Mediation and Arbitration (CCMA) hearing, the commissioner was of the view that forcing the employee to work the night shift had a discriminatory consequence. For this reason, the dismissal was automatically unfair as the employee was, in effect, discriminated against on the ground of family responsibility as per section 187(1)(f) of the LRA.

Family responsibility leave will have to be taken when a mother/father has to take care of an ill child.<sup>113</sup> Notwithstanding the right to family responsibly leave, if the illness of the baby is connected to the birth of the baby and the mother has to attend to the baby, then dismissal under these conditions will be deemed automatically unfair.<sup>114</sup> This is a factor that is connected to pregnancy, section 187(1)(e) of the LRA declares such dismissals to be automatically unfair.

In the *De Beer v SA Export Connection* decision, the employee was asked to return to work even though she had not received her prescribed four months maternity leave as per the BCEA. The employee's new-born twins suffered from baby colic (typically experienced by infants, characterised by continuous crying). The employee was dismissed as she refused to return to work, since she needed to attend to her new-born twins. The employee could have taken family responsibility leave. However, the incident occurred during the maternity leave period, therefore, an unfair dismissal claim was brought under the LRA, section 187(1)(e).

---

<sup>112</sup> *Masondo v Crossway* (1998) 19 ILJ 171 (CCMA).

<sup>113</sup> BCEA, section 27.

<sup>114</sup> Grogan J *Workplace Law* 219.

#### **2.4.7. REASONS RELATED TO PREGNANCY**

Grogan asserts that the goal of the term ‘intended pregnancy’ is to deter employers from dismissing women employees when they inform their employers that they are pregnant or intend to fall pregnant.<sup>115</sup> To elaborate on this issue, the term ‘any reason related to pregnancy’ may deter or encourage employers to dismiss pregnant employees if the reason is, for example, frequent visits to the clinic.<sup>116</sup> If the employee institutes a claim for unfair dismissal, the employee must be able to prove that there was a causal connection between the pregnancy, intended pregnancy or one or more reasons that are associated with the pregnancy and the dismissal.<sup>117</sup> It seems that the interpretation of the term ‘any reason’ as specified in section 187(1)(e) of the LRA has not been defined. However, it has been mentioned that this term refers to sick babies as well immediately following birth.<sup>118</sup>

Women cannot invoke the provisions of section 187(1)(e) of the LRA indefinitely, especially the term ‘any reason related to pregnancy’.<sup>119</sup> Circumstances will have to be considered on a case by case basis in order to ascertain whether the dismissal of a women or pregnant employee is ‘for a reason related to pregnancy.’<sup>120</sup> According to Grogan, when the real reason for the dismissal has to be determined, the term ‘intended pregnancy’ could potentially create a problem.<sup>121</sup>

A factor that is related to pregnancy is the issue of exhaustion. In *Mnguni v Gumbi*,<sup>122</sup> the employee (receptionist) who was eight months pregnant was working for nearly five hours when she needed a break due to exhaustion. Her employer threw her out of the workplace and exclaimed that she was lazy. She was told not to return to work and that the employer would contact her. After no phone call and after visiting the workplace to discuss the situation, it was discovered that the employer had employed another receptionist. The LC stated that it was clear that the reason for the employee’s dismissal was due to her pregnancy. And her exhaustion was a sub-factor to her being pregnant. In terms of section 187(1)(e) of the LRA,

<sup>115</sup> Grogan J *Workplace Law* 219.

<sup>116</sup> Grogan J *Workplace Law* 219.

<sup>117</sup> Whitear-Nel N, Grant B & Behari A ‘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>118</sup> Backer L “‘Any Reason’ Includes Mother’s Sick Babies – Protection of Pregnant Employees’ available at [http://www.labour.co.za/view\\_item.asp?id=1386](http://www.labour.co.za/view_item.asp?id=1386) (accessed 7 August 2014).

<sup>119</sup> Grogan J *Workplace Law* 219.

<sup>120</sup> Grogan J *Workplace Law* 219.

<sup>121</sup> Grogan J *Workplace Law* 218.

<sup>122</sup> *Mnguni v Gumbi* (2004) 25 *ILJ* 715 (LC) (hereafter *Mnguni v Gumbi*).

a dismissal based on a reason related to an employee's pregnancy is automatically unfair. Pakard J stated that, 'This kind of treatment of an employee is outrageous and no longer has a place in this country. Gone are the days when employees were treated in the manner the respondent has treated the applicant and could do nothing about that. The constitution guarantees the employees' rights to fair labour practice.'<sup>123</sup>

The decision in *De Beer v SA Export Connection* also illustrates the notion of 'any reason related to pregnancy'. The employee's twins suffered from colic and the employee requested another month of leave to take care of her new born twins. The employer only agreed to give her an extra two weeks of leave, but she did not accept the two weeks. As a result, she was dismissed. She claimed that her dismissal was automatically unfair in terms of section 187(1)(e) of the LRA. The employer maintained that the dismissal was not for a reason connected to the employee's pregnancy. The employer was of the view that this provision protected the mother and not the new-born babies. The LC held that the employee was afforded the protection of section 187(1)(e) of the LRA as the new-born babies illness was closely connected to the employee being pregnant.

In *Ndlovu v Pather*,<sup>124</sup> the pregnant domestic worker was dismissed after she had engaged her employer regarding her pregnancy status. She notified her employer that her baby was in a breech position. This complicated her pregnancy. As a result she had to go for check-ups, twice per week. The employer was dissatisfied that she would have to attend these antenatal appointments twice per week, as this would interfere with her workplace duties. The employee was dismissed and claimed that her dismissal was automatically unfair. The LC found that her dismissal was for reasons connected to her pregnancy. Accordingly, her dismissal was automatically unfair.

Another judgment related to reasons related to pregnancy is the case of *Niewoudt v All-Pak*.<sup>125</sup> The employee was in an advanced stage of her pregnancy. She was also at risk of having a miscarriage. The doctor declared her to be a high-risk case until she has given birth. For this reason she was unable to carry out certain of her duties at work. She was dismissed as a result. The LC noted that there was a connection between her inability to work and her pregnancy. Thus, she was automatically unfairly dismissed for reasons associated with her pregnancy.

---

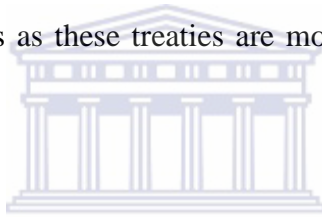
<sup>123</sup> *Mnguni v Gumbi* para 17.

<sup>124</sup> *Ndlovu v Pather* (2006) 27 ILJ 2671 (LC).

<sup>125</sup> *Niewoudt v All-Pak* (2009) 30 ILJ 2451 (LC).

## **2.5. EMPLOYMENT RIGHTS OF WOMEN AND PREGNANT EMPLOYEES IN LIGHT OF INTERNATIONAL TREATIES**

The conventions mentioned below are not the only treaties dealing with pregnancy related employment rights. There are a host of international labour standards that have been adopted by various countries.<sup>126</sup> However, South Africa has not adopted/ratified many of these treaties. For this reason, the four main treaties that will be discussed below are the Maternity Protection Convention, C103, 7 September 1952<sup>127</sup> (the Maternity Convention) and the Workers with Family Responsibilities Convention, C156, 11 August 1983<sup>128</sup> (Workers with Family Responsibilities Convention), both of which have not yet been ratified by South Africa. The Discrimination (Employment and Occupation) Convention, C111, 25 June 1958<sup>129</sup> (the Discrimination Convention) and the Convention on the Elimination of All Forms of Discrimination against Women, 18 December 1979<sup>130</sup> (CEDAW) will also be discussed. South Africa has already ratified both the Discrimination Convention and CEDAW. These treaties will be the point of focus as these treaties are most pertinent and applicable to this particular discussion.



### **2.5.1. INTERNATIONAL TREATIES THAT HAS NOT BEEN RATIFIED BY SOUTH AFRICA**<sup>131</sup>

Both conventions below have not yet been ratified by South Africa. Since their content is however of particular significance to the research topic, a brief discussion of these conventions is preferable.

<sup>126</sup> See further, International Labour Organisation (ILO), Social Security (Minimum Standards) Convention, C102, 28 June 1952 and ILO, Termination of Employment Convention, C158, 22 June 1982.

<sup>127</sup> ILO, Maternity Protection Convention, C103, 7 September 1952 (hereafter Maternity Convention). See also, ILO, Maternity Protection Convention, C183, 7 February 2002.

<sup>128</sup> ILO, Workers with Family Responsibilities Convention, C156, 11 August 1983 (hereafter Workers with Family Responsibility Convention).

<sup>129</sup> ILO, Discrimination (Employment and Occupation) Convention, C111, 25 June 1958, C111, available at [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:C111](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C111) (accessed 1 April 2015). South Africa ratified this Convention on 05 March 1997, (hereafter Discrimination Convention).

<sup>130</sup> UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, United Nations, Treaty Series, vol 1249, page 13 available at <http://www.un.org/womenwatch/daw/cedaw/cedaw.htm> (accessed 1 April 2015). South Africa ratified this convention on 15 December 1995 (hereafter CEDAW).

<sup>131</sup> It is not certain why South Africa has not ratified these particular conventions.

The Maternity Convention stipulates that employees who are breastfeeding are entitled to two 30 minutes breaks daily in order to nurse their child.<sup>132</sup> The Maternity Convention affords employees the right to take this break and still be paid.<sup>133</sup> Women and pregnant employees are likewise permitted to take leave of up to 12 weeks in order to give birth and thereafter take care of their new-born child.<sup>134</sup> It is unlawful for an employer to dismiss a pregnant employee or women employee who is on maternity leave.<sup>135</sup>

The Maternity Convention specifies that while the employee is on maternity leave, she is eligible to obtain cash benefits.<sup>136</sup> In addition, she is also eligible for pre-natal care, confinement care, post-natal care and hospital care when it is applicable.<sup>137</sup> The Maternity Convention covers many additional aspects of pregnancy that has an impact on the woman's employment status. As a consequence, the Maternity Convention adds to the protection afforded to women and specifically pregnant employees in the workplace.

In terms of the Workers with Family Responsibilities Convention, parental leave is allowed where the mother or the father has to take care of their child/children.<sup>138</sup> Parental leave is a concept that South Africa is not acquainted with. This leave should be given to the employee after maternity leave has expired, where the child is ill or where there are any other reasons that are related to the nurturing of the child.<sup>139</sup> According to the Workers with Family Responsibilities Convention, both male and female employees should have the option of combining their occupation with family responsibilities.<sup>140</sup> Employers should provide child-care and family facilities with the purpose of having employees exercise their right to freedom of employment.<sup>141</sup> The utilisation of these facilities should be complimentary for women employees or reasonably affordable.<sup>142</sup>

---

<sup>132</sup> Maternity Convention, article 5.1.

<sup>133</sup> Maternity Convention, article 5.2.

<sup>134</sup> Maternity Convention, article 3.2.

<sup>135</sup> Maternity Convention, article 6.

<sup>136</sup> Maternity Convention, article 4.1.

<sup>137</sup> Maternity Convention, article 4.3.

<sup>138</sup> Workers with Family Responsibilities Convention, article 1(1).

<sup>139</sup> International Labour Office *ABC of Women Workers' Rights and Gender Equality* (2000) 84.

<sup>140</sup> Workers with Family Responsibilities Convention, article 3 & 4(a).

<sup>141</sup> Workers with Family Responsibilities Convention, article 5(b).

<sup>142</sup> ILO, *Employment (Women with Family Responsibilities) Recommendation*, R123, 22 June 1965. See also, International Labour Office *ABC of women workers' rights and gender equality* (2000) 19.



## **2.5.2. INTERNATIONAL TREATIES THAT HAS BEEN RATIFIED BY SOUTH AFRICA**

The Discrimination Convention describes discrimination as distinguishing, excluding or extending preferential treatment to an employee based on inherent traits that has the ability to impede equal opportunity or treatment to employees.<sup>143</sup> Furthermore, the Discrimination Convention states that South Africa, as a member state, should employ methods whereby national legislation promotes educational programmes so that both employers and employees observe national anti-discrimination law.<sup>144</sup>

Article 1(1) of the Discrimination Convention inter alia states that preference made to a particular individual on the basis of that individual's sex is discrimination if the preference that was given has the eventual effect of prejudicing another individual of an opportunity in the workplace.<sup>145</sup> However there is an exception to this rule as article 1(2) stipulates that if this preference is given due to the fact that there is an inherent requirement of the job, it would not constitute discrimination.

CEDAW reiterates that discrimination against women infringes on the right to equal treatment and human dignity.<sup>146</sup> The definition of discrimination is similar to that of the definition of the Discrimination Convention, except, this definition focuses on discrimination against women.<sup>147</sup> CEDAW highlights that in order to abolish discrimination against women, actions need to be taken. Employees should have the right to equal employment opportunities<sup>148</sup> and the right to promotions and job security.<sup>149</sup> To achieve the goal of equality, employees should not be dismissed due to pregnancy and maternity leave.<sup>150</sup> CEDAW also recommends that maternity leave should be taken with remuneration,<sup>151</sup> that family and work obligations are reconciled<sup>152</sup> and that special protection be afforded to

---

<sup>143</sup> Discrimination Convention, article 1(1)(a).

<sup>144</sup> Discrimination Convention, article 3(b).

<sup>145</sup> Chapter 3 of this thesis will discuss the difference between sex and pregnancy discrimination, para 3.7.

<sup>146</sup> CEDAW, preamble.

<sup>147</sup> CEDAW, article 1.

<sup>148</sup> CEDAW, article 11(1)(b).

<sup>149</sup> CEDAW, article 11(1)(c).

<sup>150</sup> CEDAW, article 11(2)(a).

<sup>151</sup> CEDAW, article 11(2)(b).

<sup>152</sup> CEDAW, article 11(2)(c).

pregnant employees.<sup>153</sup> Finally, CEDAW stipulates that facilities in the workplace should be provided to women employees in relation to pregnancy.<sup>154</sup>

## **2.6. CONCLUSION**

Women have come a long way in the labour market, especially considering the progression of employment rights of women and pregnant employees. Though, whether these measures are sufficient remains a contentious subject in labour law. Women in the workplace have historically been in vulnerable positions. It can be argued that women continue to be in vulnerable positions when they are pregnant or after giving birth and returning to the workplace. The law attempts to remedy this situation. For this reason constitutional law, labour law and international treaties attempt to safeguard women and pregnant employees in the place of work against detrimental treatment. The Constitution protects the right to equality, human dignity and the right to fair labour practices. Pregnant employees and women who intend to fall pregnant should therefore not be treated unfavourably on the basis of pregnancy or grounds that are associated with pregnancy.

The LRA affords women and pregnant women the following protection: pregnant women may not be dismissed for or on account of pregnancy, women employees may not be dismissed if they decide to become pregnant, women may not be dismissed for any reason that is connected to pregnancy, a prospective employee may not bound herself to say that she will not fall pregnant and women cannot contract to say that they will be dismissed if they fall pregnant.

The BCEA, together with the UIA, provide women and pregnant employees' protection when the issue of maternity leave and maternity benefits arise. The BCEA has created further guidelines that the employer should follow when an employee falls pregnant. Moreover, guidelines exist that expressly states that pregnant employees should not be treated adversely. Though, this is simply a guiding principle. This guide has not deterred employers from prejudicing women and pregnant employees in the workplace.

Finally, international treaties have contributed to protecting women and pregnant employees. These conventions seem to be furthering the employment rights of women and pregnant

---

<sup>153</sup> CEDAW, article 11(2)(d).

<sup>154</sup> CEDAW, article 12(2).

employees with regard to pregnancy and matters relating to pregnancy. These conventions offer practical benefits to women and pregnant employees, such as, parental leave; employers having to provide for child-care facilities and permitting breastfeeding breaks. South Africa should consider ratifying the Maternity Convention and the Workers with Family Responsibilities Convention as it appears to greatly advance women and pregnant employees' rights.

Notwithstanding the aforementioned legislative provisions and conventions, while the law formally seems to provide substantial protection, practically it is not in fact sufficiently protecting the rights of women and pregnant employees. This is an indication that the implementation of the law is lacking.

In the next chapter the issue of discrimination, especially as it relates to the less favourable treatment of pregnant employees, in the workplace will be explored. This will further reveal the practical issues relating to unfair treatment of employees who intend to fall pregnant and pregnant employees.



## **CHAPTER 3**

### **DISCRIMINATION AS A SPECIFIC FORM OF LESS FAVOURABLE TREATMENT OF WOMEN AND PREGNANT EMPLOYEES WITHIN THE WORKPLACE**

#### **3.1. INTRODUCTION**

As discussed in chapter 2 of this thesis, the Constitution<sup>1</sup> protects women and pregnant employees against unfair treatment. This form of protection is broad, as it does not only apply to the employment sector but to all other areas of the law.<sup>2</sup> According to the Constitution, the Bill of Rights<sup>3</sup> applies to all laws, including labour legislation.<sup>4</sup>

In light of the above, national legislation should be enacted to prohibit unfair discrimination between citizens.<sup>5</sup> In giving effect to section 9(4) of the Constitution, the legislator enacted the Employment Equity Act (the EEA).<sup>6</sup> One of the EEA's objectives is to promote the constitutional right to equality.<sup>7</sup> Another aim of the EEA is to specifically contribute to workplace equity by eradicating unfair discrimination in the workplace.<sup>8</sup>

In this chapter the EEA will be explored together with the Constitution in relation to the issue of unfair discrimination in the workplace. In particular this chapter will explore how unfair discrimination relates to the less favourable treatment of women in the workplace due to pregnancy or any reason related to pregnancy.<sup>9</sup> Pregnancy discrimination in the school environment will also briefly be discussed as an analogy to the pregnancy discrimination issue in the workplace. In addition, the terms 'pregnancy discrimination' and 'sex discrimination' will be discussed as a point of clarification as there has been misperceptions' relating to these terms.

---

<sup>1</sup> Constitution of the Republic of South Africa, 1996 (hereafter the Constitution).

<sup>2</sup> Other areas of the law that is protected by the Constitution is Social Security Law, Law of Property and Environmental Law, inter alia.

<sup>3</sup> Chapter 2 of the Constitution.

<sup>4</sup> Constitution, section 8(1).

<sup>5</sup> Constitution, section 9(4).

<sup>6</sup> Employment Equity Act 55 of 1998, preamble, section 3(a) & 3(b) (hereafter the EEA). See further, Du Toit D 'The Evolution of the Concept of 'Unfair Discrimination' in South African Labour Law' (2006) 27 *ILJ* 1311 1311.

<sup>7</sup> EEA, preamble.

<sup>8</sup> EEA, preamble & section 2(a).

<sup>9</sup> See para 3.5.1. discussion on the EEA, section 6(1).

## **3.2. DISCRIMINATION: A GENERAL DISCUSSION**

### **3.2.1. INTRODUCTION**

According to the Oxford Dictionary of Law, discrimination is defined as, ‘treating a person less favourably than others on grounds unrelated to merit, usually because he or she belongs to a particular group or category.’<sup>10</sup> In other words, when an individual is treated differently because of an inherent characteristic such as sex or pregnancy, the differential treatment will possibly amount to unfair discrimination. As stated by Currie and de Waal, unfair discrimination is differentiation, but on an illegal ground.<sup>11</sup> An illegal ground will for instance be any of the grounds as listed in section 9(3) of the Constitution or section 6(1)<sup>12</sup> of the EEA.

In terms of the Constitution, the listed grounds are race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.<sup>13</sup> The historical idea of the listed grounds is that it has the potential to affect an individual’s humanity and dignity.<sup>14</sup> Similarly, the Constitutional Court (CC) has expressed that discrimination can occur on an analogous ground.<sup>15</sup> An analogous ground is, ‘based on attributes or characteristics which have the potential to impair the fundamental dignity of persons as human beings, or to affect them seriously in a comparably serious manner.’<sup>16</sup> Therefore, differentiation on a listed or analogous ground will constitute unfair discrimination, until unfair discrimination can be rebutted.<sup>17</sup>

Discrimination is unfair when it has an unfair impact.<sup>18</sup> Alternatively, discrimination is unfair when it significantly impairs the fundamental dignity of an individual.<sup>19</sup> Unfairness prevails

<sup>10</sup> Law J & Martin E (eds) *A Dictionary of Law* 7 ed (2009) 175.

<sup>11</sup> Currie I & de Waal J *The Bill of Rights Handbook* 5 ed (2005) 243. The case of *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC), illustrates the notion of fair discrimination. In contrast, the case of *Pretoria City Council v Walker* 1998 (2) SA 363 (CC), demonstrates the idea of unfair discrimination. The test of unfairness centers on the impact of discrimination on the individual in society, whether the individual has been a victim of historical patterns of discrimination, the nature of the discrimination law/action and whether there has been an impairment of the individual’s inherent right to human dignity.

<sup>12</sup> See discussion pertaining to section 6 of the EEA below, para 3.5.1.

<sup>13</sup> Constitution, section 9(3).

<sup>14</sup> Currie I & de Waal J *The Bill of Rights Handbook* 5 ed (2005) 244.

<sup>15</sup> *Harksen v Lane* NO 1998 (1) SA 300 (CC) para 46 (hereafter *Harksen v Lane*).

<sup>16</sup> *Harksen v Lane* para 46.

<sup>17</sup> Currie I & de Waal J *The Bill of Rights Handbook* 5 ed (2005) 245, 248 & 257.

<sup>18</sup> Currie I & de Waal J *The Bill of Rights Handbook* 5 ed (2005) 246.

<sup>19</sup> Currie I & de Waal J *The Bill of Rights Handbook* 5 ed (2005) 246. See further, Grogan J *Employment Rights* (2010) 175.

when there is a causal link between the discriminatory conduct and a prohibited ground as per section 9(3) of the Constitution and section 6(1) of the EEA.<sup>20</sup>

Employment discrimination legislation should be interpreted in the light of international law.<sup>21</sup> More specifically, the EEA must be interpreted in light of the International Labour Organisation (ILO), Discrimination (Employment & Occupation) Convention, C111, 25 June 1958 (Discrimination Convention).<sup>22</sup>

### **3.2.2. FORMAL VERSUS SUBSTANTIVE EQUALITY**

In *Minister of Finance v Van Heerden*<sup>23</sup> the relationship between formal and substantive equality was clarified. The notion of formal equality is where all individuals are treated in the same way regardless of inherent traits that they may possess.<sup>24</sup>

In contrast, substantive equality dictates that everyone is not equal before the law due to past circumstances.<sup>25</sup> It recognises that all individuals are distinct.<sup>26</sup> For this reason, individuals who suffered past injustices are afforded favourable treatment with the view of achieving substantive equality.<sup>27</sup> Essentially, substantive equality is where injustices of the past are addressed by promoting affirmative action measures.<sup>28</sup> The definition of equality has been given its substantive rather than formal interpretation.<sup>29</sup> The Constitution provides for substantive equality. As a result the EEA also has to provide for substantive equality; hence affirmative action is partly how this is sought.

<sup>20</sup> Du Toit D 'The Evolution of the Concept of 'Unfair Discrimination' in South African Labour Law' (2006) 27 *ILJ* 1311 1325.

<sup>21</sup> Constitution, section 39.

<sup>22</sup> EEA, section 3(d). See, International Labour Organisation (ILO), Discrimination (Employment & Occupation) Convention, C111, 25 June 1958 (hereafter Discrimination Convention). See further chapter 2 of this thesis, para 2.5 on a discussion pertaining to international treaties.

<sup>23</sup> *Minister of Finance v Van Heerden* [2004] 12 BLLR 1181 (CC) para 28.

<sup>24</sup> *Stoman v Minister of Safety and Security & others* (2002) 23 *ILJ* 1020 (T). McGregor M & Dekker A (eds) *Labour Law Rules!* (2012) 55.

<sup>25</sup> Currie I & de Waal J *The Bill of Rights Handbook* 5 ed (2005) 233.

<sup>26</sup> McGregor M & Dekker A (eds) *Labour Law Rules!* (2012) 55.

<sup>27</sup> Du Toit D, Godfrey S, Cooper C *et al Labour Relations Law: A Comprehensive Guide* 6 ed (2015) 656-657 (hereafter Du Toit D *Labour Relations Law*). See further, Currie I & de Waal J *The Bill of Rights Handbook* 5 ed (2005) 239 & McGregor M & Dekker A (eds) *Labour Law Rules!* (2012) 55.

<sup>28</sup> See discussion on affirmative active, para 3.4.1. below.

<sup>29</sup> *Stoman v Minister of Safety and Security & others* (2002) 23 *ILJ* 1020 (T) & *Co-operative Worker Association & another v Petroleum Oil & Gas Co-operative of SA & others* [2007] 1 BLLR 55 (LC).

### 3.2.3. DIRECT VERSUS INDIRECT DISCRIMINATION

Both direct and indirect discrimination is prohibited.<sup>30</sup> Indirect discrimination is where differentiation prima facie emerges to be fair, but latently it is unfair. In other words, the differential treatment seems to be harmless, but when having a closer look at the facts, it actually amounts to unfair discrimination.<sup>31</sup> Additionally, indirect discrimination transpires when the effect of the differentiation is biased. In sum, when conduct that appears to be neutral affects an individual's features, indirect discrimination occurs.<sup>32</sup>

Indirect discrimination occurred in *Collins v Volkskas Bank*.<sup>33</sup> The pregnant employee in this matter was not granted maternity leave as per a collective bargaining agreement. She was therefore forced to resign because her employer did not grant her maternity leave. She claimed that she was indirectly discriminated against in terms of section 8(2) of the interim Constitution on the basis of sex.<sup>34</sup> The collective bargaining agreement only affected women. Thus, when the employer did not permit the employee to take maternity leave, it indirectly amounted to a discriminatory practice.

The above-mentioned case confirms that indirect discrimination is where an employer 'adopts a rule or standard which is on the face neutral, and which applied equally to all employees, but which has a discriminatory effect upon a prohibited ground on one employee or group of employees in that it imposes, because of some special characteristics of the employee or group, obligations, penalties or restrictive conditions not imposed on other members of the workforce.'<sup>35</sup> Indirect discrimination can either be negligent or intentional.<sup>36</sup>

<sup>30</sup> Constitution, section 9(3).

<sup>31</sup> Currie I & de Waal J *The Bill of Rights Handbook* 5 ed (2005) 260. See further, McGregor M & Dekker A (eds) *Labour Law Rules!* (2012) 56 & Cohen T & Dancaaster L 'Flexible Working Arrangements for Employees with Family Responsibilities – The Failings of the Employment Equity Act' in Dupper O & Garbers C (eds) *Equality in the Workplace: Reflections from South Africa and Beyond* (2009) 209.

<sup>32</sup> Grogan J *Workplace Law* 11 ed (2014) 109 (hereafter Grogan J *Workplace Law*). See further, Currie I & de Waal J *The Bill of Rights Handbook* 5 ed (2005) 262, McGregor M & Dekker A (eds) *Labour Law Rules!* (2012) 56 & Grogan J *Dismissal, Discrimination and Unfair Labour Practices* 2 ed (2007) 109 (hereafter Grogan J *Dismissal, Discrimination and Unfair Labour Practices*).

<sup>33</sup> *Collins v Volkskas Bank (Westonaria Branch) – A Division of Absa Bank Ltd* (1994) 15 ILJ 1398 (IC).

<sup>34</sup> The Constitution of the Republic of South Africa Act 200 of 1993 (section 8(2) states that 'No person shall be unfairly discriminated against, directly or indirectly . . . on one or more of the following grounds in particular race, gender, sex.')

<sup>35</sup> *Ontario, Human Rights Commission v Simpson Sears Ltd* (1985) 2 SCR 536 at 551, cited in *Association of Professional Teachers & another v Minister of Education* (1995) 16 ILJ 1048 (IC) at 62.

<sup>36</sup> Grogan J *Workplace Law* (2014) 110. See *Leonard Dingler Employee Representative Council & others v Leonard Dingler (Pty) Ltd & others* (1998) 19 ILJ 285 (LC).

Direct discrimination is generally deemed to be intentional.<sup>37</sup> Direct discrimination transpires when conduct disadvantages an individual due to that individual's qualities.<sup>38</sup> The *Botha v A Import Export International CC*<sup>39</sup> decision demonstrates the notion of direct unfair discrimination. After the employee notified her employer of her pregnancy she was dismissed. Her employer stated that he did not want a pregnant employee working for him. The employee subsequently went on vacation. During this time, the employee received a telephone call saying that she is no longer required to report for duty. Naturally, the pregnant employee returned to work, only to be told to leave the workplace premises. The employee claimed that she had been automatically unfairly dismissed<sup>40</sup> and that her dismissal was an unfair labour practice. The Labour Court (LC) held that the pregnant employee was protected against direct discrimination on the basis of sex, gender and family responsibility.

### **3.3. DISCRIMINATION CLAIMS WITHIN AN EMPLOYMENT CONTEXT**

#### **3.3.1. TEST FOR DISCRIMINATION**

The recent Employment Equity Amendment Act 47 of 2013<sup>41</sup> that came into effect on 01 August 2014 makes provision for the discrimination test and the burden of proof in dealing with employment discrimination matters.<sup>42</sup> So far the test for discrimination established in the landmark CC case of *Harksen v Lane* has been the prominent test regarding discrimination. Though the matter did not deal with an employment issue at all, the fact that it was a CC case resulted in this test for discrimination also being used by the LC's.<sup>43</sup> Though the test no longer directly applies in the employment context since the new EEA amendments.<sup>44</sup> Notwithstanding, the *Harksen v Lane* test will be discussed below, followed

<sup>37</sup> Grogan J *Workplace Law* 109.

<sup>38</sup> Grogan J *Workplace Law* 109. See further, McGregor M & Dekker A (eds) *Labour Law Rules!* (2012) 56, Grogan J *Dismissal, Discrimination and Unfair Labour Practices* 108-109 & Cohen T & Dancaster L 'Flexible Working Arrangements for Employees with Family Responsibilities – The Failings of the Employment Equity Act' in Dupper O & Garbers C *Equality in the Workplace: Reflections from South Africa and Beyond* (2009) 209.

<sup>39</sup> *Botha v A Import Export International CC* (1999) 20 *ILJ* 2580 (LC) (hereafter *Botha v A Import Export International*).

<sup>40</sup> In terms of the Labour Relations Act 66 of 1995, sections 187(1)(e) & (f) (hereafter the LRA).

<sup>41</sup> Employment Equity Amendment Act 47 of 2013, Government Notice 16 in Government Gazette 37238 dated 16 January 2014. Commencement date, 01 August 2014 [Proc. No. 50, Gazette No. 37871].

<sup>42</sup> EEA, section 11.

<sup>43</sup> Du Toit D *Labour Relations Law* 660. Cooper C 'The Boundaries of Equality in Labour Law' (2004) 25 *ILJ* 813 825. Additionally, the industrial courts utilised the *Harksen v Lane* case as these courts were bound by the stare decisis as it holds persuasive value.

<sup>44</sup> Du Toit D 'Protection against Unfair Discrimination: Cleaning up the Act?' (2014) 35 *ILJ* 2623 2634.



by a discussion of the EEA's test for discrimination in terms of the now amended section 11 of the EEA.

### **3.3.2. HARKSEN V LANE: CONSTITUTIONAL LAW TEST FOR DISCRIMINATION**

The test to determine discrimination (or unfair discrimination specifically) pronounced in the *Harksen v Lane* case is applicable in determining whether there is a violation of the right to equality.<sup>45</sup> There is a two stage enquiry that needs to be satisfied in order for mere differentiation to not only amount to discrimination, but unfair discrimination.<sup>46</sup>

The first stage of the *Harksen v Lane* test would be whether the disputed law or conduct by the employer differentiates between individuals. If there is no differentiation, section 9(1) of the Constitution has not been infringed. If law or conduct by the employer however differentiates between individuals, then an assessment has to be made as to whether the differentiation has a rational connection to a legitimate government purpose. If there is no such rational connection, section 9(1) of the Constitution is contravened. If the differentiation is rational, it dictates that there is no possibility of unfair discrimination.

The second stage of the *Harksen v Lane* test only becomes applicable once differentiation has been shown in terms of the first stage discussed above. The second stage enquires whether the differentiation constitutes unfair discrimination. Determining whether unfair discrimination is present requires a further two-stage analysis. First, it has to be determined whether the differentiation amounts to discrimination. Once discrimination has been established, the second stage of the analysis is to ascertain if the discrimination amounts to unfair discrimination. If the differentiation is on a listed ground in terms of section 9 of the Constitution, unfairness will be presumed.<sup>47</sup> If it is not on a listed ground, it has to be determined if it is on an analogous ground. If the discrimination is on an analogous ground, unfairness will not simply be presumed, but will have to be established by the individual alleging unfair discrimination.

---

<sup>45</sup> *Harksen v Lane*.

<sup>46</sup> The *Harksen v Lane* test is discussed with reference to para 53 of the *Harksen v Lane* case.

<sup>47</sup> See footnote 13 for listed grounds.

At the end of the enquiry, if differentiation is found to be fair, sections 9(3) and 9(4) of the Constitution will not have been transgressed. However, if the differentiation is found to be unfair, then there is a clear violation of sections 9(3) and 9(4). The final enquiry is to establish whether the violation is justified in terms of section 36 of the Constitution.<sup>48</sup> In summary, the test in *Harksen v Lane* seeks to determine whether the less favourable treatment was unjust.<sup>49</sup>

### **3.3.3 SECTION 11: EMPLOYMENT EQUITY ACT TEST FOR DISCRIMINATION**

This section deals with the burden of proof relating to the alleged discrimination within the employment context.<sup>50</sup> On the one hand, presuming that there is unfair discrimination on one of the listed grounds,<sup>51</sup> on a balance of probabilities, the employer should prove that either no discrimination occurred,<sup>52</sup> or that the discrimination was fair.<sup>53</sup> On the other hand, if the discrimination is on an arbitrary ground,<sup>54</sup> on a balance of probabilities, the employee should prove that the conduct of the employer was not fair,<sup>55</sup> that the conduct constitutes discrimination<sup>56</sup> and that the discrimination is unfair.<sup>57</sup> After studying section 11 of the EEA, it seems as if section 11 incorporates the *Harksen v Lane* test into its provisions.

Du Toit is sceptical regarding the effectiveness that the new amendments have on the establishing equality in the workplace.<sup>58</sup> Section 11(2)(a) creates a test for rationality.<sup>59</sup> In other words, the employee should prove that the employers conduct was irrational in the circumstances. According to du Toit, section 11(2)(b) might possibly create difficulties, though its application should be uncomplicated.<sup>60</sup> Section 11(2)(c) will undoubtedly be a

<sup>48</sup> A justified limitation enquiry should be made to determine if the unfair discrimination was for a valid reason. This enquiry will be made using the factors listed in section 36 of the Constitution.

<sup>49</sup> Grogan J *Dismissal, Discrimination and Unfair Labour Practices* 106.

<sup>50</sup> See further, the case of *Food & Allied Workers Union & others v Pets Products (Pty) Ltd* (2000) 21 ILJ 1100 (LC) where the two-fold test is discussed. Above is a detailed discussion of the renowned case of *Harken v Lane* where the constitutional law test for discrimination was established by the Constitutional Court.

<sup>51</sup> See para 3.5.1. below.

<sup>52</sup> Employment Equity Amendment Act 47 of 2013, section 11(1)(a).

<sup>53</sup> Employment Equity Amendment Act 47 of 2013, section 11(1)(b).

<sup>54</sup> See para 3.5.2. below.

<sup>55</sup> Employment Equity Amendment Act 47 of 2013, section 11(2)(a).

<sup>56</sup> Employment Equity Amendment Act 47 of 2013, section 11(2)(b).

<sup>57</sup> Employment Equity Amendment Act 47 of 2013, section 11(2)(c).

<sup>58</sup> Du Toit D 'Protection against Unfair Discrimination: Cleaning up the Act?' (2014) 35 ILJ 2623.

<sup>59</sup> Du Toit D 'Protection against Unfair Discrimination: Cleaning up the Act?' (2014) 35 ILJ 2623 2627.

<sup>60</sup> Du Toit D 'Protection against Unfair Discrimination: Cleaning up the Act?' (2014) 35 ILJ 2623 2627.

challenging provision to construe.<sup>61</sup> As the term ‘unfair’ will be questioned since section 6(1) and section 11(2) of the amended EEA now includes the term ‘arbitrary’.<sup>62</sup>

### **3.4. DEFENCES FOR UNFAIR DISCRIMINATION IN THE EMPLOYMENT CONTEXT**<sup>63</sup>

The EEA allows for employers to raise only one of two defences against a claim of alleged unfair discrimination. First, an employer can claim that the practice/action was an affirmative action measure.<sup>64</sup> Secondly, there are certain job descriptions that require an employee to meet a prerequisite in order to fulfil her duties, called inherent requirements of the job.<sup>65</sup> Following is a discussion relating to the defences against unfair discrimination specifically, affirmative action and the inherent requirements of the job.

#### **3.4.1. AFFIRMATIVE ACTION**

The Constitution states that measures aimed at removing the effects of past discrimination are not unfair.<sup>66</sup> One of these measures is affirmative action. One of the purposes of the EEA is to achieve equity in the workplace by, ‘implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups, in order to ensure their equitable representation in all occupational categories and levels in the workforce.’<sup>67</sup> Thus, the purpose of affirmative action is to afford work opportunities to designated groups of people,<sup>68</sup> to ensure that they are adequately represented in the workplace.<sup>69</sup>

<sup>61</sup> Du Toit D ‘Protection against Unfair Discrimination: Cleaning up the Act?’ (2014) 35 *ILJ* 2623 2627.

<sup>62</sup> Du Toit D ‘Protection against Unfair Discrimination: Cleaning up the Act?’ (2014) 35 *ILJ* 2623 2627. See para 3.5.2. below on discussion relating to the term ‘arbitrary’.

<sup>63</sup> This discussion pertains to defences as per the EEA, that is, affirmative action and inherent requirements of the job. The LRA, section 187(2)(a) & (b) makes reference to other discrimination defences. That is, inherent requirements of the job and agreed/ normal retirement age.

<sup>64</sup> EEA, section 6(2)(a).

<sup>65</sup> EEA, section 6(2)(b).

<sup>66</sup> Constitution, section 9(2) & 9(4).

<sup>67</sup> EEA, section 2(b).

<sup>68</sup> EEA, section 1 (black people, women and people with disabilities). ‘Black people’ is a generic term which means Africans, Coloureds and Indians. ‘People with disabilities’ means people who have a long-term or recurring physical or mental impairment which substantially limits their prospects of entry into, or advancement in, employment.

<sup>69</sup> EEA, section 15.

There are conflicting views pertaining to the notion of affirmative action. There are authors who are of the opinion that affirmative action can be seen as fair discrimination.<sup>70</sup> At the other extreme, there are authors who are of the view that in the employment context, fair discrimination has no application.<sup>71</sup> With reference to the case of *Solidarity obo Barnard v SAPS*,<sup>72</sup> affirmative action is no doubt a means of attaining equality. Therefore, affirmative action does not amount to discrimination. This concept is also confirmed in section 6(2)(a) of the EEA where it is stated that affirmative action measures is not seen as unfair discrimination.<sup>73</sup> Affirmative action is a sui generis form of legitimate differentiation.<sup>74</sup> Thus, when an employer raises affirmative action as a defence, the discrimination will not amount to unfair discrimination.<sup>75</sup>

### **3.4.2. INHERENT REQUIREMENTS OF THE JOB**

‘It is not unfair discrimination to distinguish, exclude or prefer any person on the basis of an inherent requirement of a job.’<sup>76</sup> If a job necessitates a particular feature, it will not amount to unfair discrimination where the employer excludes candidates without that precise feature.<sup>77</sup>

In the *Wallace v Du Toit*<sup>78</sup> decision, the LC established that the employee was unfairly discriminated against on the basis of pregnancy in terms of section 6(1) of the EEA. The court firmly declared that not having children is not an inherent requirement for being an au pair. Pillemer AJ stated that, ‘This is the kind of generalisation or stereotyping that evidences the unfairness of the discrimination.’<sup>79</sup> The argument that was made is that, in terms of section 6(2)(b) of the EEA, not being pregnant cannot be an inherent requirement for a job.

<sup>70</sup> Hepple B ‘Can discrimination ever be fair?’ in Malherbe K & Sloth-Nielsen J (eds) *Labour Law into the Future: Essays in honour of D’Arcy du Toit* (2012) 1.

<sup>71</sup> Hepple B ‘Can discrimination ever be fair?’ in Malherbe K & Sloth-Nielsen J (eds) *Labour Law into the Future: Essays in honour of D’Arcy du Toit* (2012) 1.

<sup>72</sup> *Solidarity obo Barnard v SAPS* (2010) 31 ILJ 742 (LC).

<sup>73</sup> Hepple B ‘Can discrimination ever be fair?’ in Malherbe K & Sloth-Nielsen J (eds) *Labour Law into the Future: Essays in honour of D’Arcy du Toit* (2012) 2.

<sup>74</sup> Du Toit D ‘The Evolution of the Concept of ‘Unfair Discrimination’ in South African Labour Law’ (2006) 27 ILJ 1311 1338.

<sup>75</sup> Du Toit D ‘The Evolution of the Concept of ‘Unfair Discrimination’ in South African Labour Law’ (2006) 27 ILJ 1311 1338.

<sup>76</sup> EEA, section 6(2)(b).

<sup>77</sup> McGregor M & Dekker A (eds) *Labour Law Rules!* (2012) 61.

<sup>78</sup> *Wallace v Du Toit* (2006) 27 ILJ 1754 (LC) (hereafter *Wallace v Du Toit*). See chapter 2 of this thesis for facts, background and ratio decidendi.

<sup>79</sup> *Wallace v Du Toit* para 19.

The following discussion is an extension to the inherent job requirement defence. The term ‘uninterrupted job continuity’ has been connected with the term inherent requirement of the job. It seems as if employers have been utilising the notion of ‘uninterrupted job continuity’ as a defence. However, this is not a defence against unfair discrimination within the employment context. Though, employers regard it as an inherent requirement of the job defence. The *Woolworths v Whitehead*<sup>80</sup> case exemplifies this notion and is discussed below to demonstrate how employers have utilised the term ‘uninterrupted job continuity’ as a defence.

The job continuity prerequisite has a negative impact on women and pregnant employees. This is a subject where pregnancy discrimination is prevalent.<sup>81</sup> De Villiers contends that an investigation has to be completed whereby it can be proved that the absence of a pregnant employee will not cause undue hardship to the employers business.<sup>82</sup> An employer should be able to prove that he would suffer undue hardship when faced with the issue of an employee’s pregnancy at work. In Canada it was ascertained that replacement labour and the training of temporary workers have not resulted in an undue hardship for employers.<sup>83</sup>

In the South African case of *De Beer v SA Export Connection*,<sup>84</sup> the LC stated that a burden rests on the employer to keep an employee’s job open for her while she is on maternity leave. It is part of the social and legal recognition that men and women are equal in the workplace. ‘The “social and legal recognition of the equal status of women in the work place” clearly requires that women are not disadvantaged in their employment or employment prospects by virtue of their unique capacity to become pregnant.’<sup>85</sup> There should be a balance between the employers’ commercial interest and the pregnant employees’ employment rights.<sup>86</sup>

In *Heath V A & N Paneelkloppers*,<sup>87</sup> Snyman AJ contended that the employees pregnancy was a hindrance that stood in the way of the employers smooth running of his business. The employer was not prepared to be saddled with the difficulties that a pregnant employee who

<sup>80</sup> *Woolworths v Whitehead* (2000) 21 ILJ 571 (LAC) (hereafter *Woolworths v Whitehead*).

<sup>81</sup> De Villiers C ‘Addressing systemic sex discrimination: Employer defences to discrimination in Canada and South Africa’ (2001) 2001 *Acta Juridica* 175 180 (hereafter De Villiers C ‘Addressing systemic sex discrimination’).

<sup>82</sup> De Villiers C ‘Addressing systemic sex discrimination’ 180.

<sup>83</sup> De Villiers C ‘Addressing systemic sex discrimination’ 182.

<sup>84</sup> *De Beer v SA Export Connection CC t/a Golden Paws* (2008) 29 ILJ 347 (LC) para 10.

<sup>85</sup> *Botha v A Import Export International CC* para 21.

<sup>86</sup> Du Toit D ‘The Evolution of the Concept of ‘Unfair Discrimination’ in South African Labour Law’ (2006) 27 ILJ 1311 1315.

<sup>87</sup> *Heath V A & N Paneelkloppers* (2015) 36 ILJ 1301 (LC).

remained absent from work due pregnancy presents. Thus, employers perceive pregnancy as a threat to the prosperity of their businesses.<sup>88</sup>

### 3.4.3. WOOLWORTHS V WHITEHEAD

The job continuity concept will now further be discussed with reference to the revolutionary case of *Woolworths v Whitehead*. The *Woolworths v Whitehead* decision was the first time that the Labour Appeal Court (LAC) had to deliberate on a pregnancy discrimination matter.<sup>89</sup> Many have criticised the decision of *Woolworths v Whitehead*.<sup>90</sup> Whitear-Nel expressed her concern about the three various approaches adopted by the judges. She questioned how confused employers should be as to the treatment of pregnant job applicants.<sup>91</sup>

Wyllie states that the *Woolworths v Whitehead* judgement encourages pregnancy discrimination.<sup>92</sup> It is evident that the LAC did not favour the approach taken by the LC. The concept of work was the issue, but the LAC concluded differently.<sup>93</sup> The LAC diverted from the literal interpretation to the purposive interpretation of the law.<sup>94</sup> McGregor concurs with the purposive interpretation being utilised as it gives effect to the basic rights as encompassed in the Bill of Rights.<sup>95</sup> Labour law should be interpreted in the broadest possible manner, in order to broaden the protection afforded by the Constitution.<sup>96</sup> The advancement of women in the labour market should similarly be promoted.<sup>97</sup> However the decision in the *Woolworths v*

<sup>88</sup> McDonald P *et al* 'Expecting the Worst: Circumstances Surrounding Pregnancy Discrimination at Work and Progress to Formal Redress' (2008) *Industrial Relations Journal* 29:3 229 241.

<sup>89</sup> Steinem G 'Too Pregnant to work – The Dilemma of Economic Rationality versus Equality' (2000) 16 *SAJHR* 690 691.

<sup>90</sup> Whitear-Nel N 'To employ or not to employ a pregnant woman...that was the question' (2000) 8 *Juta's Bus. L.* 95 95.

<sup>91</sup> Whitear-Nel N 'To employ or not to employ a pregnant woman...that was the question' (2000) 8 *Juta's Bus. L.* 95 95.

<sup>92</sup> Wyllie C 'The judiciary fails working mothers' (2000) 16:44 *Agenda: Empowering Women for Gender Equity* 90 90 available at <http://dx.doi.org/10.1080/10130950.2000.9675838>.

<sup>93</sup> McGregor M 'Is Actual Commencement of Work a Requirement to be an "employee" for Purposes of Unfair Dismissal? A Purposive Interpretation' (2004) 16 *SA Merc LJ* 270 273 (hereafter McGregor M 'Is Actual Commencement of Work a Requirement to be an 'employee').

<sup>94</sup> McGregor M 'Is Actual Commencement of Work a Requirement to be an "employee"' 273.

<sup>95</sup> Mubangizi J 'Pregnancies at school: discipline versus discrimination' (2003) 1 *Stell LR* 138, 142. See further, McGregor M 'Is Actual Commencement of Work a Requirement to be an "employee"' 274.

<sup>96</sup> McGregor M 'Is Actual Commencement of Work a Requirement to be an "employee"' 274.

<sup>97</sup> Wyllie C 'The judiciary fails working mothers' (2000) 16:44 *Agenda: Empowering Women for Gender Equity* 90 95 available at <http://dx.doi.org/10.1080/10130950.2000.9675838>.

*Whitehead* case hinders the development of women attaining senior positions in the workplace.<sup>98</sup>

In a critique by Gloria Steinem, she claims that Willis JA in *Woolworths v Whitehead* did not consider jurisprudence on equality and unfair discrimination.<sup>99</sup> Steinem is of the opinion that case law generally demonstrates the judiciary's aptitude for protecting the right to equality.<sup>100</sup> Thus Willis JA in deliberating the case of *Woolworths v Whitehead* should have applied these same principles. The result is that the *Woolworths v Whitehead* decision has a negative outcome on how the judiciary should be interpreting the equality clause.<sup>101</sup> Willis JA heavily relied on the jurisprudence of tax law as opposed to constitutional law.<sup>102</sup> Hence, the analysis of whether the treatment by the employer was unfair was based on the commercial interests of the employer.<sup>103</sup>

Samuel maintains that a judgement of this nature is a complete opposite of the objective of establishing equality for women.<sup>104</sup> Case law has a tendency to display that the judiciary is supportive towards women employees who have been treated unfairly due to their pregnancies and matters related to pregnancy.<sup>105</sup> However, the *Woolworths v Whitehead* case has a quite opposite response from the public. As a consequence, critics and feminist agree that the *Woolworths v Whitehead* case should be tested in the CC.<sup>106</sup>

Moreover, Samuel highlights that issues in the judgments relate to stereotypical and sexist attitudes that is present within the judiciary.<sup>107</sup> The *Woolworths v Whitehead* case reinforces the idea that to employ pregnant women would invariably harm the economy.<sup>108</sup> Such

<sup>98</sup> Wylie C 'The judiciary fails working mothers' (2000) 16:44 *Agenda: Empowering Women for Gender Equity* 90 95 available at <http://dx.doi.org/10.1080/10130950.2000.9675838>.

<sup>99</sup> Steinem G 'Too Pregnant to work – The Dilemma of Economic Rationality versus Equality' (2000) 16 *SAJHR* 690 694.

<sup>100</sup> Steinem G 'Too Pregnant to work – The Dilemma of Economic Rationality versus Equality' (2000) 16 *SAJHR* 690 694.

<sup>101</sup> Samuel S 'Achieving equality – how far have women come?' (2001) 16:47 *Agenda: Empowering Women for Gender Equity* 21 24 available at <http://www.jstor.org/stable/4066450> (hereafter Samuel S 'Achieving equality – how far have women come?')

<sup>102</sup> *Woolworths v Whitehead* para 114.

<sup>103</sup> *Woolworths v Whitehead* paras 69, 130 & 131.

<sup>104</sup> Samuel S 'Achieving equality – how far have women come?' 24-25.

<sup>105</sup> Gobind J & Ukpere W 'Labour pains: employees and their employers' (2012) 6:46 *African Journal of Business Management* 11549 11551.

<sup>106</sup> Whitear-Nel N 'To employ or not to employ a pregnant woman...that was the question' (2000) 8 *Juta's Bus. L.* 95 95.

<sup>107</sup> Samuel S 'Achieving equality – how far have women come?' 25.

<sup>108</sup> Samuel S 'Achieving equality – how far have women come?' 25.

reasoning affects a woman's role in the workplace and her economic status.<sup>109</sup> This has a ripple effect on a woman's ability to realise and enjoy equality legislation.<sup>110</sup> It is evident from the *Woolworths v Whitehead* decision that the judges adjudicating the case were insensitive to South Africa's history, where women were subjected to unjust laws during the apartheid era.<sup>111</sup> Judges who adjudicated the *Woolworths v Whitehead* case should have read labour law in light of the Constitution.<sup>112</sup> As a result, many authors are of the view that the LAC has decided incorrectly in the *Woolworths v Whitehead* case.<sup>113</sup>

### **3.5. PREGNANCY DISCRIMINATION IN EMPLOYMENT**

Pregnant employees can be discriminated against in various ways. Dismissal, negative comments regarding pregnancy, demotion, denial of promotions, denial of maternity leave and undesirable changes in working conditions could possibly amount to unfair discrimination on the basis of pregnancy.<sup>114</sup>

Traditionally, the less favourable treatment of pregnant women was justified.<sup>115</sup> The basis for this was that no man could be compared to a woman.<sup>116</sup> Regardless, pregnant employees should be treated equally to other employees in the workplace.<sup>117</sup>

Gobind and Ukpere, reckon that South African labour law affords extensive protection against the unfair treatment of pregnant employees.<sup>118</sup> It is therefore noteworthy to further examine the EEA and the protection that it affords in safeguarding the employment rights of women and pregnant employees.<sup>119</sup>

<sup>109</sup> Samuel S 'Achieving equality – how far have women come?' 25.

<sup>110</sup> Samuel S 'Achieving equality – how far have women come?' 25.

<sup>111</sup> Samuel S 'Achieving equality – how far have women come?' 28.

<sup>112</sup> LRA, section 1. See further, Steinem G 'Too Pregnant to work – The Dilemma of Economic Rationality versus Equality' (2000) 16 *SAJHR* 690 697.

<sup>113</sup> Mubangizi J 'Pregnancies at school: discipline versus discrimination' (2003) 1 *Stell LR* 138 142.

<sup>114</sup> McDonald P *et al* 'Expecting the Worst: Circumstances Surrounding Pregnancy Discrimination at Work and Progress to Formal Redress' (2008) *Industrial Relations Journal* 29:3 229 232.

<sup>115</sup> Townshend-Smith R *Sex Discrimination in Employment: Law, Practice and Policy* (1989) 29 (hereafter Townshend-Smith R *Sex Discrimination in Employment*).

<sup>116</sup> Townshend-Smith R *Sex Discrimination in Employment* 29-30.

<sup>117</sup> Kay HH 'Equality and Difference: The Case of Pregnancy' in Smith P *Feminist Jurisprudence* (1993) 34.

<sup>118</sup> Gobind J & Ukpere W 'Labour pains: employees and their employers' (2012) 6:46 *African Journal of Business Management* 11549 11549 & 11552.

<sup>119</sup> The EEA, section 9 extends the protection of pregnancy discrimination to applicants for employment too. However, no meaning or interpretation has been attached to this term by the LC's. This was illustrated in the



Women and pregnant employees are protected against prejudicial treatment by their employers.<sup>120</sup> Section 6 of the EEA clarifies that women should not be prejudiced against because they are women and can bear children.<sup>121</sup>

What follows below is a focused discussion on discrimination based on the ground of pregnancy specifically. This discussion should be read and understood within the general discrimination framework discussed above.

### **3.5.1. LISTED GROUNDS**

Section 6(1) of the EEA is the equivalent to section 9(3) of the Constitution. The amended section 6(1)<sup>122</sup> states that, ‘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,<sup>123</sup> marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth or on any other arbitrary ground.’<sup>124</sup>

### **3.5.2. ARBITRARY GROUNDS**

The grounds listed in section 6(1) of the EEA are not a closed list.<sup>125</sup> Hence, the inclusion of the term ‘arbitrary grounds’ as it suggests that any other factor can conceivably constitute unfair discrimination.<sup>126</sup>

Section 6 has moreover been expanded upon to include, ‘[a] difference in terms and conditions of employment between employees of the same employer performing the same or

---

case of *Wyeth SA (Pty) Ltd v Manqele & others* [2003] 7 BLLR 734 (LC), where the LC held that an employee is protected by labour law the moment the offer of employment is accepted.

<sup>120</sup> EEA, section 6.

<sup>121</sup> Mdaka A ‘Pregnancy and Employment’ *Labour Watch* December 2007 11 available at [www.ccma.org.za/UploadedMedia/CCMAil-December2007\(2\).doc](http://www.ccma.org.za/UploadedMedia/CCMAil-December2007(2).doc) (accessed 8 August 2014).

<sup>122</sup> See footnote 41.

<sup>123</sup> For the purpose of the thesis, the issue of less favourable treatment against pregnant women in the workplace will be the focal point.

<sup>124</sup> Employment Equity Amendment Act 47 of 2013, section 6(1).

<sup>125</sup> McGregor M & Dekker A (eds) *Labour Law Rules!* (2012) 56.

<sup>126</sup> Grogan J *Workplace Law* 108 & 110. An ‘arbitrary ground’ dictates any factor that has the potential to devalue an individual.

substantially the same work of equal value that is directly or indirectly based on any one or more of the grounds listed in subsection (1), is unfair discrimination.’<sup>127</sup>

In effect, discrimination occurs when certain individuals at work are refused benefits and rights that are afforded to another group of individuals.<sup>128</sup> Alternatively, unfair discrimination occurs when an employee is prejudiced due to an inherent attribute.<sup>129</sup>

The following event is an illustration of how women employees were denied benefits due to their pregnancies. In an article titled, ‘Cape Town discriminating against female fire fighters’ it was stated by the South African Municipal Union that discrimination has been taking place in the fire department by the City of Cape Town.<sup>130</sup> Non-working female fire fighters are losing certain benefits when they become pregnant, while males continue to receive benefits when they are not working.<sup>131</sup> ‘The City is rolling back years of struggle meant to prevent discrimination against women for their child bearing responsibilities’.<sup>132</sup> Bagraim was of the opinion that males do not take off from work for three months, whereas pregnant women take maternity leave for up to four months, hence, it is discrimination.<sup>133</sup>

When assessing less favourable treatment in the workplace against women, an employer that prevents a woman with children to take on more responsibilities discriminates against that woman regardless of economic rationality.<sup>134</sup> Grogan asserts that if a discriminatory system is alleged, the system must impact on the dignity of the individual.<sup>135</sup> It is true that ‘Employees need protection against employer conduct that undermines their dignity as much as against conduct which unfairly threatens their economic interests.’<sup>136</sup>

<sup>127</sup> Employment Equity Act 47 of 2013, section 6(4).

<sup>128</sup> Grogan J *Workplace Law* 108.

<sup>129</sup> Grogan J *Workplace Law* 108.

<sup>130</sup> Hearne A & Khumalo M ‘Cape Town discriminating against female fire fighters – SAMWU’ available at <http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/paqe71654?oid=389663&sn=Detail&pid=71654> (accessed 7 August 2014) (hereafter Hearne A & Khumalo M ‘Cape Town discriminating against female fire fighters – SAMWU’).

<sup>131</sup> Hearne A & Khumalo M ‘Cape Town discriminating against female fire fighters – SAMWU’. See also, Mtyala Q ‘Pregnant firefighter takes city to CCMA’ *The Times Live* 09 July 2013 available at <http://www.timeslive.co.za/thetimes/2013/07/09/pregnant-firefighter-takes-city-to-ccma> (accessed 7 August 2015) (hereafter Mtyala Q ‘Pregnant firefighter takes city to CCMA’).

<sup>132</sup> Hearne A & Khumalo M ‘Cape Town discriminating against female fire fighters – SAMWU’. See also, Mtyala Q ‘Pregnant firefighter takes city to CCMA’.

<sup>133</sup> Mtyala Q ‘Pregnant firefighter takes city to CCMA’.

<sup>134</sup> Townshend-Smith R *Sex Discrimination in Employment* 44.

<sup>135</sup> Grogan J *Workplace Law* 108.

<sup>136</sup> Du Toit D ‘The Evolution of the Concept of ‘Unfair Discrimination’ in South African Labour Law’ (2006) 27 *ILJ* 1311 1316.

### **3.5.3. CONSTITUTIONAL V EMPLOYMENT DISCRIMINATION LAW**

Cooper maintains that the jurisprudence on unfair discrimination in labour law is incoherent and obscure.<sup>137</sup> The reason for this is the courts inconsistency in applying constitutional jurisprudence to labour law.<sup>138</sup> In the case of *Leonard Dingler Employee Representative Council v Leonard Dingler (Pty) Ltd*,<sup>139</sup> the LC referred to constitutional law in resolving the issue of unfair discrimination. At the other extreme, the LAC in the *Woolworths v Whitehead* case relied on the commercial needs of the employer in the absence of considering the precedence of unfair discrimination. Notwithstanding the various approaches by the LC and LAC, an intermediate position had been struck.<sup>140</sup> This is a clear indication that there is a vagueness and unpredictability on how far constitutional law jurisprudence can be utilised as a guide to interpret unfair discrimination in labour law.<sup>141</sup>

### **3.6. PREGNANCY DISCRIMINATION AT SCHOOL: AN ANALOGY**

The protection of women and pregnant employees in the working environment is the issue in this thesis. However, pregnancies at school have likewise become a legal issue. Mubangizi asserts that learners that have fallen pregnant have been treated less favourably.<sup>142</sup> This discussion is significant because it highlights the problem that women are facing in South Africa. That is, discrimination on the basis of pregnancy-related matters, where pregnant women are marginalised and where they are socially and economically disadvantaged. This discussion indicates how pregnancy discrimination commences at a basic level (at school) and how it advances and infiltrates into the working environment.

‘Grade 12 pupil expelled for being pregnant’ was the title of the article in the Mercury newspaper. Veronica Shabane was eight months pregnant when she was told not to return to school.<sup>143</sup> The school governing body stated that pregnant learners are not welcomed in the

<sup>137</sup> Cooper C ‘A Constitutional Reading of the Test for Unfair Discrimination in Labour Law’ (2001) 2001 *Acta Juridica* 121 129 (hereafter Cooper C ‘A Constitutional Reading of the Test for Unfair Discrimination in Labour Law’).

<sup>138</sup> Cooper C ‘A Constitutional Reading of the Test for Unfair Discrimination in Labour Law’ 122 & 129.

<sup>139</sup> *Leonard Dingler Employee Representative Council & Others v Leonard Dingler (Pty) Ltd & Others* (1998) 19 *ILJ* 285 (LC).

<sup>140</sup> Cooper C ‘A Constitutional Reading of the Test for Unfair Discrimination in Labour Law’ 129.

<sup>141</sup> Cooper C ‘A Constitutional Reading of the Test for Unfair Discrimination in Labour Law’ 129.

<sup>142</sup> Mubangizi J ‘Pregnancies at school: discipline versus discrimination’ (2003) 1 *Stell LR* 138 138.

<sup>143</sup> Makhanya P ‘Grade 12 pupil expelled for being pregnant’ *The Mercury* 18 July 2002 available at <http://www.iol.co.za/news/south-africa/grade-12-pupil-expelled-for-being-pregnant->

community.<sup>144</sup> Spokesperson for the Education Department (the Department) alluded that this was a common reoccurrence and that the Department was aware of the discrimination occurring in schools.<sup>145</sup> Msibi was strongly of the view that such behaviour is contrary to the spirit of the Constitution.<sup>146</sup> A year later, Veronica Shabane exclaimed that her giving birth and completing matric was a victory that broke policies that are established to treat women unfairly.<sup>147</sup>

Case law also demonstrates how pregnancy discrimination is prevalent in the school environment. In the case of *Mfolo v Minister of Education Bophuthatswana*,<sup>148</sup> the schools code of conduct stated that a student who fell pregnant would have to leave school. The applicant fell pregnant and was asked to leave school. Needless to say, she challenged the code of conduct. The adjudicator held that the code of conduct not only transgressed the principles of the Constitution, but it also transgressed common sense.<sup>149</sup>

Within the employment context, pregnancy discrimination at school is relevant. Similar to the Department and to school governing bodies, employers have also made decisions in respect of pregnant employees that have far transgressed the principles of the Constitution, the Labour Relations Act (LRA)<sup>150</sup>, the Basic Conditions of Employment Act (BCEA)<sup>151</sup> and the EEA. Employers should utilise their common sense, that is, pregnant women should not be treated less favourably due to their pregnancies or reasons related to pregnancy.

There seems to be a trend when the issue of pregnancy arises. The law seeks to protect pregnant women, whether at school or work. Therefore, the law should fulfil its role in protecting pregnant women by affording them equal treatment.

---

[1.89980?ot=inmsa.ArticlePrintPageLayout.ot](http://1.89980?ot=inmsa.ArticlePrintPageLayout.ot) (accessed 20 March 2015) (hereafter Makhanya P 'Grade 12 pupil expelled for being pregnant').

<sup>144</sup> Makhanya P 'Grade 12 pupil expelled for being pregnant'.

<sup>145</sup> Makhanya P 'Grade 12 pupil expelled for being pregnant'.

<sup>146</sup> Makhanya P 'Grade 12 pupil expelled for being pregnant'.

<sup>147</sup> Makhanya P 'Grade 12 pupil expelled for being pregnant'.

<sup>148</sup> *Mfolo v Minister of Education* 1992 (3) SA 181 (BGD) (hereafter *Mfolo v Minister of Education*).

<sup>149</sup> *Mfolo v Minister of Education* para 188.

<sup>150</sup> Labour Relations Act 66 of 1995 (hereafter the LRA).

<sup>151</sup> Basic Conditions of Employment Act 75 of 1997 (hereafter the BCEA).

### 3.7. PREGNANCY VERSUS SEX DISCRIMINATION

The terms sex, gender and pregnancy are words that have their own definitions.<sup>152</sup> For this reason, to say that these words can be used interchangeably is incorrect. The legislature likewise made a clear distinction when drafting the Constitution, the LRA and the EEA between the terms sex, gender and pregnancy.<sup>153</sup> However, the idea of pregnancy has caused confusion since sex and gender discrimination is relatively akin to one another.<sup>154</sup> Hence, this part of the thesis will briefly discuss this misconception. As a point of departure, ‘sex discrimination may be described as the less favourable or differential treatment of a woman solely on the basis of her sex.’<sup>155</sup>

In the Canadian case of *Brooks v Canada Safeway Ltd*,<sup>156</sup> this misperception was illustrated. The respondent company’s disability plan provided 26 weeks of disability benefits to employees who was absent from work due to health reasons. Notwithstanding, the plan denied benefits to pregnant employees. Pregnant employees who were unable to work, either because of pregnancy-related complications or non-pregnancy-related illness, were not eligible for these benefits. The court held that the plan discriminated against pregnant employees. The second issue was whether discrimination due to pregnancy was discrimination because of sex. It was contended that only women are affected by this form of discrimination and they are discriminated against because of their sex. The court concluded that the disability plan discriminated against pregnant employees because of their sex. Since only women could conceive, it naturally is the argument that pregnancy discrimination is also akin to sex/gender discrimination. Therefore, the Canadian court found that there is a connection between sex and pregnancy discrimination.

In the South African case of *Botha v A Import Export International CC*, it was mentioned that ‘Dismissal on the ground of pregnancy is a particularly reprehensible form of sex discrimination because it deals a severe blow to a woman at a time when she is most vulnerable and least resilient.’<sup>157</sup>

---

<sup>152</sup> Sex is the biological term while gender is the psychological term.

<sup>153</sup> Mubangizi J ‘Pregnancies at school: discipline versus discrimination’ (2003) 1 *Stell LR* 138 143.

<sup>154</sup> Steinem G ‘Too Pregnant to work – The Dilemma of Economic Rationality versus Equality’ (2000) 16 *SAJHR* 690 697.

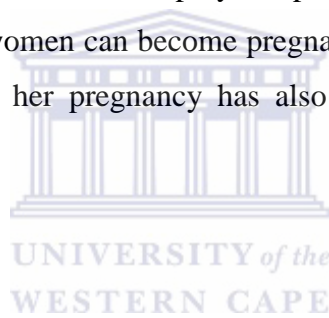
<sup>155</sup> *Association of Professional Teachers & another v Minister of Education* (1995) 16 *ILJ* 1048 (IC) page 1081.

<sup>156</sup> *Brooks v Canada Safeway Ltd* [1989] 1 *RCS* 1219.

<sup>157</sup> *Botha v A Import Export International CC* para 30.

In the Zimbabwean case of *Mandizvidza v Chaduka NO, and Morgenster College and The Minister of Higher Education*,<sup>158</sup> the college had a rule that if a student fell pregnant or caused a woman to become pregnant, it would result in exclusion from the course of study. Mandizvidza fell pregnant; subsequently she was excluded from the college. She challenged the rule. She contended that her exclusion amounted to gender discrimination in terms of section 23(1) of the Zimbabwean Constitution. The Zimbabwean court stated that this rule was directed at female students. If a male impregnated a woman, there would be no consequences as it would be difficult to prove that he caused the pregnancy.

Sex and pregnancy discrimination are closely related terms, but are not the same.<sup>159</sup> With regard to the EEA, De Villiers argues that the judiciary is too tolerant against the defences that employers can claim against sex discrimination.<sup>160</sup> In light of this, a new approach is needed whereby sex discrimination is taken more seriously.<sup>161</sup> This is because, if the less favourable treatment is on the ground of an employee's pregnancy it must be established that it can only affect women. Only women can become pregnant; an employer who dismisses an employee for reasons related to her pregnancy has also treated her unfavourably on the ground of her sex.



### 3.8. CONCLUSION

The EEA has been amended with significant changes. This could potentially have the effect of enhancing the protection of pregnant employees. The term 'arbitrary ground' has also been added to section 6 of the EEA. Additionally, section 11 of the EEA now includes an employment law test for discrimination. However, du Toit states that, 'The amendments make no fundamental changes to our law on employment discrimination.'<sup>162</sup> South Africa anticipates the interpretation of the amended sections 6 and 11 of the EEA.

Notwithstanding these amendments and various areas of the law that protect women and pregnant employees, the idea of pregnancy discrimination continues to be a frowned upon topic. Women continue to seek for equality in the workplace even though equality law

<sup>158</sup> *Mandizvidza v Chaduka NO, and Morgenster College and The Minister of Higher Education* Unreported HH-236-99.

<sup>159</sup> Mubangizi J 'Pregnancies at school: discipline versus discrimination' (2003) 1 *Stell LR* 138 143.

<sup>160</sup> De Villiers C 'Addressing systemic sex discrimination' 175.

<sup>161</sup> De Villiers C 'Addressing systemic sex discrimination' 175.

<sup>162</sup> Du Toit D 'Protection against Unfair Discrimination: Cleaning up the Act?' (2014) 35 *ILJ* 2623 2636.

exists.<sup>163</sup> Kadalie states that the labour market is polarised to such an extent that women remain inferior to men.<sup>164</sup>

Thus, there are barriers that prevent women and pregnant employees to advance in their careers. For instance, women and specifically pregnant employees face challenges in the workplace that are inherently embedded in the culture of the labour market.<sup>165</sup> In addition, it is clear that during pregnancy, women's abilities are limited. In contrast, a man's capabilities are not affected when his partner becomes pregnant. In light of this statement, equality denotes that women's opportunities should not be curtailed as a consequence of such pregnancy.

Anti-discrimination law in the constitutional and labour contexts exists, but women and pregnant employees need greater protection in the workplace as anti-discrimination laws seems to be ineffective. The rights of employers and women/pregnant employees should be balanced when discussing discrimination and inequality in the workplace.

With regard to the EEA, the absence of legal precedent and the unsuccessful enforcement of the EEA to address the pregnancy discrimination issue denote that employees are complacent with their working arrangements. Alternatively, the EEA does not sufficiently address their needs. It is established that South Africa is in need of a furtherance of equality for women and pregnant employees. The content and poor implementation of the EEA results in little protection being afforded to women, pregnant employees and working moms.

Moreover, the right to equality should take precedence over economic rationality by the employer. The right to equality should prevail in any circumstance where a woman or pregnant employee has been prejudiced because of pregnancy. The right to equality must be protected. Employers should advance and promote opportunities to all individuals regardless of differences such as pregnancy.

The following chapter outlines various anti-discrimination, labour and social security legislation relating to the employment rights of women in dealing with pregnancy within the UK.

---

<sup>163</sup> Kadalie R 'Women in the new South Africa: From transition to governance' in Liebenberg S *The Constitution of South Africa from a Gender Perspective* (1995) 65.

<sup>164</sup> Kadalie R 'Women in the new South Africa: From transition to governance' in Liebenberg S *The Constitution of South Africa from a Gender Perspective* (1995) 73.

<sup>165</sup> Townshend-Smith R *Sex Discrimination in Employment* 28.

## **CHAPTER 4**

### **THE DEVELOPMENT OF EMPLOYMENT RIGHTS OF WOMEN IN DEALING WITH ISSUES OF PREGNANCY WITHIN THE UNITED KINGDOM (UK)**

#### **4.1. INTRODUCTION**

As discussed in the preceding chapters, in the South African workplace environment, less favourable treatment on the basis of pregnancy has become problematic. In the UK this has also become problematic. The UK acknowledges that its economic development is highly dependent on advancing women in the labour market.<sup>1</sup> Thus, treating women and pregnant employees unfavourably on the basis of pregnancy or related issues has a major influence on the economy.<sup>2</sup> In light of this, this part of the thesis will comprehensively analyse how the UK has advanced and developed its pregnancy protection laws in the workplace.

#### **4.2. BACKGROUND: WOMEN AND PREGNANCY IN THE UK WORKPLACE**

In the UK, women have frequently been denied employment opportunities because they were, or might become pregnant.<sup>3</sup> Statistics reveal that seven per cent of pregnant employees who have been treated poorly resign from their employment, alternatively their jobs become redundant and they are retrenched.<sup>4</sup> Statistics also reveal that five per cent of women have been forced to resign after notifying their managers about their pregnancies.<sup>5</sup> In total, 21 per cent of women have experienced unfavourable treatment on the basis of their pregnancies.<sup>6</sup> Additionally, 45 per cent of pregnant employees have experienced ‘tangible discrimination.’<sup>7</sup> This includes being denied training, denied maternity leave, receiving unsuitable working

<sup>1</sup> James CG ‘Law’s Response to Pregnancy/Workplace Conflicts: A Critique’ (2007) 15 *Feminist Legal Studies* 167 170 (hereafter James CG ‘Law’s Response to Pregnancy/Workplace Conflicts: A Critique’).

<sup>2</sup> Fredman S ‘A Difference with Distinction: Pregnancy and Parenthood Reassessed’ (1994) 110 *LRQ* 106 106 (hereafter Fredman S ‘A Difference with Distinction: Pregnancy and Parenthood Reassessed’).

<sup>3</sup> Pannick D *Sex Discrimination Law* (1985) 145.

<sup>4</sup> Payne J ‘Pregnancy Discrimination in the Workplace’ available at <http://www.eurofound.europa.eu/ewco/2006/06/UK06060191.htm> (accessed 07 August 2014) (hereafter Payne J ‘Pregnancy Discrimination in the Workplace’).

<sup>5</sup> Payne J ‘Pregnancy Discrimination in the Workplace’. See also, James CG ‘Law’s Response to Pregnancy/Workplace Conflicts: A Critique’ 168.

<sup>6</sup> Payne J ‘Pregnancy Discrimination in the Workplace’.

<sup>7</sup> Payne J ‘Pregnancy Discrimination in the Workplace’.



hours or receiving heavy workloads.<sup>8</sup> Additionally, statistics indicate that an average of 1 000 women employees file pregnancy dismissal claims on a yearly basis.<sup>9</sup> In total, 30 000 pregnant women experience pregnancy discrimination at work per year.<sup>10</sup> Half of the population of employees challenge their employers regarding unfair dismissals on the basis of pregnancy or related matters.<sup>11</sup>

#### **4.3. LEGISLATION PROTECTING WOMEN AND PREGNANT EMPLOYEES WITHIN THE UK**

Before the year 1970, employers and the collective bargaining process exclusively decided the fate of women and pregnant employees.<sup>12</sup> Legislation protecting pregnant employees was not a phenomenon to be reckoned with.<sup>13</sup> Anti-discrimination law and employment law protecting the rights of women and pregnant employees further progressed in 1994.<sup>14</sup>

The right not to be dismissed on the basis of pregnancy only became available to employees who were employed for at least 16 hours a week by a single employer.<sup>15</sup> Moreover, these employees had to be employed for two years for the same employer in order to be protected.<sup>16</sup> Likewise, the right to return to work after maternity leave could only be instituted if the above employment prerequisites were satisfied.<sup>17</sup> However, due to certain employees not receiving protection, the UK had to disregard the eligibility prerequisites.<sup>18</sup> What follows below is a discussion pertaining to the various anti-discrimination, labour and social security statutes that affords protection to women and pregnant employees.

---

<sup>8</sup> Payne J 'Pregnancy Discrimination in the Workplace'. See also, James CG 'Law's Response to Pregnancy/Workplace Conflicts: A Critique' 168.

<sup>9</sup> James CG 'Law's Response to Pregnancy/Workplace Conflicts: A Critique' 173.

<sup>10</sup> James CG 'Law's Response to Pregnancy/Workplace Conflicts: A Critique' 173.

<sup>11</sup> James CG 'Law's Response to Pregnancy/Workplace Conflicts: A Critique' 181.

<sup>12</sup> Fredman S 'A Difference with Distinction: Pregnancy and Parenthood Reassessed' 108.

<sup>13</sup> Fredman S 'A Difference with Distinction: Pregnancy and Parenthood Reassessed' 108.

<sup>14</sup> Fredman S *Women and the Law* (1997) 195.

<sup>15</sup> Fredman S *Women and the Law* (1997) 195.

<sup>16</sup> Fredman S *Women and the Law* (1997) 195.

<sup>17</sup> Fredman S *Women and the Law* (1997) 196.

<sup>18</sup> Trade Union Reform and Employment Rights Act 1993, sections 23 & 24(3). See further, Hare I 'Commentary: Pregnancy and Sex Discrimination' (1991) 20 *ILJ* 124 16.

### **4.3.1. PREGNANCY/SEX DISCRIMINATION AND EQUALITY LEGISLATION**

It has become common to treat sex discrimination as a form of pregnancy discrimination.<sup>19</sup> Thus, this discussion centres on the notion that pregnancy is a form of sex discrimination. What is to follow is a discussion relating to pregnancy/sex discrimination and equality laws. The Sex Discrimination Act 1975<sup>20</sup> (the SDA) and the Equality Act 2010<sup>21</sup> (the EA) will specifically be discussed. Case law dealing with important issues under the relevant legislation will also be discussed separately.

#### **4.3.1.1. THE SEX DISCRIMINATION ACT 1975**

As a point of departure it is noteworthy to mention that the Equality Act 2010 has repealed the Sex Discrimination Act (SDA). Notwithstanding, the SDA remains relevant to this discussion, as it will provide a background to how UK equality legislation has progressed. The SDA pursued to eradicate direct and indirect sex discrimination and promote equality in the broader and in the employment context.<sup>22</sup> According to the SDA, '[a] person discriminates against a woman in any circumstances...on the ground of her sex if he treats her less favourably than he treats or would treat a man.'<sup>23</sup>

For this reason, direct discrimination would transpire when an employer treats an employee with prejudice for reasons related to her sex. Moreover, section 6(2)(b) of the SDA stipulates that it is unlawful to discriminate against women employees by dismissing them or subjecting them to prejudicial treatment. The SDA protected all workers from being discriminated against on the basis of sex, regardless of whether they were self-employed, on contract or agency workers.<sup>24</sup> All workers were protected against discrimination in the context of recruitment, training, promotion and workplace benefits.<sup>25</sup>

<sup>19</sup> Wintemute R 'When is Pregnancy Discrimination Indirect Sex Discrimination?' (1998) 27:1 *ILJ* 23 28.

<sup>20</sup> Sex Discrimination Act 1975 (hereafter the SDA).

<sup>21</sup> Equality Act 2010 (hereafter the EA).

<sup>22</sup> SDA, preamble. See also, the Equal Treatment Directive 76/207/EEC of 09 February 1976 (hereafter the Equal Treatment Directive). The principle of equal treatment relating to men and women was implemented. Equal treatment includes but is not limited to access to employment, training, promotion and workplace conditions.

<sup>23</sup> SDA, section 1(1)(a).

<sup>24</sup> James G *The Legal Regulation of Pregnancy and Parenting in the Labour Market* (2008) 51.

<sup>25</sup> James G *The Legal Regulation of Pregnancy and Parenting in the Labour Market* (2008) 51.

## **I. SEX DISCRIMINATION AGAINST WOMEN AND PREGNANT EMPLOYEES**

In *Page v Freight Hire (Tank Haulage) Ltd*,<sup>26</sup> the issue of paternalism was demonstrated. This case involved a 23-year-old female employee who transported certain chemicals. The manufacturer warned the employer of potential risks towards women of childbearing age who transported these chemicals. Mrs Page acknowledged the risks. Despite the risks, she continued to transport the hazardous chemicals. The employer subsequently terminated the employee's employment. Mrs Page claimed that her dismissal was contrary to section 1(1) of the SDA. The court a quo held that discrimination was established on the basis of sex, as male employees were permitted and continued to transport the harmful chemicals.

On appeal, the Employment Appeal Tribunal (EAT) rejected the court a quo's decision. The EAT contended that the employer made its decision on the basis of safety.<sup>27</sup> Morris and Nott aver that in *Page v Freight Hire*, the notion of equality was conceded, giving support to paternalism.<sup>28</sup> The *Page v Freight Hire* case exemplifies the notion that sex discrimination is rooted in the patriarchal idea that men are the defenders of women.<sup>29</sup> In other words, men are the breadwinners and women are the caretakers of the home.<sup>30</sup>

In *Webb v EMO Air Cargo (UK) Ltd*,<sup>31</sup> a temporary employee fell pregnant and was dismissed when the employer became aware of her pregnancy. She contended that her dismissal was direct/indirect discrimination on the basis of sex. Moreover, it was contrary to the provisions of section 1(1) of the SDA. The EAT held that the rationale for the dismissal was just and correct. The EAT stated that envisaging a pregnant man is absurd. However, comparing a pregnant woman who has to take maternity leave with a man who has a medical condition that would necessitate him to be absent for the same period of time that the woman would be absent is possible. In other words, the court would have to treat a sick man in the

<sup>26</sup> *Page v Freight Hire (Tank Haulage) Ltd* [1981] ICR 299 (hereafter *Page v Freight Hire*)

<sup>27</sup> The *Page v Freight Hire* decision was ultimately based on the Health and Safety at Work Act 1974.

<sup>28</sup> Morris A & Nott S 'The Legal Response to Pregnancy' (1992) 12 *Legal Stud.* 54 60 (hereafter Morris A & Nott S 'The Legal Response to Pregnancy').

<sup>29</sup> Hanlon J 'The 'Sick' Woman: Pregnancy Discrimination in Employment' (1995) 4:3 *Journal of Gender Studies* 315 315 (hereafter Hanlon J 'The 'Sick' Woman: Pregnancy Discrimination in Employment').

<sup>30</sup> Hanlon J 'The 'Sick' Woman: Pregnancy Discrimination in Employment' 315.

<sup>31</sup> *Webb v EMO Air Cargo (UK) Ltd* [1990] IRLR 124 (EAT) (hereafter *Webb v EMO Air Cargo*). Similarly, in *Reaney v Kanda Jean Products Ltd* [1978] IRLR 427 the Industrial Tribunal (IT) held that the employee was not dismissed because she was a woman. On the contrary, she was dismissed because she was pregnant. The IT concluded that the dismissal was on the basis of pregnancy. However, the dismissal did not amount to sex discrimination.

same manner that it would treat Ms Webb. The dismissal thus stemmed from her inability to fulfil her primary duties for which she was temporarily recruited.

In *New Southern Railway Ltd v Quinn*,<sup>32</sup> it was illustrated that a claim based on sex discrimination could be successful if a claim based on pregnancy discrimination were unsuccessful. In this case, the employees' wages were reduced and she was demoted after the employer discovered that she was pregnant. As a result, the pregnant employee resigned. She claimed constructive and unfair dismissal. On the one hand, the employer argued that her dismissal was justified because her duties were dangerous to her health and safety. On the other hand, the employee asserted that she had been discriminated against on account of sex. The EAT stated that the employee was prejudiced by virtue of her being pregnant and being a woman. The employee's claim for sex discrimination succeeded as the employer made an individual decision to demote the employee and to reduce her wages.

## II. COMPARING MEN AND WOMEN: PREGNANCY

An employee was dismissed in *Hertz v Aldi Marked K/S*,<sup>33</sup> following her failure to return to work when her maternity leave expired. She failed to return to work as she suffered from an illness that was linked to her pregnancy. The European Court of Justice (ECJ) contended that this did not constitute sex discrimination, as her illness was not adequately connected to her pregnancy. The ECJ held that where a woman is ill as a result of her pregnancy, she was required to compare herself to an ill man. Once this comparison has been made she would be afforded protection. Even though pregnancy is an incomparable state between men and women, UK courts have nonetheless explored the idea of a pregnant male.<sup>34</sup> Their sentiment is that a sick man is equivalent to a pregnant woman.<sup>35</sup> Fredman however reckons that pregnancy is not an illness, and it should not be labelled as 'unhealthy.'<sup>36</sup>

<sup>32</sup> *New Southern Railway Ltd. v Quinn* [2006] IRLR 266. This case was based on the Management of Health and Safety at Work Regulations 1999, see para 4.3.2.4. below.

<sup>33</sup> *Hertz v Aldi Marked K/S* [1991] IRLR 31.

<sup>34</sup> Hanlon J 'The 'Sick' Woman: Pregnancy Discrimination in Employment' 317. See further, Hare I 'Commentary: Pregnancy and Sex Discrimination' (1991) 20 *ILJ* 124 125.

<sup>35</sup> Hanlon J 'The 'Sick' Woman: Pregnancy Discrimination in Employment' 317. See further, Hervey T & O'Keeffe D *Sex Equality Law in the European Union* (1996) 54.

<sup>36</sup> Fredman S 'A Difference with Distinction: Pregnancy and Parenthood Reassessed' 113. See further, Fredman S *Discrimination Law* (2011) 2 ed 170.

In the case of *Turley v Allders Department Stores Ltd*,<sup>37</sup> the EAT stated that ‘[i]n order to see if she has been treated less favourably than a man...you must compare like and you cannot. When she is pregnant a woman is no longer just a woman. She is a woman...with child and there is no masculine equivalent.’<sup>38</sup> If the dismissal is based on pregnancy, it is effectively based on the fact that she is a woman. But for her womanliness, she would not have been treated unfavourably. To establish discrimination, a comparison between a woman’s pregnancy and a man’s pregnancy has to be made. The EAT averred that this scenario is virtually impossible. The EAT held that men cannot conceive. Consequently, it is impossible to compare a woman to a man. Sex discrimination could thus not be established. Based on this decision, it is lawful to treat a woman differently on the basis of pregnancy.

However, Pannick states that the EAT erred in deciding that it was lawful to treat a woman differently on account of pregnancy.<sup>39</sup> The EAT’s approach to the sex discrimination issue was influenced by the judgement in the US district court.<sup>40</sup> That is that the dismissal of a woman because she is pregnant cannot be discrimination on the ground of sex, ‘because only women become pregnant and only men grow beards’.<sup>41</sup>

In contrast to the above case law discussions, in the *Hayes v Malleable Working Men’s Club*<sup>42</sup> decision, the EAT rejected the decision in the *Turley* case on the basis of the comparability prerequisite. In *Hayes*, the EAT approached the issue differently. The court contended that women dismissed on the grounds of pregnancy could claim that they were discriminated against based on sex. However, the employee should prove that a man would have received more advantageous treatment if he were in her situation. Certain authors are of the opinion that the *Hayes* case shows flexibility regarding the sex/pregnancy discrimination approach.<sup>43</sup> The *Hayes* test confirms that it is not sufficient for a pregnant employee to only prove that she was dismissed for a reason connected to her pregnancy.<sup>44</sup> She should

---

<sup>37</sup> *Turley v Allders Department Stores Ltd* [1980] ICR 66 (EAT) (hereafter *Turley*).

<sup>38</sup> *Turley* at 70.

<sup>39</sup> Pannick D *Sex Discrimination Law* (1985) 161.

<sup>40</sup> Pannick D *Sex Discrimination Law* (1985) 161. See, *Rafford v. Randle Eastern Ambulance Service Inc* 348 F Supp 316, 320 (1972).

<sup>41</sup> *Rafford v. Randle Eastern Ambulance Service Inc* 348 F Supp 316, 320 (1972) & Pannick D *Sex Discrimination Law* (1985) 161.

<sup>42</sup> *Hayes v Malleable Working Men’s Club* [1985] IRLR 367 (hereafter *Hayes*).

<sup>43</sup> Morris A & Nott S ‘The Legal Response to Pregnancy’71.

<sup>44</sup> Morris A & Nott S ‘The Legal Response to Pregnancy’71.

additionally prove that a man in a similar position to her would have been treated more favourably.<sup>45</sup>

In the revolutionary case of *Dekker v Stichting Vormingscentrum voor Jong Volwassen (VJV-Centrum) Plus*,<sup>46</sup> the comparator prerequisite was not utilised. In this case, Mrs Dekker was a suitable candidate for the job despite her pregnancy. However, she was not appointed, as the company could not provide her with maternity leave. The European Court (EC) held that because the company had not recruited her (on the basis of her pregnancy), their actions were directly associated to her sex. Therefore, their actions amounted to sex discrimination.

When the issue of sex discrimination arises, it is imperative to reverse the sexes in order to draw an analogy.<sup>47</sup> To determine sex discrimination against a woman, the enquiry should be whether a man in a similar position would have been treated in the same manner.<sup>48</sup> If it is established that one sex was treated more favourably than the other, sex discrimination is established.<sup>49</sup> Regardless of the above-mentioned analogy, pregnancy cannot be compared to any other situation.<sup>50</sup> There is only one biological difference between men and women, that is, pregnancy.<sup>51</sup> This therefore creates difficulties, as there is no comparator to pregnancy. Men and women cannot be treated equally as they cannot be compared.<sup>52</sup> In *James v Eastleigh Borough Council*,<sup>53</sup> it was confirmed that no comparison is needed as a woman cannot fall pregnant, but for the reason that she is a woman.

Hare suggests that in terms of the SDA, a comparison between a woman and a man should be made.<sup>54</sup> However, the UK realised that this was impossible. The notion of a comparator is thus no longer applicable.<sup>55</sup>

<sup>45</sup> Fredman S 'A Difference with Distinction: Pregnancy and Parenthood Reassessed' 111.

<sup>46</sup> *Dekker v Stichting Vormingscentrum voor Jong Volwassen (VJV-Centrum) Plus* [1991] 20 1 IRLR 27 (ECJ). This case was decided based on the Equal Treatment Directive.

<sup>47</sup> Banda F *Women, Law and Human Rights: An African Perspective* (2005) 27.

<sup>48</sup> Banda F *Women, Law and Human Rights: An African Perspective* (2005) 27.

<sup>49</sup> Banda F *Women, Law and Human Rights: An African Perspective* (2005) 27.

<sup>50</sup> Banda F *Women, Law and Human Rights: An African Perspective* (2005) 27.

<sup>51</sup> Townshend-Smith R *Sex Discrimination in Employment: Law, Practice and Policy* (1989) 29 (hereafter Townshend-Smith R *Sex Discrimination in Employment*).

<sup>52</sup> Steinem G 'Too Pregnant to Work – The Dilemma of Economic Rationality versus Equality' (2000) 16 *SAJHR* 690 699. See further, Grogan J *Dismissal, Discrimination and Unfair Labour Practices* 2 ed (2007) 139.

<sup>53</sup> *James v Eastleigh Borough Council* [1990] ICR 554.

<sup>54</sup> Hare I 'Commentary: Pregnancy and Sex Discrimination' (1991) 20 *ILJ* 124 126.

<sup>55</sup> James G *The Legal Regulation of Pregnancy and Parenting in the Labour Market* (2008) 53.

### III. GENDER RIGHTS APPROACH

In the case law analysis explored below, the courts applied the gender rights approach. In the *James v Eastleigh Borough Council*<sup>56</sup> decision the House of Lords contended that it is unlawful discrimination to dismiss a pregnant employee. It was established that employers are utilising a gender-based criterion in dismissing pregnant employees. The Industrial Tribunal (IT) reiterated that there is absolutely no possibility of men falling pregnant. As a result, men cannot be compared to women when the issue of pregnancy arises. Thus, there is no reason to compare sex, gender or pregnancy.

Not recruiting a woman because she is pregnant amounts to direct discrimination. The approach taken by the labour courts suggests that the labour courts have moved towards protecting gender rights.<sup>57</sup> This approach originates from the influence that pregnancy has on social values.<sup>58</sup>

From the above discussion it can be seen that affording special treatment to pregnant employees is appropriate in the UK.<sup>59</sup> The employment rights of women not to be denied opportunities for reasons that are connected to pregnancy have frequently be brought under the SDA.<sup>60</sup> However, the SDA was not without criticism. Pannick suggests that the SDA had a limited scope of protecting pregnant women against unfair dismissal and the right to maternity pay.<sup>61</sup> These rights were contingent on continuous employment; thus, the SDA had to extend its protection.<sup>62</sup> These criticisms were considered, since in 2010 the SDA is no longer in force. The abolition of the SDA made provision for a developed and progressive statute, the Equality Act (EA).

---

<sup>56</sup> *James v Eastleigh Borough Council* [1990] ICR 554.

<sup>57</sup> Fredman S 'A Difference with Distinction: Pregnancy and Parenthood Reassessed' 115. See further, Hanlon J 'The 'Sick' Woman: Pregnancy Discrimination in Employment' 319.

<sup>58</sup> Fredman S 'A Difference with Distinction: Pregnancy and Parenthood Reassessed' 106. See further, Hanlon J 'The 'Sick' Woman: Pregnancy Discrimination in Employment' 319.

<sup>59</sup> SDA, section 2(2), 17(2)(b) & schedule 1, part 1, section 3(1)(b).

<sup>60</sup> Pannick D *Sex Discrimination Law* (1985) 145-146.

<sup>61</sup> Pannick D *Sex Discrimination Law* (1985) 145.

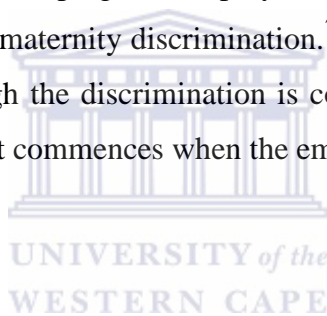
<sup>62</sup> Pannick D *Sex Discrimination Law* (1985) 145.

#### **4.3.1.2. THE EQUALITY ACT 2010**

The Equality Act (EA) provides increased protection to women and pregnant employees since the abolition of the SDA. Unlawful discrimination<sup>63</sup> on the grounds of pregnancy and maternity leave is dealt with in terms of the EA.<sup>64</sup> According to the EA, discrimination transpires when an employer relies on pregnancy, maternity or illness related to pregnancy<sup>65</sup> as a reason for treating an employee less favourably.<sup>66</sup>

Treating pregnant employees less favourably on the basis of maternity leave can amount to discrimination.<sup>67</sup> According to Collins, not granting a pregnant employee maternity leave amounts to discrimination due to the past prejudice suffered by women.<sup>68</sup> Discrimination will likewise be established where the characteristic is sex and the less favourable treatment is because a woman employee is breast-feeding.<sup>69</sup>

The EA states that treating a woman/pregnant employee unfavourable during ‘the protected period’ is unlawful pregnancy or maternity discrimination.<sup>70</sup> Thus, it cannot amount to direct sex discrimination,<sup>71</sup> even though the discrimination is connected to the employee’s sex.<sup>72</sup> Relating to the protected period, it commences when the employee falls pregnant.<sup>73</sup>



<sup>63</sup> EA, section 13(1) states that direct discrimination is where, ‘A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.’ A protected characteristic includes age, disability, marriage and civil partnership, race and sex. The EA, section 19(1) states that indirect discrimination is where, ‘A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B’s.’ In terms of indirect discrimination, pregnancy and maternity is not seen as a protected characteristic. Both these definitions require the aggrieved party to be compared to another individual (the comparator). The burden of proof rests on the employee to prove that there has been discrimination on the grounds of pregnancy or maternity. Thereafter the burden shifts to the employer to prove that there has been no discrimination. The employer must prove on a balance of probabilities that there was no discrimination.

<sup>64</sup> EA, sections 4 & 18. Pregnancy and maternity is an additional protected characteristic and does not fall under the definition of direct sex discrimination as per the EA, section 13(6). Thus, discrimination on the grounds of pregnancy and maternity requires no comparison to prove that it is less favorable.

<sup>65</sup> Illnesses include morning sickness, fatigue, backache, high blood pressure, miscarriage and post-natal depression, haemorrhoids and depression (James G *The Legal Regulation of Pregnancy and Parenting in the Labour Market* (2008) 31 & 57).

<sup>66</sup> EA, section 18(2)(a) & (b).

<sup>67</sup> EA, section 18(3) & (4).

<sup>68</sup> Collins H *Employment Law* (2010) 54.

<sup>69</sup> EA, section 13(6)(a).

<sup>70</sup> EA, section 18(7).

<sup>71</sup> EA, section 18(7).

<sup>72</sup> Wadham J (ed), Robinson A *et al Blackstone’s Guide to the Equality Act 2010* (2012) 41.

<sup>73</sup> Wadham J (ed), Robinson A *et al Blackstone’s Guide to the Equality Act 2010* (2012) 30.



The length of the protected period is determined by the employee's statutory leave privileges.<sup>74</sup> If the unfavourable treatment occurs after the protected period has expired, but if the prejudicial decision was made during the protected period, it would be considered as though the decision was made during the protected period.<sup>75</sup> If the protected period has expired and a woman or pregnant employee has been treated unfavourably, the detrimental treatment would be considered as a form of sex discrimination.<sup>76</sup>

Regarding pregnancy related illnesses; James is of the view that pregnancy related illnesses are capable of disturbing the workplace balance.<sup>77</sup> In *Elegbede v Wellcome Foundation*,<sup>78</sup> Mrs Elegbede experienced extreme hypertension connected to her pregnancy. She remained absent from work and was dismissed because of her continued absence. The IT held that despite her pregnancy, she would have been present at work and would have had the ability to complete her tasks. Thus, Mrs Elegbede's dismissal was unfair as it was for a reason related to her pregnancy.

In *L Thomson v Mr and Mrs Bell t/a St Stephens Nursing & Residential Home*,<sup>79</sup> the employee was dismissed as she was incapable of lifting patients as per her work duties. The court stated that the employees' dismissal was associated with her illness that stemmed from her pregnancy. Thus, she was unable to carry out her duties.

An employee who suffered from post-natal depression in *Halfpenny v IGE Medical Systems Ltd*<sup>80</sup> was dismissed on the basis of sex. The employee's depression prohibited her from returning to work after maternity leave. She therefore claimed that she was unfairly dismissed, as her depression was associated with her pregnancy. Likewise in *Kwik Saves Stores Ltd v Greaves*,<sup>81</sup> Mrs Greaves was prevented from returning to work after maternity leave due to severe back pain. The source of her back pain was related to her pregnancy and eventual childbirth.

---

<sup>74</sup> Wadham J (ed), Robinson A *et al Blackstone's Guide to the Equity Act 2010* (2012) 30. See further, the discussion pertaining to maternity and parental leave entitlements, para 4.3.2.1. below.

<sup>75</sup> EA, section 18(6).

<sup>76</sup> EA, section 13(6). See further, Wadham J (ed), Robinson A *et al Blackstone's Guide to the Equity Act 2010* (2012) 30.

<sup>77</sup> James G *The Legal Regulation of Pregnancy and Parenting in the Labour Market* (2008) 58.

<sup>78</sup> *Elegbede v Wellcome Foundation* [1977] IRLR 383.

<sup>79</sup> *L Thomson v Mr and Mrs Bell t/a St Stephens Nursing & Residential Home* (2406937/97 Manchester 24/04/98).

<sup>80</sup> *Halfpenny v IGE Medical Systems Ltd* [1999] IRLR 177, CA. See further, *Crees v Royal London Insurance* [1998] IRLR 246, CA & *Caledonia Bureau Investment & Property v Caffrey* [1998] IRLR 110, EAT.

<sup>81</sup> *Kwik Saves Stores Ltd v Greaves* [1997] IRLR 268 EAT.

The law protects women employees from being treated detrimentally on the basis of pregnancy related illnesses.<sup>82</sup> However, the law lacks protection for women suffering from detrimental treatment after returning to work from maternity leave.<sup>83</sup> Effectively, an employer who treats a pregnant employee less favourably before and after the birth of her baby will possibly commit discrimination.<sup>84</sup> There is no justification where the discrimination is on the grounds of pregnancy and maternity.<sup>85</sup>

#### **4.3.2. LABOUR AND SOCIAL SECURITY LEGISLATION**

What follows below is a focused discussion on labour and social security legislation. This discussion should be read and understood within the pregnancy/sex discrimination and equality framework discussed above.

##### **4.3.2.1. THE EMPLOYMENT PROTECTION (CONSOLIDATION) ACT 1978**

The Employment Protection (Consolidation) Act 1978<sup>86</sup> (the EPCA) is the principal statute in the UK dealing with the protection of employees. With reference to pregnant employees, '[a]n employee shall be treated for the purposes of this Part as unfairly dismissed if the reason or principal reason for her dismissal is that she is pregnant or is any other reason connected with pregnancy...'.<sup>87</sup>

Pregnant employees who rely on the EPCA for protection have to be employed for at least two uninterrupted years for the same employer.<sup>88</sup> Additionally, they would have had to work for a minimum period of 16 hours per week.<sup>89</sup> Essentially, if employees work less than 16 hours per week, they are not protected against less favourable treatment on the grounds of pregnancy.

<sup>82</sup> James G *The Legal Regulation of Pregnancy and Parenting in the Labour Market* (2008) 58.

<sup>83</sup> James G *The Legal Regulation of Pregnancy and Parenting in the Labour Market* (2008) 58 & 59.

<sup>84</sup> Townshend-Smith R *Sex Discrimination in Employment* 12.

<sup>85</sup> Wadham J (ed), Robinson A *et al Blackstone's Guide to the Equity Act 2010* (2012) 41.

<sup>86</sup> Employment Protection (Consolidation) Act 1978 (hereafter the EPCA).

<sup>87</sup> EPCA, section 60 (1).

<sup>88</sup> EPCA, section 33(3)(b).

<sup>89</sup> EPCA, schedule 13, paras 3 & 4.

In *Clayton v Vigers*,<sup>90</sup> Mrs Vigers was dismissed after the birth of her child. She claimed that her dismissal was automatically unfair in terms of section 60(1) of the EPCA. The EAT contended that a causal connection between the employers decision to dismiss an employee and the employees pregnancy or childbirth should not be a prerequisite for dismissal. The term ‘any other reason connected with pregnancy’ should be read broadly. A broad approach will give full effect to the objectives of the EPCA. Accordingly, it was adequate for the dismissal to be associated with Mrs Vigers’ pregnancy or childbirth.

Conversely, in *Grimbsy Carpet Company v Bedford*,<sup>91</sup> after Mrs Bedford received advice from her doctor, she remained at home due to an illness that she experienced owing to her pregnancy. Her employer subsequently dismissed her. She claimed that her dismissal was unfair as it was based on pregnancy. Mrs Bedford was incapable of fulfilling her duties at work. Thus, the EAT held that the illness connected to Mrs Bedford’s pregnancy was a fair reason for her dismissal. The *Grimbsy* case narrows the protection afforded in section 60 of EPCA.<sup>92</sup> Employers could possibly abuse the precedent set in the *Grimbsy* case. Employers might rely on the *Grimbsy* judgement to dismiss pregnant employees suffering from an illness that is connected to pregnancy.<sup>93</sup>

Likewise, in the *Brown v Stockton-on-Tees Borough Council*<sup>94</sup> decision, Mrs Brown instituted a claim in terms of section 60 of the EPCA.<sup>95</sup> She averred that she should not have been dismissed due to her illness that was related to her pregnancy. Griffiths LJ held that a burden is placed on employers when pregnant employees are scheduled to go on maternity leave. This is a burden that employers have to carry in order to ensure the equal treatment of women in the workplace. The fact that her illness was connected to her pregnancy was not significant. The issue was that she had been treated in a similar manner as an ill man would have been treated. Therefore the UK House of Lords concluded that sex discrimination had not been established.

<sup>90</sup> *Clayton v Vigers* [1990] IRLR 177.

<sup>91</sup> *Grimbsy Carpet Company v Bedford* [1987] IRLR 438 (hereafter *Grimbsy*).

<sup>92</sup> Morris A & Nott S ‘The Legal Response to Pregnancy’66.

<sup>93</sup> Morris A & Nott S ‘The Legal Response to Pregnancy’67.

<sup>94</sup> *Brown v Stockton-on-Tees Borough Council* [1989] AC 20.

<sup>95</sup> In the appeal court, the House of Lords referred to the Equal Treatment Directive, whereby it was stated that illness was extended to pregnancy related illnesses.

In terms of the EPCA, pregnant employees should not be treated unfairly.<sup>96</sup> Likewise, pregnant employees should not be unfairly dismissed due to pregnancy.<sup>97</sup> They have the right to paid time off for antenatal appointments.<sup>98</sup> They also have the right to maternity pay.<sup>99</sup> Finally, they have the right to return to work after maternity leave.<sup>100</sup>

Regarding maternity leave,<sup>101</sup> an employee should give her employer written notice, 21 days before she plans to take maternity leave.<sup>102</sup> Additionally, she has to inform her employer of the date that she will return to work, after maternity leave.<sup>103</sup>

UK legislation affords pregnant employees the right to return to the employment in the same or similar job after maternity leave.<sup>104</sup> In the case of *Home Office v Holmes*,<sup>105</sup> it was held that not permitting an employee to return to work after maternity leave are grounds for discrimination.<sup>106</sup> Although in the *N. Peplow v Cooper Nimmo*<sup>107</sup> case, after the employee returned from maternity leave, she was offered a position that would pay her less than her previous position. The right to return to work denotes that when employees return to work, they should return to their previous positions.



UNIVERSITY of the  
WEST OF ENGLAND

<sup>96</sup> EPCA, section 60 (1) & (2). See also, the Trade Union Reform & Employment Rights Act 1993 (hereafter the TURERA), section 24 & the Maternity and Parental Leave, etc Regulations 1999, regulation 19(2)(a)-(b) & 20(3)(a)(b).

<sup>97</sup> EPCA, section 60 (1) & (2). See also, the TURERA, section 24 & the Maternity and Parental Leave, etc Regulations 1999, regulation 19(2)(a)-(b) & 20(3)(a)(b).

<sup>98</sup> EPCA, section 31A. See also, Employment Act 1980, section 13; Employment Rights Act 1996, section 55 & 56 & Children & Families Act 2014, section 127 & 130.

<sup>99</sup> EPCA, sections 33(1)(a) & 34. See also, Employment Act 1980, section 11; Employment Rights Act 1996, sections 71-75 & the TURERA, section 23.

<sup>100</sup> EPCA, sections 33(1)(b) & 45. See also, Employment Act 1980, section 11 & 12 & the TURERA, section 23.

<sup>101</sup> In terms of social security law, the Social Security Act 1986, stipulates that pregnant employees or past employees are entitled to claim Statutory Maternity Pay (SMP). However, the employee has to establish that she has been in employment for 26 weeks continuously before claiming SMP. SMP will be paid for the duration of 18 weeks of maternity leave. Section 46 lists other prerequisites that need to be satisfied in order for employees to claim SMP. It is for this reason that Morris states that, 'There is no clearer illustration of this than the fact that pregnant employees do not qualify automatically for these rights but must "earn" them.' The duration of maternity leave is 52 weeks in the UK. The 52 weeks consists of 26 weeks ordinary maternity leave and 26 weeks additional maternity leave.

<sup>102</sup> EPCA, section 33(3)(c)(i). See also, the Maternity and Parental Leave, etc Regulations 1999, regulation 4(1)(a)(i)-(iii) & 4(3)(b).

<sup>103</sup> EPCA, section 33(3)(c)(ii) & 47. See also, See also, the Maternity and Parental Leave, etc Regulations 1999, regulation 11 & 12.

<sup>104</sup> Hanlon J 'The 'Sick' Woman: Pregnancy Discrimination in Employment 316. See further, Fredman S, *Women and the Law* (1997) 193.

<sup>105</sup> *Home Office v Holmes* [1984] IRLR 299.

<sup>106</sup> See para 4.3.1. above on discussion pertaining to anti-discrimination legislation.

<sup>107</sup> *N. Peplow v. Cooper Nimmo* 2406839/97 Manchester, 1 June 1998.

#### **4.3.2.2. THE EMPLOYMENT RIGHTS ACT 1996**

The Employment Rights Act 1996<sup>108</sup> (the ERA) provides additional protection to women employees relating to pregnancy and related matters. All women employees are protected in terms of the ERA. In other words, the ERA does not consider the length of service or hours worked by the employee as opposed to the ordinary unfair dismissal route contained in the EPCA.<sup>109</sup> An employee will be automatically unfairly dismissed when the reason concerns pregnancy, childbirth, maternity or parental leave.<sup>110</sup>

In *Caledonia Bureau Investment & Property v Caffrey*,<sup>111</sup> the employee was dismissed after suffering from post-natal depression following maternity leave. The court held that her dismissal was unfair, relying on the automatic unfairness provision in terms of section 99(1)(a) of the ERA. She was automatically protected against dismissal.

Pertaining to family leave, the ERA seeks to establish a family-friendly work environment.<sup>112</sup> Both parents have a right to parental leave.<sup>113</sup> Employees similarly receive leave days for family crises.<sup>114</sup> Leave is also provided for when it is needed with regard to other family reasons.<sup>115</sup>

The ERA introduced a radical change when the right for parents to request flexible working hours was included into the legislative framework.<sup>116</sup> Employers should not make decisions that would detrimentally affect employees where they opt to engage with the right to flexible working.<sup>117</sup> Employees have the right to request a variation in their employment contracts, specifically as it relates to their working times.<sup>118</sup> This right enables women employees to work flexible hours in order to take care of their child/ children who are below the age of 18.<sup>119</sup>

<sup>108</sup> Employment Rights Act 1996 (hereafter the ERA).

<sup>109</sup> *R v SS for Employment Ex Parte EOC* [1994] ICR 317, HL.

<sup>110</sup> ERA, section 99(1) & (3).

<sup>111</sup> *Caledonia Bureau Investment & Property v Caffrey* [1998] IRLR 111.

<sup>112</sup> James G *The Legal Regulation of Pregnancy and Parenting in the Labour Market* (2008) 39 & Collins H *Employment Law* (2010) 93.

<sup>113</sup> ERA, section 76.

<sup>114</sup> ERA, section 57 ZA-ZB.

<sup>115</sup> ERA, section 99(1)(a).

<sup>116</sup> James G *The Legal Regulation of Pregnancy and Parenting in the Labour Market* (2008) 39.

<sup>117</sup> ERA, section 47E.

<sup>118</sup> ERA, section 80F.

<sup>119</sup> ERA, section 80F (1) & (2).

### **4.3.2.3. THE PREGNANT WORKERS DIRECTIVE**

Measures have been established in terms of the Pregnant Workers Directive<sup>120</sup> whereby a healthy and safe working environment has to be provided for women, pregnant employees or employees who have given birth.<sup>121</sup> The Pregnant Workers Directive is a guideline that was enacted that is aimed at employers, specifically to improve the health and safety of women and pregnant employees at work.

The Pregnant Workers Directive states that pregnant or breastfeeding employees should not be exposed to risks at work.<sup>122</sup> They should not be forced to work the night shift, thus, they should be given a daytime shift.<sup>123</sup> A 14 week continuous maternity leave should be granted.<sup>124</sup> The Pregnant Workers Directive also provides that pregnant employees can take time off from work to attend antenatal appointments.<sup>125</sup> Finally, a dismissal on the ground of pregnancy or a related reason is forbidden.<sup>126</sup>

After analysing the Pregnant Workers Directive, it can be surmised that these rights are specific to pregnant employees. Hence, there is no need for a male comparator.<sup>127</sup> Fredman maintains that since the courts have moved beyond the notion of having a male comparator, substantive progress has been made.<sup>128</sup> It is said that the Pregnant Workers Directive affords true protection to women and pregnant employees.<sup>129</sup> Moreover, this development is said to have a great impact on UK law.<sup>130</sup>

---

<sup>120</sup> Pregnant Workers Directive 92/85/EC of 19 October 1992 (hereafter the Pregnant Workers Directive).

<sup>121</sup> Pregnant Workers Directive, article 1(1).

<sup>122</sup> Pregnant Workers Directive, article 5.

<sup>123</sup> Pregnant Workers Directive, article 7(1)-(2). In *Haberman-Beltermann v Arbeiterwohlfahrt, Bezirksverband*, (1994) ECR I-1657 (case C-421/92), a pregnant employee working the night shift was dismissed. In terms of German Law, she was restricted from working the night shift. In terms of the Equal Treatment Directive, one of its objectives is to protect pregnant women's temporary incapacity to work. Thus, the dismissal was conflicting with the objectives of the Equal Treatment Directive.

<sup>124</sup> Pregnant Workers Directive, article 8(1).

<sup>125</sup> Pregnant Workers Directive, article 9.

<sup>126</sup> Pregnant Workers Directive, article 10(1).

<sup>127</sup> Fredman S *Discrimination Law* (2011) 2 ed 171.

<sup>128</sup> Fredman S *Discrimination Law* (2011) 2 ed 12.

<sup>129</sup> Fredman S *Discrimination Law* (2011) 2 ed 170.

<sup>130</sup> Fredman S 'A Difference with Distinction: Pregnancy and Parenthood Reassessed' 122.

#### **4.3.2.4. THE MANAGEMENT OF HEALTH AND SAFETY AT WORK REGULATIONS 1999**

The Management of Health and Safety at Work Regulations<sup>131</sup> (the MHSWR) regulates the situation where an employee of childbearing age performs duties that are dangerous. Similar to the Pregnant Workers Directive, the MHSWR is a framework that guides employers regarding the health and safety of women in the workplace. The MHSWR requires that employers complete a workplace risk assessment form before recruiting and employing women of childbearing age. An assessment to ascertain if there is a possible risk to an employee who works with hazardous items should also be concluded.<sup>132</sup> More importantly, a pregnant employee should notify her employer in writing of her pregnancy to reduce the potential risk to the foetus and employee.<sup>133</sup>

In *Hardman v Mallon t/a Orchard Nursing Home*,<sup>134</sup> Mrs Hardman was employed as a care assistant where she assisted elderly people in a nursing home. Part of her duties was to move the elderly patients. She informed her employer that she was pregnant and that a risk assessment should be completed. She also provided her employer with a medical certificate stating that she should refrain from heavy lifting. Her employer ignored her request to complete the risk assessment and offered her a job as a cleaner. The EAT concluded that her employer's conduct amounted to sex discrimination as he failed to complete the risk assessment whilst she was pregnant. He also failed to observe the risk to her pregnancy.

#### **4.4. SELECTED ISSUES REGARDING PREGNANCY IN THE UK CONTEXT**

##### **4.4.1. LESS FAVOURABLE TREATMENT OF WOMEN AND PREGNANT EMPLOYEES**

In the following case law discussions, it will be illustrated that less favourable treatment includes but is not limited to selection for redundancy on the grounds of pregnancy, refusing to train or promote a pregnant employee, reducing a pregnant employee's salary or working hours or pressurising a pregnant employee to resign.

<sup>131</sup> Management of Health and Safety at Work Regulations 1999 (hereafter the MHSWR).

<sup>132</sup> MHSWR, regulation 16(1)(a)-(b).

<sup>133</sup> MHSWR, regulation 18(1).

<sup>134</sup> *Hardman v Mallon t/a Orchard Nursing Home* [2002] IRLR 516.

In the case of *S.C. Wilson v C. Turner*,<sup>135</sup> the pregnant employee's working hours were reduced from about 40 hours to 13-17 hours weekly, without her consent. Likewise, in *J.W. Beswick v R. Awan & A. Mistra*,<sup>136</sup> the pregnant employee's working hours were reduced without her permission after informing her employer about her pregnancy.

This was also the case in *Walton v The Nottingham Gateway Hotel Ltd*,<sup>137</sup> where Ms Walton worked as a maid in a hotel for approximately 13 hours per week. A working schedule was drawn up weekly. After informing her employer that she was pregnant, she took three days leave. Subsequently, she was scheduled to work for two weeks only. Thereafter her name was no longer included in the schedule. The employer argued that her name did not appear on the schedule, as there was not sufficient work for all the employees. However, the Nottingham employment tribunal discovered that another employee had received extra working hours. Despite the argument advanced by the employer that there was insufficient work so as to include Ms Walton in the work schedule. The employment tribunal concluded that she was treated less favourably on the basis of her pregnancy.

Shifting focus to dismissal as a ground for less favourable treatment, in *S Bennison v Sutton Bridge Ltd*,<sup>138</sup> the employee was dismissed two weeks after informing her colleagues of her pregnancy. The employer contended that her dismissal was based on the employee's misconduct. However, the employer provided the employee with no prior warnings. The court considered the fact that the employer made a 'hurried and pre-emptory'<sup>139</sup> decision soon after the employee fell pregnant. The court held that the 'hurried and pre-emptory' decision was a valid point to consider in deciding that the employee was unlawfully dismissed.

Likewise, in *Jimenez Melger v Ayuntamiento de Los Barrios*,<sup>140</sup> the pregnant employees fixed-term contract was not renewed. The employee held that the employer based his decision on the employees' pregnancy. She also averred that her dismissal was in contravention of the

---

<sup>135</sup> *S.C. Wilson v. C. Turner* 4561/96 Norwich, 17 April 1996.

<sup>136</sup> *J.W. Beswick v. R. Awan & A. Mistra* 2406856/97 Manchester, 12 February 1998.

<sup>137</sup> *Walton v The Nottingham Gateway Hotel Ltd* [2004] ET2600273/04.

<sup>138</sup> *S Bennison v Sutton Bridge Ltd* (2601446/97 Nottingham 27/08/97) (hereafter *S Bennison v Sutton Bridge Ltd*).

<sup>139</sup> *S Bennison v Sutton Bridge Ltd* para 21.

<sup>140</sup> *Jimenez Melger v Ayuntamiento de Los Barrios* [2001] IRLR 848 ECJ.



Equal Treatment Directive 76/207/EEC of 09 February 1976.<sup>141</sup> Thus, her dismissal was unlawful direct discrimination.

#### **4.4.2. AWARENESS OF PREGNANCY**

Employers have argued that in order for employees to be treated less favourably on the basis of pregnancy, employers would have to be aware of the pregnancy. The rationale for this is that pregnancy has to be the predominant reason for the less favourable treatment.<sup>142</sup> The following case law discussions will be explored against this brief background.

First, in *A.S. Barton v Bass Taverns Ltd*,<sup>143</sup> the manager who was responsible for the dismissal of the employee was seemingly not aware that the employee was pregnant. Yet three other managers were aware of the employee's pregnancy. The employment tribunal concluded that since the employee's direct manager was subjectively unaware of the employee's pregnancy he could not have dismissed her on the basis of pregnancy.

Secondly, in *Del Monte Foods v Mundon*,<sup>144</sup> the employee was dismissed and claimed that the dismissal was due to her pregnancy. The legal issue was whether the employer was aware of the employee's pregnancy at the time of the dismissal. It emerged that the day after the dismissal the employer contended that he was not aware of the pregnancy. Thus, the fact that the employee was pregnant did not influence his decision to dismiss her.

Thirdly, in *L.V. Reckless v The Salvation Army Social Services*,<sup>145</sup> the employee's supervisor became aware of her pregnancy in the morning (08h00) and she was dismissed on the same day, the afternoon (12h45). The employer argued that the decision to dismiss the pregnant employee had been taken at a former meeting. The employment tribunal was however not influenced by the fact that no formal warning was given to the pregnant employee. The employment tribunal held that there was no conspiracy to deceive the pregnant employee.

---

<sup>141</sup> See footnote 22.

<sup>142</sup> James G *The Legal Regulation of Pregnancy and Parenting in the Labour Market* (2008) 560.

<sup>143</sup> *A.S. Barton v Bass Taverns Ltd* (1600256/97 Cardiff, 17 June 1997).

<sup>144</sup> *Del Monte Foods v Mundon* [1980] IRLR 224 (EAT).

<sup>145</sup> *L.V. Reckless v The Salvation Army Social Services*, 17680/96 Manchester, 30 October 1996.

Fourthly, in the case of *Tele Danmark A/S v. Handels-og Kontorfunktionærernes Forbund i Danmark*,<sup>146</sup> the employee was recruited for a temporary period. During the interview she did not disclose that she was pregnant. She only informed her employer of her pregnancy two months after she was employed. Upon becoming aware of the employee's pregnancy, the employer terminated her employment contract. The employer contended that the employee failed to disclose her pregnancy during her interview. The ECJ held that it was unlawful to terminate her employment contract due to her pregnancy. The pregnant employee was protected from dismissal, irrespective of the duration of her employment.

Finally, in *F. Wright v Amorium (UK) Ltd (t/a Wicanders)*,<sup>147</sup> the employee informed her employer in writing of her pregnancy. Seven days later, she was dismissed. Her employer denied having any knowledge of her pregnancy. However, the delivery of the letter was recorded. For this reason, the employer could not rebut that he was unaware of the employee's pregnancy.<sup>148</sup>

#### **4.4.3. EMPLOYERS' BUSINESS UNDERTAKINGS**

Employers treat pregnant employees less favourably due to the shortcomings that pregnancies bring to their businesses.<sup>149</sup> Thus, it can be surmised that employers perceive pregnant employees as liabilities.<sup>150</sup> In their opinion, pregnant employees become lazy and they become detached from their employment duties.<sup>151</sup> Employers also regard employees to be

<sup>146</sup> *Tele Danmark A/S v Handels-og Kontorfunktionærernes Forbund i Danmark (acting on behalf of Brandt-Nielsen)* Case C-109/00 [2001] IRLR 853.

<sup>147</sup> *F. Wright v Amorium (UK) Ltd (t/a Wicanders)* 2302259/97 London South, 3 November 1998.

<sup>148</sup> See further case law discussions, *Ramdoolar v Bycity Ltd* EAT 30/07/04 (0236/04) EAT, *Eildon Ltd v Sharkey* [2004] EAT 0109/03, *D Labab-Sharman v Anthony Property Company Ltd* (1093/96 London North 13/03/97), *RL Lister v Mr R Morgan t/a 'Oasis'* (1801179/97) Leeds 27/05/97, *ML Roberts v (1) Marske Site Service Ltd (2) Marske Machine Co Ltd (3) D Wright* (2503092/97 Middlesbrough 20/10/97), *N Howarth v Goldsmith Crewe & Co (Mfg) Ltd* (2402899/96 Manchester 13/03/97), *MP v VJW* (21682/Bristol 20/05/96), *CE Brady v D Giacomet* (2901149/97), *V Case v Timloc Building Products Ltd* (1801347/97 Leeds 28/05/97), *D Lewis v G & L Logan t/a The Paperbox*, (2103671/97 Liverpool 29/10/97 & 25/11/97), *CA Morris v Ellis Swain Securities* (611/96 Nottingham 18/04/96), *TL Bishop v Regional Railways North East* (1802030/96 Leeds 29/01/97) & *S Bennison v Sutton Bridge Ltd* (2601446/97 Nottingham 27/08/97).

<sup>149</sup> In the *Berrisford v Woodward Schools (Midland Division) Ltd* [1991] IRLR 247 case it was held that the reason for the school matrons dismissal was that she set a poor example to her pupils, as she was an unmarried mother. The dismissal was held to be lawful.

<sup>150</sup> Smit N & Olivier M 'Discrimination Based on Pregnancy in Employment Law' (2002) 4 TSAR 783 793-794.

<sup>151</sup> James CG 'Law's Response to Pregnancy/Workplace Conflicts: A Critique' 175.

irrational, emotional and passive when they are pregnant.<sup>152</sup> In other words, employers are sceptical regarding the impact that pregnancy and childbirth has on the progression of their businesses.<sup>153</sup>

Upon returning to work, after maternity leave, women are generally given a job of lower status and remuneration.<sup>154</sup> Employers' dread that the employee may no longer be able to work long hours, that the employee will be absent from work, that the employee will have to leave work early or that the employee will arrive late at work.<sup>155</sup> Thus, in the UK, it is submitted that employing a pregnant woman is economically irrational.<sup>156</sup>

In the decision of *Community Task Force v Rimmer*,<sup>157</sup> the employee, while on maternity leave, was notified that her job became redundant. She subsequently applied for various other vacancies. However she was told that she could not be employed, as the company was required to recruit someone who was unemployed for a lengthier period. The EAT affirmed that economic reasons should not be the focal point when considering employing a particular candidate. An employee's right has to take preference over and above the employer's business undertakings. Therefore, her dismissal was unfair.

James suggests that these pregnancy/workplace conflicts test the current labour law framework's capacity to efficiently protect employees.<sup>158</sup> Townshend-Smith avers that women are insignificant in the workplace.<sup>159</sup> Accordingly, women and pregnant employees are not safeguarded against unfavourable treatment on the basis of pregnancy or maternity leave matters.<sup>160</sup> Hence it can be established that there is a gap between employee rights, employer responsibilities and that what occurs in practice.<sup>161</sup>

Women are dismissed at a whim due to pregnancy-related matters.<sup>162</sup> The underlying reason for their dismissal is because pregnancy curtails the employees' time at work.<sup>163</sup> Employers

<sup>152</sup> Wynn M 'Pregnancy Discrimination: Equality, Protection or Reconciliation?' (1999) 62 *The Modern Law Review* 435-435. See further, James CG 'Law's Response to Pregnancy/Workplace Conflicts: A Critique' 175.

<sup>153</sup> James CG 'Law's Response to Pregnancy/Workplace Conflicts: A Critique' 175.

<sup>154</sup> Townshend-Smith R *Sex Discrimination in Employment* 19.

<sup>155</sup> Honey S 'Pregnancy and Sex Discrimination' (2000) 29:1 *ILJ* 43-44. See further, James CG 'Law's Response to Pregnancy/Workplace Conflicts: A Critique' 175-176.

<sup>156</sup> Townshend-Smith R *Sex Discrimination in Employment* 12.

<sup>157</sup> *Community Task Force v Rimmer* [1986] IRLR 203.

<sup>158</sup> James CG 'Law's Response to Pregnancy/Workplace Conflicts: A Critique' 173.

<sup>159</sup> Townshend-Smith R *Sex Discrimination in Employment* 20.

<sup>160</sup> Townshend-Smith R *Sex Discrimination in Employment* 20.

<sup>161</sup> James CG 'Law's Response to Pregnancy/Workplace Conflicts: A Critique' 173.

<sup>162</sup> Hanlon J 'The 'Sick' Woman: Pregnancy Discrimination in Employment' 321.

are thus encumbered with having to search for alternative employment.<sup>164</sup> However, a business decision should not be an excuse to treat women or pregnant employees unfairly.<sup>165</sup> An employers' argument regarding the company's financial hardship that pregnancy and maternity leave might cause is not a plausible argument.

#### **4.5. CONCLUSION**

Equality, labour, social security and health legislation have been utilised as an approach to safeguard women and pregnant employees against less favourable treatment in the UK. Protection and benefits are provided for in terms the EA, the EPCA, the ERA, the Pregnant Workers Directive and the MHSWR. Thus, these statutes provide five times protection to women and pregnant employees against unfavourable treatment in the workplace.

Labour law specifically provides for an extended right to paid maternity leave, the right to return to work after maternity leave as an attempt to end the custom of dismissing employees because of pregnancy or related issues. New ideas that have emerged are the notion of pregnancy and maternity discrimination and the notion of a protected period as per the EA. The EPCA provides for paid time off which enables employees to attend antenatal appointments. The most significant change that has been introduced is the right to flexible working in terms of the ERA. In essence, the UK seeks to create a family friendly working environment.

Given that women and pregnant employees have received little or no protection in the past, the UK has acknowledged that pregnancy-related issues require special protection. Women and pregnant employees can therefore select the unfavourable treatment or unfair dismissal route in terms of various statutes. Substantial progress has accordingly been made in the UK pertaining to the legal protection afforded to women and pregnant employees. The UK has acknowledged that the position of women and pregnant employees is special. Hence, women and pregnant employees should be treated differently; they should also be afforded preferential treatment.

---

<sup>163</sup> Hare I 'Commentary: Pregnancy and Sex Discrimination' (1991) 20 *ILJ* 124 127. See further, Hanlon J 'The 'Sick' Woman: Pregnancy Discrimination in Employment 321.

<sup>164</sup> Hanlon J 'The 'Sick' Woman: Pregnancy Discrimination in Employment 321.

<sup>165</sup> Morris A & Nott S 'The Legal Response to Pregnancy'68.

## **CHAPTER 5**

### **CONCLUSION AND RECOMMENDATIONS**

#### **5.1. INTRODUCTION**

As has been shown, there are predicaments pertaining to pregnancy and related matters in the South African workplace. Legislation has been promulgated to deal with these predicaments. However, from the preceding chapters it is evident that these legislative measures are not adequate to address all issues. Less favourable treatment of women and pregnant employees in the employment context still prevails.

The impact of the unfavourable treatment is severe.<sup>1</sup> Women remain a marginalised group in the workplace. As a result, pregnant women are victims of subordination, and are deprived of opportunities and resources simply because they have the capacity to give birth. If improvements are not made, women employees in South Africa will constantly be faced with obstacles regarding the issue of unfavourable treatment as it relates to pregnancy.

Women and pregnant employees should be protected against unfair treatment efficiently. This chapter will aim to propose recommendations on how existing legislative provisions providing for the formal protection of women and pregnant employees should be implemented and better understood by Government, employers and employees.

#### **5.2. SUMMARY OF EXISTING LEGISLATIVE MEASURES IN SOUTH AFRICA**

According to the Constitution,<sup>2</sup> unfavourable treatment of pregnant women is unacceptable, especially considering the role that women play in society and the workplace. Feminists believe that differences between men and women should be acknowledged, this requires individuals to understand the role of women in society.<sup>3</sup> Their role is separate and different from men's but has equal value.<sup>4</sup> Thus women should be equally valued.

---

<sup>1</sup> See chapters 2 & 3 of this thesis.

<sup>2</sup> Constitution of the Republic of South Africa, 1996 (hereafter the Constitution).

<sup>3</sup> Banda F *Women, Law and Human Rights: An African Perspective* (2005) 29.

<sup>4</sup> Banda F *Women, Law and Human Rights: An African Perspective* (2005) 29.

Accordingly, the Constitution provides for the right to equality. Women should not be discriminated against on the basis of pregnancy. If a woman is discriminated against on account of pregnancy, it might amount to unfair discrimination.

Within the employment context, the Employment Equity Act<sup>5</sup> (the EEA) governs the notion of less favourable treatment of women employees based on pregnancy. The Labour Relations Act<sup>6</sup> (the LRA) further protects women and pregnant employees in the workplace. If a woman or pregnant employee is dismissed due to pregnancy or reasons that are closely connected to pregnancy, it would render the dismissal automatically unfair.

Women and pregnant employees are furthermore afforded maternity rights in terms of the Basic Conditions of Employment Act<sup>7</sup> (the BCEA). The BCEA provides that women and/or pregnant employees should be granted maternity leave and maternity benefits. The BCEA also makes provision for family responsibility leave.

Women's working conditions whilst pregnant and after giving birth is regulated by the Code of Good Practice on the Protection of Employees During Pregnancy and After the Birth of a Child.<sup>8</sup> The Code of Good Practice on Pregnancy was enacted as a mere guide to assist employers and employees regarding pregnancy and child birth and the safety thereof.

Finally, the Convention on Discrimination in Respect of Employment and Occupation<sup>9</sup> and the Convention on the Elimination of All Forms of Discrimination against Women<sup>10</sup> have been ratified by South Africa to further enhance women's and pregnant employees' position at work.

---

<sup>5</sup> Employment Equity Act 55 of 1998 (hereafter the EEA).

<sup>6</sup> Labour Relations Act 66 of 1995 (hereafter the LRA).

<sup>7</sup> Basic Conditions of Employment Act 75 of 1997 (hereafter the BCEA).

<sup>8</sup> BCEA, Code of Good Practice on the Protection of Employees During Pregnancy and After the Birth of a Child in GN R1441 in GG 19453 of 13 November 1998 (hereafter the Code of Good Practice on Pregnancy).

<sup>9</sup> ILO, *Discrimination (Employment and Occupation) Convention, C111*, 25 June 1958, C111, available at [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100\\_ILO\\_CODE:C111](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C111) (accessed 1 April 2015). South Africa ratified this Convention on 05 March 1997.

<sup>10</sup> UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, vol 1249, p. 13 available at <http://www.un.org/womenwatch/daw/cedaw/cedaw.htm> (accessed 1 April 2015). South Africa ratified this Convention on 15 December 1995 (hereafter CEDAW).

### **5.3. RECOMMENDATIONS**

In the preceding chapters it was illustrated that South Africa has a wealth of pregnancy protection legislation. Consequently, it could be argued that there is no shortage of legislation in South Africa that protects women and pregnant employees. In fact, after reviewing the legislation it could even be stated that South Africa has sufficient and effective legislation. However, the fact remains, women and pregnant employees are inadequately protected as the unfavourable treatment difficulty persists. For this reason, the law lacks proficiency in respect of its implementation. Legislative transformation is required. Fredman confirms that it is the legal enforcement of the laws that is a problem.<sup>11</sup>

What follows next is a discussion pertaining to how the South African government, how employers and employees can approach the abovementioned issues. Since chapter 4 of this thesis was included to be a guide to the lessons that South Africa can learn from the United Kingdom (UK), these discussions will take place with the UK system in mind.

#### **5.3.1. THE SOUTH AFRICAN GOVERNMENT**

‘If the law is here to stay, it should be strengthened and used to its full capacity.’<sup>12</sup> Indeed, South Africa’s constitutional and labour law framework that protects women and pregnant employees should be utilised to its full capacity. But there is a shortfall in these laws, as there is a gap between the legal framework and the actual experience in practice by women and pregnant employees. The recommendation to this problem is the following. The South African Government specifically plays a role in this regard.

##### **5.3.1.1. PERCEPTION CHANGE**

It is crucial for the South African legislature and judiciary to understand what women and pregnant employees are facing in the workplace. Understanding should be fostered in order for the protection afforded to women and pregnant employees to be strengthened. This can be achieved by understanding that pregnancy is the only biological difference between men and women. Acknowledging this difference is conceding that in the past, women have been

<sup>11</sup> Fredman S ‘A Difference with Distinction: Pregnancy and Parenthood Reassessed’ (1994) 110 *LRQ* 106 119.

<sup>12</sup> Townshend-Smith R *Sex Discrimination in Employment: Law, Practice and Policy* (1989) 31.

subordinate to men.<sup>13</sup> Considering the historic insubordination suffered by women and that women are generally more disadvantaged than men in the labour market, the goal should be to remedy the insubordination.<sup>14</sup>

Essentially, transformation is needed where the mind-set of those administering our justice system is realised.<sup>15</sup> Therefore the extent, nature and treatment of women and pregnant employees should be studied. The Department of Labour<sup>16</sup> (DOL) could possibly conduct empirical research. Conducting a confidential questionnaire survey is a way of conducting empirical research. The purpose of the survey should be to obtain feedback regarding women and pregnant employees' experience in the workplace. Additionally, the survey is to gather how employees view the laws that theoretically protect them.

The feedback received should be utilised to cultivate an understanding, with the result that the laws should be improved and be made more effective. Likewise, the DOL could present focus groups and consultations on a bi-annual basis to prompt information from both employers and employees. Programmes could also be hosted to create awareness regarding the current pregnancy-related issues faced in the workplace.

In the UK it was established that unless changes in social attitudes towards the idea of family responsibilities are made, women will not be able to merge work-life with child-care.<sup>17</sup> The work-life/child-care merger can only occur if employers have flexible policies regarding pregnancy, maternity and child-care. A change in perception relating to pregnancy, maternity, family and child-care is thus required in South Africa.

---

<sup>13</sup> Townshend-Smith R *Sex Discrimination in Employment: Law, Practice and Policy* (1989) 29.

<sup>14</sup> Townshend-Smith R *Sex Discrimination in Employment: Law, Practice and Policy* (1989) 29.

<sup>15</sup> Samuel S 'Achieving equality-how far have women come?' (2001) 16:47 *Agenda: Empowering Women for Gender Equity* 23 available at <http://www.tandfonline.com/doi/pdf/10.1080/10130950.2001.9675928> (accessed 22 August 2014).

<sup>16</sup> The Department of Labour (the DOL) publishes legislation that regulates labour practices and activities. The DOL will play a significant role in reducing unemployment, poverty and inequality through a set of policies and programmes developed in consultation with social partners, which are aimed at eliminating inequality and discrimination in the workplace (inter alia). The DOL'S mission is to Regulate the South Africa labour market for a sustainable economy through: appropriate legislation and regulations; inspection, compliance monitoring and enforcement; protection of human rights; provision of Employment Services; promoting equity; social and income protection and social dialogue, available at <http://www.labour.gov.za/DOL/about-us> (accessed 10 November 2015).

<sup>17</sup> Pannick D *Sex Discrimination Law* (1985) 321.



### 5.3.1.2. PROCEDURAL GUIDELINES

Procedural guidelines are needed in South Africa. These guidelines are needed, as there are difficulties in enforcing the law.

Guidance should be given to employers in order for the law to be observed. If no guidelines exist, it effectively dictates that there is no proper execution and fulfilment of employment rights of women and pregnant employees. As seen from previous chapters, there is a lack of procedural guidelines in labour law. Employers are perplexed about their position and processes that should be followed when dealing with pregnancy-related matters at work. Having a practical guide would aid tremendously as employers will be in the boundary of the law.

The guide should include the current legislative provisions providing protection to women and pregnant employees.<sup>18</sup> The guide could also possibly include the following and could be labelled as pregnancy rights of employees.

The first category should include issues that are related to matters that women and pregnant employees experience before pregnancy. Employers should know the impact and consequences of treating women and pregnant employees unfavourably.<sup>19</sup> Employers should recognise that at the recruitment stage, candidates should not be forced to divulge their pregnancy status. Nor should they be asked about their intentions of falling pregnant.

The second category should include issues that are related to matters during pregnancy. Pregnant friendly working environments should be established. Employers should realise that they have a duty to take care and make reasonable workplace adjustments. Essentially, employers should reasonably be accommodating pregnant employees within the workplace. Employers should not abuse or take advantage of pregnant employees. In other words, they should not threaten pregnant employees with performance reviews when they announce their pregnancies. Special assistance should be provided to pregnant employees who occupy positions that include intensive labour. For instance, where employees lift heavy materials, where they farm or work in mines. Employers should consider reassigning duties/shifts, providing flexi-hours, part time work opportunities or alternative employment to pregnant employees.

---

<sup>18</sup> See para 5.2. above.

<sup>19</sup> The consequences will be discussed together with dispute resolution processes later.

Moreover, employers should make available improved working conditions. Improved working conditions include but is not limited to, providing pregnant employees the scope to take daily rest periods (periodic rest breaks), having restrooms close to the working area and providing escalators or elevators in the buildings that only have stairs. The legislator should also consider providing pregnant employees with pregnancy leave. The notion of pregnancy leave derives from the viewpoint that pregnant employees do not get time off from work to attend antenatal appointments and routine check-ups when their annual leave has expired. Pregnancy leave would cover these areas. Pregnant employees should continue to be afforded opportunities such as training, development and promotions.

The final category should include issues that are related to matters after pregnancy. After childbirth, employees should know that their jobs are secured. Thus, they should have the right to return to the same job after maternity leave. Additionally, employees should have access to a private facility within the workplace setting to express/pump breast milk on a daily basis at specific times. With regard to maternity leave, the current period that provides for four months maternity leave should be revised. The suggested time frame should be six months of unpaid maternity leave.

Finally, penalties should be established if employers fail to comply with the above laws/guide.

### **5.3.1.3. POLICY-MAKING REFORM**

Policy-making reform is a potential solution to the difficulty of unfavourable treatment of women and pregnant employees. Anti-discrimination provisions are not fulfilling its purpose. Labour law is also not fulfilling its purpose to protect women and pregnant employees' against discrimination. Thus, policy making reform can be achieved through affording women a special set of rights in the workplace as it pertains to pregnancy.

Taking a look at the UK, the UK recognised and has emphasised in numerous court decisions that pregnancy is a state that is exclusive to women. This uniqueness is therefore best protected by a set of specific rights that is independent of the equal treatment principle.<sup>20</sup> For

---

<sup>20</sup> Fredman S *Women and the Law* (1997) 207.

this reason, the UK Government enacted the Pregnant Workers Directive.<sup>21</sup> The Pregnant Workers Directive does not have additional conditions that should be satisfied in order to benefit from pregnancy protection legislation in the workplace. As opposed to the Sex Discrimination Act 1975 and the Employment Protection Consolidation Act 1978 that have conditions.

A broad set of rights in respect of pregnancy should be adopted in South Africa, in addition to current legislation. This may include the right for women employees to return to work after maternity leave, as in the UK. Leave for parents in the primitive months of the baby's life. Legislation that South Africa can adopt from the UK is the right that both men and women employees are afforded three months parental leave until the child is eight years old. Pregnant-friendly working environments should be established in South Africa. However, this right is worthless though, if measures are not put in place for childcare facilities at work.<sup>22</sup> Essentially, the notions of pregnancy and work should be integrated.

To ensure that employers are abiding by the law, the DOL should conduct compliance audits. On a bi-annual basis the DOL should conduct these audits so that employers are aware that they are being examined. This would be beneficial, as the employers would be compelled to obey the law. If audit results reflect that pregnancy discrimination occurred, there should be sanctions in the form of financial penalties. The audit results should be published on an online database. This would deter employers from not adhering to the law, as this would affect business and the reputation of the company.

Finally, women and pregnant employees who have been victims of unfavourable treatment should receive compensation. This will demonstrate how serious the Government is in eradicating less favourable treatment of women and pregnant employees. The DOL could possibly administer this process. First, complaints should be lodged, followed by an investigation by the DOL. The DOL should have a basic criterion in which to work from to assess complaints. An award should be made according to the above criterion.

---

<sup>21</sup> Pregnant Workers Directive 92/85/EC of 19 October 1992 (hereafter the Pregnant Workers Directive).

<sup>22</sup> Morris A & Nott S 'The legal response to pregnancy' (1992) 12 *Legal Stud.* 54 56.

#### **5.3.1.4. TRAINING IN EMPLOYMENT LAW**

Judges and commissioners need up-to-date training in employment law as well as anti-discrimination law. The rationale for recommending training emerges from the erroneous manner in which presiding officers have applied and interpreted the law.

Judges of the Labour Courts and commissioners of the Commission for Conciliation Mediation and Arbitration (CCMA) have to read labour legislation in light of the Constitution. Presiding officers need to read labour legislation in the broadest way possible, as to give effect to the protection afforded in the Constitution.

An example of where the presiding officers should have utilised anti-discrimination law as opposed to business law is in *Woolworths v Whitehead*.<sup>23</sup> In *Woolworths v Whitehead* cognisance should have been taken of the equality clause and unfair discrimination jurisprudence. The ultimate goal should be to advance the employment rights of women and pregnant employees. Thus, a broad interpretation of the Constitution, the LRA, the BCEA and the EEA should be taken when deliberating disputes pertaining to the discriminatory treatment of women and pregnant employees.

The benefit of this procedure would be that presiding officers would be up to speed with the latest developments. They would interpret and apply the law in a manner that would achieve the goal of eradicating pregnancy discrimination. Additionally, the goal of advancing women in the workplace would possibly be attained.

#### **5.3.2. THE EMPLOYER**

First, the relationship between employer and women/ pregnant employee should be fostered. In order for this to occur, a full assessment should be conducted as to why employers prejudice women and pregnant employees. Once this has been established, the employer should attempt to understand and support employees who intend to fall pregnant, pregnant employees or employees who has given birth. This is an essential part of educating employers regarding their responsibilities towards women and pregnant employees in the workplace.

---

<sup>23</sup> *Woolworths v Whitehead* (2000) 21 ILJ 571 (LAC) (hereafter *Woolworths v Whitehead*).

Secondly, there seems to be a generic idea that pregnancy is an illness. Thus, educational seminar/workshops should be held so that employers can understand that pregnancy is not an illness. Pregnant employees should not be treated as though they are ill. Consequently another misconception exists, that is that maternity leave is equivalent to sick leave.<sup>24</sup>

Thirdly, change should be promoted through education. Employers should be in a position where they are competent to manage the pregnancy-related situation without it having a disadvantageous effect on the employment relationship.

Employers and management should receive annual training on the latest regulations protecting women and pregnant employees. Moreover, they should be educated on how to avoid discriminating against women and pregnant employees. Human Resources (HR) should specifically have access to training as well. More specifically, a particular individual within HR should be appointed to deal with pregnancy-related questions and complaints.

Furthermore, pregnant employees and working mothers should not be sanctioned for considering their pregnancies or child before work. A sanction can only be justified if what is expected from the woman or pregnant employee is relevant to the employment. The UK Government has suggested that a Code of Practice is needed whereby employers can train their employees concerning equality in the workplace. The rationale for this is so that employers can monitor the sexual composition of their workforce and regularly assess their job requirements to remove conditions that would adversely affect women and pregnant employees.

Fourthly, employers should be instructed on their duties and obligations towards women and pregnant employees. In terms of common law, employers have a strict duty to provide a safe working environment for employees.<sup>25</sup> Likewise, employers have a legal obligation to protect pregnant employees and employees who have given birth. If they do not abide by this legal obligation, the DOL should reprimand or even penalise employers. Employers should firstly receive a written warning, followed by a final written warning. Thereafter, the law still being disregarded, the employers should be fined a substantial amount. The last resort should be conduct a disciplinary hearing whereby further sanctions could be deliberated upon. These

---

<sup>24</sup> Steinem G 'Too Pregnant to work – The Dilemma of Economic Rationality versus Equality' (2000) 16 *SAJHR* 690 700.

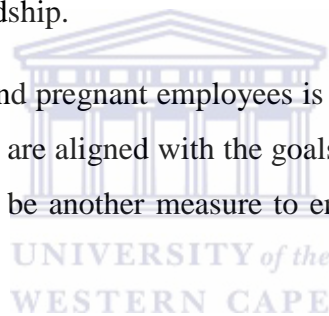
<sup>25</sup> *Wilson & Clyde Coal Ltd v English* [1938] AC 57.

penalties will be on record and has the ability to negatively affect the employers' business reputation.

The UK system dictates that legal obligations should be imposed on employers to enable working mothers to combine their family-care duties with work. If employers provide for day care facilities at work, they will be able to fulfil this obligation. Additionally, employers should provide for flexible working hours, part-time work, paternity leave and job-sharing. The UK has acknowledged that change is incumbent in respect of working hours and days in general, in relation to pregnant women and working moms. This is to support the notion of parenting and work.

Finally, once employers understand their legal obligations, they would be better equipped to accommodate pregnant employees and working moms. Accommodating the unique condition of pregnancy should be a primacy for employers. However, in doing so, employers should not view it as being an undue hardship.

Part of accommodating women and pregnant employees is for the employer to guarantee that company policies and regulations are aligned with the goals of the Constitution, the LRA, the BCEA and the EEA. This might be another measure to ensure that employers comply with the law.



### **5.3.3. EDUCATING WOMEN AND PREGNANT EMPLOYEES IN THE WORKPLACE**

Women and pregnant employees need to be involved. Employers could engage with women employees by organising educational programmes. First, pregnant employees, employees intending to fall pregnant and working moms should readily have access to information regarding pregnancy and maternity from HR.

Secondly, information concerning how pregnancy-related matters will impact their job should be obtainable.<sup>26</sup> Thirdly, once this information has been obtained, they should be more equipped to realise that their employer's behaviour towards them might amount to unjust treatment. In essence, employees should be aware and know that they have employment

---

<sup>26</sup> See para 5.3.1.2.

rights when falling pregnant or after giving birth. They should also be aware of their obligations before engaging in discussions with their employers relating to pregnancy.

Finally, an internal platform should be established where women employees are able to pose questions regarding pregnancy and related matters. Scope should similarly be given where they could possibly report unfair treatment relating to pregnancy internally. An essential part of this platform would be the opportunity to access redress procedures.<sup>27</sup> This would result in employees having confidence in the internal system, before resorting to the CCMA.

#### **5.4. CONCLUDING REMARKS**

Women and pregnant employees have historically been a marginalised group. Today, it appears as if women and pregnant employees are continuing to be an insignificant group within the workplace. Unless drastic steps are taken to remedy the problem, it might not be the final word on this.

It is acknowledged that legislation is necessary, but it is not the only manner to remedy the problem. Hence, assistance is required from Government, employers and employees. The problem is shared by all. The problem needs to be regulated. If the problem persists and if little or nothing is done, the ramifications will escalate. Change has to start with the law that protects women and pregnant employees.

Women should realise that they should not be forced to choose between being a mother and being an employee. There should be equal rights for women and pregnant employees in the workplace. In Europe, the notion of a work-family balance has been reconciled in the minds of Europeans. This is a notion that South Africa should adopt into its labour law provisions. Without it, women and pregnant employees will continue to be victims of unfair treatment as it relates to pregnancy. Unfavourable treatment should be taken more seriously as it affects women and pregnant employees' humanity (to conceive and give birth) and right to human dignity.

Women and pregnant employees are worthy to receive a special position, which affords them special protection/rights. South Africa should be welcoming any developments in order to

---

<sup>27</sup> See para 5.3.1.2.

secure women's position in the working environment. The idea of having a special set of pregnancy rights could be the answer.

**WORD COUNT: ± 33 337**





## BIBLIOGRAPHY

### BOOKS

Banda F *Women, Law and Human Rights: An African Perspective* (2005) Bloomsbury Publishing.

Collins H *Employment Law* (2010) Oxford: Oxford University Press.

Currie I & de Waal Johan *The Bill of Rights Handbook* (2005) Juta: Cape Town.

Du Toit D, Godfrey S *et al Labour Relations Law: A Comprehensive Guide* (2015) Durban: LexisNexis Butterworths.

Fredman S *Discrimination Law* (2011) Oxford: Oxford University Press.

Fredman S *Women and the Law* (1997) Clarendon Press.

Grogan J *Dismissal, Discrimination and Unfair Labour Practices* (2007) Cape Town: Juta.

Grogan J *Employment Rights* (2010) Cape Town: Juta.

Grogan J *Workplace Law* (2014) Cape Town: Juta.

Hervey T & O'Keeffe D *Sex Equality Law in the European Union* (1996) John Wiley & Sons Ltd.

International Labour Office *ABC of Women Workers' Rights and Gender Equality* (2000) International Labour Organisation.

James G *The Legal Regulation of Pregnancy and Parenting in the Labour Market* (2008) London: Routledge.

Law J & Martin E (eds) *A Dictionary of Law* (2009) Oxford: Oxford University Press.

McGregor M & Dekker A (eds) *Labour Law Rules!* (2012) Siber Ink.

Pannick D *Sex Discrimination Law* (1985) Oxford: Clarendon Press.

Townshend-Smith R *Sex Discrimination in Employment: Law, Practice and Policy* (1989) London: Sweet & Maxwell.

Wadham J (ed), Robinson A *et al Blackstone's Guide to the Equity Act 2010* (2012) Oxford: Oxford University Press.

### CASE LAW

#### SOUTH AFRICA

*Association of Professional Teachers & another v Minister of Education* (1995) 16 ILJ 1048 (IC).

*Botha v A Import Export International CC* (1999) 20 ILJ 2580 (LC).

*Collins v Volkskas Bank (Westonaria Branch) – A Division of Absa Bank Ltd* (1994) 15 ILJ 1398 (IC).

*Co-operative Worker Association & another v Petroleum Oil & Gas Co-operative of SA & others* [2007] 1 BLLR 55 (LC).

*De Beer v SA Export Connection CC t/a Golden Paws* (2008) 29 ILJ 347 (LC).

*Food & Allied Workers Union & others v Pets Products (Pty) Ltd* (2000) 21 ILJ 1100 (LC).

*Harksen v Lane NO* 1998 (1) SA 300 (CC).

*Heath v A & N Paneelkloppers* (2015) 36 ILJ 1301 (LC).

*Hunt v ICC Car Importers Services Co (Pty) Ltd* (1999) 20 ILJ 364 (LC).

*Leonard Dingler Employee Representative Council & others v Leonard Dingler (Pty) Ltd & others* (1998) 19 ILJ 285 (LC).

*Lukie v Rural Alliance CC t/a Rural Developments Specialists* (2004) 25 ILJ 1445 (LC).

*Mashava v Cuzen and Woods Attorneys* (2000) 21 ILJ 402 (LC).

*Masondo v Crossway* (1998) 19 ILJ 171 (CCMA).

*Memela & another v Ekhamanzi Springs (Pty) Ltd* (2012) 33 ILJ 2911 (LC).

*Mfolo v Minister of Education* 1992 (3) SA 181 (BGD).

*Minister of Finance v Van Heerden* [2004] 12 BLLR 1181 (CC).

*Mnguni v Gumbi* (2004) 25 ILJ 715 (LC).

*Ndlovu v Pather* (2006) 27 ILJ 2671 (LC).

*Niewoudt v All-Pak* (2009) 30 ILJ 2451 (LC).

*Ontario, Human Rights Commission v Simpson Sears Ltd* (1985) 2 SCR 536 at 551, cited in *Association of Professional Teachers & another v Minister of Education* (1995) 16 ILJ 1048 (IC).

*President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC).

*Pretoria City Council v Walker* 1998 (2) SA 363 (CC).

*Randall v Progress Knitting Textiles Ltd* (1992) 13 ILJ 200 (IC) D.

*Sheridan v The Original Mary-Ann's at the Colony (Pty) Ltd* (1999) 20 ILJ (LC).

*Solidarity obo McCabe v SA Institute for Medical Research* [2003] 9 BLLR 927 (LC).

*Stoman v Minister of Safety and Security & others* (2002) 23 ILJ 1020 (T).

*Swart v Greenmachine Horticultural Services (A Division of Sterikleen (Pty) Ltd* (2010) 31 ILJ 180 (LC).

*Uys v Imperial Car Rental (Pty) Ltd* (2006) 27 ILJ 2702 (LC).

*Victor v Finro Cash & Carry* (2000) 21 ILJ 2489 (LC).

*Wallace v Du Toit* (2006) 27 ILJ 1754 (LC).

*Warldaw v Supreme Mouldings (Pty) Ltd* (2004) 25 ILJ 1094 (LC).

*Woolworths v Whitehead* (2000) 21 ILJ 571 (LAC).

*Wyeth SA (Pty) Ltd v Manqele & others* [2003] 7 BLLR 734 (LC).

## **INTERNATIONAL CASE LAW**

*A.S. Barton v Bass Taverns Ltd* (1600256/97 Cardiff, 17 June 1997).

*Berrisford v Woodward Schools (Midland Division) Ltd* [1991] IRLR 247.

*Brooks v Canada Safeway Ltd* [1989] 1 RCS 1219.

*Brown v Stockton-on-Tees Borough Council* [1989] AC 20.

*CA Morris v Ellis Swain Securities* (611/96 Nottingham 18/04/96).

*Caledonia Bureau Investment & Property v Caffrey* [1998] IRLR 110, EAT.

*Clayton v Vigers* [1990] IRLR 177.

*Community Task Force v Rimmer* [1986] IRLR 203.

*Crees v Royal London Insurance* [1998] IRLR 246, CA.

*D Labab-Sharman v Anthony Property Company Ltd* (1093/96 London North 13/03/97).

*D Lewis v G & L Logan t/a The Paperbox*, (2103671/97 Liverpool 29/10/97 & 25/11/97).

*Dekker v Stichting Vormingscentrumvoor Jong Volwassen (VJV-Centrum) Plus* [1991] 20 1 IRLR 27 (ECJ).

*Del Monte Foods v Mundon* [1980] IRLR 224 (EAT).

*Eildon Ltd v Sharkey* [2004] EAT 0109/03.

*Elegbede v Wellcome Foundation* [1977] IRLR 383.

*F. Wright v Amorium (UK) Ltd (t/a Wicanders)* 2302259/97 London South, 3 November 1998.

*Grimbsy Carpet Company v Bedford* [1987] IRLR 438.

*Haberman-Beltermann v Arbeiterwohlfahrt, Bezirksverband*, (1994) ECR I-1657 (case C-421/92).

*Halfpenny v IGE Medical Systems Ltd* [1999] IRLR 177, CA.

*Hardman v Mallon t/a Orchard Nursing Home* [2002] IRLR 516.

*Hayes v Malleable Working Men's Club* [1985] IRLR 367.

*Hertz v Aldi Marked K/S* [1991] IRLR 31.

*Home Office v Holmes* [1984] IRLR 299.

*J.W. Beswick v. R. Awan & A. Mistra* 2406856/97 Manchester, 12 February 1998.

*James v Eastleigh Borough Council* [1990] ICR 554.

*Jimenez Melger v Ayuntamiento de Los Barrios* [2001] IRLR 848 ECJ.

*Kwik Saves Stores Ltd v Greaves* [1997] IRLR 268 EAT.

*L Thomson v Mr and Mrs Bell t/a St Stephens Nursing & Residential Home* (2406937/97 Manchester 24/04/98).

*L.V. Reckless v The Salvation Army Social Services*, 17680/96 Manchester, 30 October 1996.

*Mandizvidza v Chaduka NO, and Morgenster College and The Minister of Higher Education* Unreported HH-236-99.

*ML Roberts v (1) Marske Site Service Ltd (2) Marske Machine Co Ltd (3) D Wright* (2503092/97 Middlesbrough 20/10/97).

*MP v VJW* (21682/Bristol 20/05/96), *CE Brady v D Giacomet* (2901149/97).

*N Howarth v Goldsmith Crewe & Co (Mfg) Ltd* (2402899/96 Manchester 13/03/97).

*N. Peplow v. Cooper Nimmo* 2406839/97 Manchester, 1 June 1998.

*New Southern Railway Ltd. v Quinn* [2006] IRLR 266.

*Page v Freight Hire (Tank Haulage) Ltd* [1981] ICR 299.

*R v SS for Employment Ex Parte EOC* [1994] ICR 317, HL.

*Rafford v. Randle Eastern Ambulance Service Inc* 348 F Supp 316, 320 (1972).

*Ramdoolar v Bycity Ltd* EAT 30/07/04 (0236/04) EAT.

*Reaney v Kanda Jean Products Ltd* [1978] IRLR 427.

*RL Lister v Mr R Morgan t/a 'Oasis'* (1801179/97) Leeds 27/05/97).

*S Bennison v Sutton Bridge Ltd* (2601446/97 Nottingham 27/08/97).

*S.C. Wilson v. C. Turner* 4561/96 Norwich, 17 April 1996.

*Tele Danmark A/S v Handels-og Kntorfunktionfrenes Forbundi Danmark (acting on behalf of Brandt-Nielsen)* Case C-109/00 [2001] IRLR 853.

*TL Bishop v Regional Railways North East* (1802030/96 Leeds 29/01/97).

*Turley v Allders Department Stores Ltd* [1980] ICR 66 (EAT).

*V Case v Timloc Building Products Ltd* (1801347/97 Leeds 28/05/97).

*Walton v The Nottingham Gateway Hotel Ltd* [2004] ET2600273/04.

*Webb v EMO Air Cargo (UK) Ltd* [1990] IRLR 124 (EAT).

*Wilson & Clyde Coal Ltd v English* [1938] AC 57.

### **CHAPTERS IN BOOKS**

Cohen T & Dancaster L 'Flexible Working Arrangements for Employees with Family Responsibilities – The Failings of the Employment Equity Act' in Dupper O & Garbers C (eds) *Equality in the Workplace: Reflections from South Africa and Beyond* (2009) Cape Town: Juta.

Hepple B 'Can discrimination ever be fair?' in Malherbe K & Sloth-Nielsen J (eds) *Labour Law into the Future: Essays in honour of D'Arcy du Toit* (2012) Cape Town: Juta.

Kadali R 'Women in the new South Africa: From transition to governance' in Liebenberg S *The Constitution of South Africa from a Gender Perspective* (1995) Cape Town: Community Law Centre, University of the Western Cape.

Kay HH 'Equality and Difference: The Case of Pregnancy' in Smith P *Feminist Jurisprudence* (1993) London: Oxford University Press.

### **CONVENTIONS AND RECOMMENDATIONS**

ILO, Discrimination (Employment and Occupation) Convention, C111, 25 June 1958.

ILO, Employment (Women with Family Responsibilities) Recommendation, R123, 22 June 1965.

ILO, Maternity Protection Convention, C103, 7 September 1952.

ILO, Maternity Protection Convention, C183, 7 February 2002.

ILO, Social Security (Minimum Standards) Convention, C102, 28 June 1952.

ILO, Termination of Employment Convention, C158, 22 June 1982.

ILO, Workers with Family Responsibilities Convention, C156, 11 August 1983.

UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), 18 December 1979, United Nations, Treaty Series, vol 1249.

### **DELEGATED LEGISLATION**

Code of Good Practice on the Arrangement of Working Time published in GN 1440 in GG 19453 of 13 November 1998.

Code of Good Practice on the Protection of Employees During Pregnancy and After the Birth of a Child published in GN R1441 in GG 19453 of 13 November 1998.

The Women Empowerment and Gender Equality Bill, published in the GG 37005 of 6 November 2013.

### **JOURNAL ARTICLES**

Barnard J '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* 510 512.

Cooper C 'A Constitutional Reading of the Test for Unfair Discrimination in Labour Law' (2001) 2001 *Acta Juridica* 121.

Cooper C 'The Boundaries of Equality in Labour Law' (2004) 25 *ILJ* 813.

De Villiers C 'Addressing systemic sex discrimination: Employer defences to discrimination in Canada and South Africa' (2001) 2001 *Acta Juridica* 175.

Du Toit D 'Protection against Unfair Discrimination: Cleaning up the Act?' (2014) 35 *ILJ* 2623.

Du Toit D 'The Evolution of the Concept of 'Unfair Discrimination' in South African Labour Law' (2006) 27 *ILJ* 1311.

Fredman S 'A Difference with Distinction: Pregnancy and Parenthood Reassessed' (1994) 110 *LRQ* 106.

Gobind J & Ukpere WI 'Labour pains: Lessons from South Africa for Women Employees and their Employers' (2012) 6:46 *Africa Journal of Business Management* 11549.

Hanlon J 'The 'Sick' Woman: Pregnancy Discrimination in Employment' (1995) 4:3 *Journal of Gender Studies* 315.

Hare I 'Commentary: Pregnancy and Sex Discrimination' (1991) 20 *ILJ* 124.

Honey S 'Pregnancy and Sex Discrimination' (2000) 29:1 *ILJ* 43.

James CG 'Law's Response to Pregnancy/Workplace Conflicts: A Critique' (2007) 15 *Feminist Legal Studies* 167.

Kohl J *et al* 'Recent Trends in Pregnancy Discrimination Law' (2005) 48 *Business Horizons* 421 421 & 427.

McDonald P *et al* 'Expecting the Worst: Circumstances Surrounding Pregnancy Discrimination at Work and Progress to Formal Redress' (2008) 29:3 *Industrial Relations Journal* 229.

McGregor M 'Is Actual Commencement of Work a Requirement to be an 'employee' for Purposes of Unfair Dismissal? A Purposive Interpretation' (2004) 16 *SA Merc LJ* 270.

Morris A & Nott S 'The Legal Response to Pregnancy' (1992) 12 *Legal Stud.* 54.

Mubangizi J 'Pregnancies at school: discipline versus discrimination' (2003) 1 *Stell LR* 138.

Queneau H & Marmot M 'Tensions Between Employment and Pregnancy: A Workable Balance' (2001) 50:1 *Family Relations* 59.

Samuel S 'Achieving equality – how far have women come?' (2001) 16:47 *Agenda: Empowering Women for Gender Equity* 21 24 available at <http://www.jstor.org/stable/4066450>.

Smit N & Olivier M 'Discrimination Based on Pregnancy in Employment Law' (2002) 4 *TSAR* 783.

Steinem G 'Too Pregnant to Work – The Dilemma of Economic Rationality versus Equality' (2000) 16 *SAJHR* 690.

Whitear-Nel N 'To employ or not to employ a pregnant woman...that was the question' (2000) 8 *Juta's Bus. L.* 95.

Whitear-Nel N, Grant B & Behari A '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.

Wintemute R 'When is Pregnancy Discrimination Indirect Sex Discrimination?' (1998) 27:1 *ILJ* 23.

Wyllie C 'The judiciary fails working mothers' (2000) 16:44 *Agenda: Empowering Women for Gender Equity* 90 90 available at <http://dx.doi.org/10.1080/10130950.2000.9675838>.

Wynn M 'Pregnancy Discrimination: Equality, Protection or Reconciliation?' (1999) 62 *The Modern Law Review* 435.

## **LEGISLATION**

### **SOUTH AFRICA**

Basic Conditions of Employment Act 3 of 1983.

Basic Conditions of Employment Act 75 of 1997.

Constitution of the Republic of South Africa Act 200 of 1993.

Constitution of the Republic of South Africa, 1996.

Employment Equity Act 55 of 1998.

Employment Equity Amendment Act 47 of 2013.

Labour Relations Act 27 of 1956.

Labour Relations Act 66 of 1995.

Labour Relations Amendment Act 6 of 2014.

Mine Health and Safety Act 27 of 1996.

Occupational Health and Safety Act 85 of 1993.

Unemployment Insurance Act 63 of 2001.



### **UNITED KINGDOM**

Children & Families Act 2014.

Employment Act 1980.

Employment Protection (Consolidation) Act 1978.

Employment Rights Act 1996.

Equal Treatment Directive 76/207/EEC of 09 February 1976.

Equality Act 2010.

Health and Safety at Work Act 1974.

Management of Health and Safety at Work Regulations 1999.

Maternity and Parental Leave, etc Regulations 1999.

Pregnant Workers Directive 92/85/EC of 19 October 1992 (hereafter the Pregnant Workers Directive).

Sex Discrimination Act 1975.



Social Security Act 1986.

Trade Union Reform & Employment Rights Act 1993.

## **WEBSITES**

Anonymous 'Pregnancy and Contracts' available at <http://www.mywage.co.za/main/decent-work/employment-security/pregnancy-contracts> (accessed 04 August 2014).

Anonymous 'Pregnancy in the Workplace' available at <http://www.inc.com/encyclopedia/pregnancy-in-the-workplace.html> (accessed 7 August 2014).

Anonymous 'South African History Online: Towards a People's History' <http://www.sahistory.org.za/topic/womens-charter> (accessed 25 August 2014).

Anonymous, 'The Turbulent 1950's – Women as Defiant Activists' <http://www.sahistory.org.za/topic/womens-charter> (accessed 18 August 2014).

Backer L "'Any Reason' Includes Mother's Sick Babies – Protection of Pregnant Employees' available at [http://www.labour.co.za/view\\_item.asp?id=1386](http://www.labour.co.za/view_item.asp?id=1386) (accessed 7 August 2014).

Bouwer L 'Fired for Being Pregnant?' available at <http://www.retrenchmentassist.co.za/index.php/ra-newsletters/80-fired-for-being-pregnant> (accessed 7 August 2014).

Citizen Reporter 'Army Abuses Pregnant Women' *The Citizen* available at <http://www.security.co.za/fullStory.asp?NewsId=23550> (accessed 17 September 2014).

Hastie L 'Dismissed for Being Pregnant' available at <http://www.polity.org.za/article/dismissed-for-being-pregnant-2011-04-20> (accessed 7 August 2014).

Hearne A & Khumalo M 'Cape Town discriminating against female fire fighters – SAMWU' available at <http://www.politicsweb.co.za/politicsweb/view/politicsweb/en/page71654?oid=389663&sn=Detail&pid=71654> (accessed 7 August 2014).

Hern J, 'Not enough women in senior management positions in South Africa' available at <http://www.gt.co.za/news/2013/03/not-enough-women-in-senior-management-positions-in-south-africa/> (accessed 18 August 2014).

Kalideen N 'Working Moms Get a Raw Deal' *The Star* 24 January 2005 available at <http://www.iol.co.za/news/south-africa/working-moms-get-a-raw-deal-1.232194#.V0djjSymErg> (accessed 20 February 2015).

Makhanya P 'Grade 12 pupil expelled for being pregnant' *The Mercury* 18 July 2002 available at <http://www.iol.co.za/news/south-africa/grade-12-pupil-expelled-for-being-pregnant-1.89980?ot=inmsa.ArticlePrintPageLayout.ot> (accessed 20 March 2015).

Mdaka A 'Pregnancy and Employment' *Labour Watch* December 2007 10 available at [www.ccma.org.za/UploadedMedia/CCMAil-December2007\(2\).doc](http://www.ccma.org.za/UploadedMedia/CCMAil-December2007(2).doc) (accessed 8 August 2014).

Mtyala, Q 'Pregnant fire-fighter takes city to CCMA' *The Times Live* 9 July 2013 available at <http://www.timeslive.co.za/thetimes/2013/07/09/pregnant-firefighter-takes-city-to-ccma> (accessed 07 August 2014).

Osterberger L 'Still only a quarter of senior business positions filled by women in SA – Grabt Thornton survey' available at <http://www.gt.co.za/news/2014/03/still-only-a-quarter-of-senior-business-positions-filled-by-women-in-sa-grabt-thornton-survey/> (accessed 24 February 2015).

Payne J 'Pregnancy Discrimination in the Workplace' available at <http://www.eurofound.europa.eu/ewco/2006/06/UK06060191.htm> (accessed 07 August 2014).

Sapa 'Gender Equity Bill Passed Amid Criticism' *The Mail & Guardian* 05 March 2014 available at <http://mg.co.za/article/2014-03-05-women-equity-bill-passed> (accessed 12 April 2015).

Sapa 'Pregnant SANDF women humiliated at Oudtshoorn military base' *Mail & Guardian* 29 January 2013 available at <http://mg.co.za/article/2013-01-29-pregnant-women-humiliated-at-oudtshoorn-military-base> (accessed 8 August 2014).

South African Labour Guide 'Pregnancy and the Employer' available at <http://www.labourguide.co.za/pregnancy-and-the-employer> (accessed 15 September 2014).

The Women's Charter for Effective Equality available at <http://www.anc.org.za/show.php?id=233> (accessed 17 February 2015).