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Ferrigno, Darius Anthony Jameson

**“UK and European Maternity Rights -
Success, Failure or a Confused Court?”**

Master of Jurisprudence 1999

University of Durham

Department of Law

1999

VOLUME I of II

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23 MAY 2000

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“UK and European Maternity Rights - Success, Failure or a Confused Court?”

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An analysis of the increasing number of women to be found in the workplace, and the rapidly changing nature of women's employment in part-time positions.

The role played by the law in enabling women to return to work, particularly on a flexible basis.

The development of UK maternity rights, with a brief analysis of current UK maternity rights under the Employment Rights Act 1996. The application of the Sex Discrimination Act, particularly when women wish to combine their employment with child care.

Maternity rights available in other EU countries, coupled with flexibility arrangements, and access to parental leave and details of the financial arrangements available.

A consideration of EU maternity rights, including a review of the Equal Treatment Directive, and the derogations therefrom, namely where the sex of the worker constitutes a determining factor, for the protection of women particularly as regards pregnancy and maternity, and for positive discrimination.

Examination of decisions of the UK courts and the European Court of Justice, in particular considering the cases of Dekker, Hertz, Larsson, Habermann-Beltermann, Johnston v. RUC, Webb, Boyle, Brown v. Rentokil, Gillespie, London Underground v. Edwards, Caledonia Bureau Investment and Property Company v. Caffrey, Halfpenny v. I. G. E. Medical Systems, and Hofmann.

Particular consideration of the protection afforded to female employees in respect of the pre- and post birth periods, especially in relation to pregnancy related illness.

Analysis of the Pregnant Workers Directive and the Management of Health and Safety at Work (Amendment) Regulations.

Consideration of the Parental Leave Directive and new Maternity Rights to be introduced under the Employment Relations Bill.

Consideration of possible future developments to include the Part Time Work Directive.

CONTENTS

CHAPTER 1 INTRODUCTION.....	2
CHAPTER 2 MATERNITY RIGHTS	5
CHAPTER 3 THE EQUAL TREATMENT DIRECTIVE	30
CHAPTER 4 THE PREGNANT WORKERS DIRECTIVE.....	77
CHAPTER 5 PARENTAL LEAVE DIRECTIVE.....	95
CHAPTER 6 NEW MATERNITY RIGHTS	113
CHAPTER 7 THE FUTURE.....	116
CHAPTER 8 CONCLUSION.....	123



CHAPTER 1 INTRODUCTION

“The quantitative and qualitative significance of the EU law on equality between men and women is undisputed. The amount of legislation and the number and importance of decisions by the European Court exceed any other area of social policy. The fundamental principles created in the context of this evolution have had an impact of EU law going far beyond the area of policy concerned. It has probably had greater influence on the domestic law of the member states than any other area of social law and policy.¹”

The article continues, “Equal opportunities between women and men has been in the forefront of the social policy of the European Communities since its beginnings. Article 119 of the Rome Treaty, Directives on Equal Pay, Equal Treatment and Social Security, the extensive case law of the European Court of Justice (beginning with *Defrenne v. Belgium*), and a quantity of ‘soft law’ (such as the recommendation on the promotion of positive action) have contributed to the prominence of this social policy. It has been argued that equal treatment of men and women has achieved the status of a ‘fundamental right’.”

It may be a fundamental right, but has it worked?

This paper will examine maternity rights in the United Kingdom and the impact of European law upon such rights.

Against a dramatically changing background to women’s participation in employment, it will show how the U.K. Maternity Rights fit within European

¹ Bercusson, B., European Labour Law, (1996) Butterworths, p. 169

Community law as a result of the Equal Treatment Directive (76/207/EEC), the Pregnant Workers Directive (92/85/EEC), the Parental Leave Directive (96/34/EC), and other forthcoming measures. The paper will also indicate some areas of conflict between U.K. Law and European Law, as well as attempting to focus on some criticisms of the way in which UK and European law have attempted to deal with sex equality.

The paper will indicate that whilst there have been some major successes, highlighted by individual cases, there is, in the UK at least, a very ad hoc approach to maternity rights, and that there has been a marked reluctance to move away from UK perceptions of maternity law towards European perceptions.

Additionally, the paper will argue that there has been a failure to address the wider aspects of maternity rights, particularly in terms of parental leave within the United Kingdom, although this will shortly be dealt with by the legislature. Some consideration will also be given to feminist jurisprudential criticism of the anti-discrimination legislation and court decisions, although this will not form a particularly large part of this thesis.

It will also be argued that the fundamental attack on pregnancy as an illness, mounted by the European Court of Justice, has not been followed through to its logical conclusion, and that the Court and the law remains confused, searching for a legally and logically non-existent distinction between pregnancy and maternity connected issues pre-, during-, and post-birth, particularly after the maternity leave period has expired.

Finally, there will be an attempt to focus on the future for the UK's maternity laws.

Inevitably, this focus will shift depending upon our political masters. The Labour Government of Tony Blair has already shown a very fresh approach to Europe, and we can shortly expect major changes in view of the Government's commitment to family friendly policies, for example, adoption of the Parental Leave Directive via the Employment Relations Bill currently before Parliament.

The paper will attempt to explain a number of the difficulties, and to clarify some outstanding issues. It was hardly surprising that Laura Cox, QC wrote "all this has resulted in a confusing and complicated array of Domestic and European Legislative Provisions, giving rights subject to different qualifying conditions and notification requirements; and, further, in a mass of discrimination case law, answering some questions but tantalisingly posing many others. Much new law remains to be decided that legal complexity is all the more regrettable when it occurs in laws which govern the every day lives of working people." ²

² Palmer, Camilla, Maternity Rights, (1996) Legal Action Group, Foreword by Laura Cox, QC, p. vi

CHAPTER 2 MATERNITY RIGHTS

For the last fifty years or so the participation of women in the labour market has changed beyond all recognition, and whilst women find themselves working in ever increasing numbers, and working as mothers in increasing numbers, they maintain an unfortunate stranglehold over the majority of poorly paid, part time and occupationally segregated positions.

Walby writes “there has been a massive growth in the number of women who are in formal waged employment since the Second World War. There are nearly as many women as men who are employees in employment - 49.6% were women in 1995 ... since the 1950s women have moved from being around one third to one half of employees The changes are most marked among married women, whose economic activity rate has increased from 26% in 1951 to 71% in 1991. This is now little different from that of unmarried women.....”³

Slightly more recent figures⁴ show that there were almost 12.2 million women in the workplace. This represents an economic activity rate of 71.4%, with women comprising more than 44% of the entire workforce. In the ten years to 1997, the economic activity rate of those with young children has shown a particularly notable increase, rising from 42% to 55% for those with children under five years of age. 55% of women with children aged up to four years are economically active, whilst for those with children aged five to ten years, this figure rises to 71%.

³ Walby, S., Gender Transformations, (1997) Routledge, p. 27

⁴ Labour Market Trends, March 1998

Statistics also indicate that females do not necessarily leave their employment due to childbirth. For those with children under four years, the survey shows that 40% of those in work had a level of service with their present employer of over five years. Slightly over 20% of mothers with children aged up to four had been in employment prior to giving birth, and had not left since the birth.

In a recent report⁵ by the Policy Studies Institute, it was found that 67% of those in employment giving birth in 1996 returned to work within eleven months of giving birth. The data was compared with a previous survey conducted in 1988, which showed that only 45% of female employees working during their pregnancy returned to employment within nine months of the birth of a child. Very interestingly, the survey found that those most likely to return to work were those who were able to take advantage of extended maternity leave. The figure in this case was 72%.

The same report also found that approximately a third of women returning from maternity leave who had previously been employed on a full time basis were able to return on a part time basis. The report also highlighted that of those returning to part time work who had previously worked full time, 50% of those giving birth for the first time had elected to follow this route. Approximately 25% of those who did not return following their maternity leave stated that this was because they were unable to accommodate their child caring and job responsibilities within appropriate and suitable hours.

The survey does not deal with an important phenomenon, namely that those who return frequently suffer downward occupational mobility. In other words,

⁵ Callender, Millward, Lissenburgh, Forth, Maternity Rights and Benefits in Britain, (1996), DSS Research Series, Report No. 76

because there is no right under English law to return to an identical job (after extended maternity leave), it is perfectly possible that the woman will return to a job of lower pay or status. It may well be that the law does not technically allow this, but any attempt to return part time (which, again, is not a legal requirement in the United Kingdom), if agreed, will frequently be on the basis of a lower level position. (This chapter will examine the possible responses to such circumstances via indirect sex discrimination claims).

This serves only to perpetuate gender differentials and, frequently because of employers' perceptions, low skills and training.

It has been stated that “despite the economic changes of recent years, women’s increased labour market participation, and changes in family structure, such as increases in divorce and single parenthood, there appears to be enormous stability in women’s and men’s domestic roles and the value system that underpins them..... women’s role as primary child carers causes severe disruption to their long term labour market position. This is mirrored in the fact that male breadwinners increase their career opportunities over their lifetime and enjoy a substantial earnings premium in the process”⁶

This huge growth in the participation of women in the labour market has occurred without any significant increase in (formal) childcare provision. In this respect, it is interesting to note that there is a quite literally, staggering rise in part time employment for women, with only a relatively modest rise for men. “The increase in full time women workers from 1971 to 1975 is less than 200,000, a rise of only 3%. During the same period the number of women working part time has

⁶ MacEwan Scott, A., Gender Segregation and Social Change, and the SCCLI Research, (1994), OUP, p. 34

increased by over two million, that is 75%, and as a percentage for total employment has risen from 13% to 23%. Women are now almost as likely to be working part time as full time, that is, 47%.”⁷

“Male part time employment has been growing, but not on the same scale, rising to 11% of male workers in 1994. Most of this is concentrated among young people, often students, and among older workers, while that among women is more widely spread among various age groups.....”⁸

Many employers have found this growth in flexible, part time working significantly to their advantage. It has frequently meant that an employer could have a more malleable, less unionised, less educated, and less well paid workforce, and that when women have caused ‘trouble’ they have simply dropped out of the labour market or moved on to another employer.

With the sharp growth in the employment of women in the labour market, the pressures of adherence to the familial ideology that assumes “that a woman’s work outside the home should not interfere with her domestic responsibilities in caring for her husband and particularly in caring for her children and other dependant relatives”⁹ have inevitably brought employers and employees into conflict.

In spite of modern legislative changes, ad hoc evidence suggests that the attitude to women in the workplace (even amongst larger employers providing rights better than those required under law) is far from satisfactory. In a recent report

⁷ Walby, S., Gender Transformations, (1997) Routledge, p. 31

⁸ Walby, S., Gender Transformations, (1997) Routledge, p. 32

⁹ Beechey, V., Women’s Employment in Contemporary Britain, in Beechey, V. and Whitegg, E., (eds.) Women in Britain Today, (1986), OUP, p. 125

from the University of Loughborough,¹⁰ statistics indicated that female employees who are pregnant are regarded as “invalids”. Moreover, the report elucidated that significant attitudes to pregnant women still remain in the form that mother should be at home, and also that pregnant female workers were endangering themselves, their children, and others. The situation is further complicated by a lack of clarity in what is surely one of the most incomprehensible areas of the law.

This stems from the rather bizarre way in which maternity rights have come about in the United Kingdom. It would doubtless surprise many young working mothers to know that prior to 1975, the United Kingdom did not provide employees with any maternity rights. Indeed, in those early days, employers were prepared to take far more risks with women's rights than they might now.

It would also doubtless surprise many to note that the English statutes themselves were not borne from the EEC directives, and this, to some degree, accounts for the rather piecemeal approach which the UK legislature has taken to issues such as maternity rights and equal pay.

“The argument is that there had built up very strong domestic pressures for legislation on equal opportunities for women in the early 1970s so that action in this area was inevitable, whether or not required by British membership of the EEC.”¹¹

¹⁰ University of Loughborough, Pregnancy and Employment: The Perceptions and Beliefs of Fellow Workers

¹¹ Davies, P., European Equality Legislation, UK Legislative Policy and Industrial Relations, in *Women, Employment and European Equality Law*, McCrudden, C. ed., Eclipse (1987), p. 35

Thus, it was provided in 1975 that there would be rights to maternity leave and maternity pay, and that women would be protected from unfair dismissal due to pregnancy. The latter, however, was within the ambit of the unfair dismissal legislation rather than anything specific to pregnancy, or based upon sex discrimination laws.

It was to take ten years before it was accepted that treating a woman differently on the grounds of her pregnancy could amount to sex discrimination. In Hayes v. Malleable Working Mens Club [1985] IRLR 367, this principle was acknowledged, but still not on an entirely equal basis, with the woman being required to use the 'sick male comparator', namely a man off work in supposedly similar circumstances.

The exercise of those maternity rights was, of course, very much dependent upon the length of service of the female employee. It used to be the case that those working more than sixteen hours per week could attract maternity rights after two years service, whilst those working eight to fifteen hours per week had to wait until they had completed five years service. Those working less than eight hours per week would never attract maternity rights.

So, it took ten years from the introduction of maternity rights to Hayes, and it was to take another ten years before the thresholds were to be reviewed.

The difference between the rights of full-timers and part-timers was finally addressed by the House of Lords in R v. Secretary of State for Employment, ex parte Equal Opportunities Commission [1994] IRLR 176 and, thereafter, by Statutory Instrument on 6th February, 1995. The House of Lords held that these requirements were sexually discriminatory in their nature; there are no longer any

hours thresholds in the United Kingdom providing for eligibility for maternity rights.

The river which has been running alongside the stream of UK employment rights came when the United Kingdom joined the European Economic Community on 1st January, 1973.

We are now members of the European Union, and in legal terms, this has had a massive impact.

The United Kingdom has effectively ceded certain areas of its legal sovereignty to the European Community, and the Treaty of Rome is described as having established a new legal order.

Because of this, European Community Law is regarded as the highest order, and where UK Law conflicts, or is incompatible with European Community Law, then European Community Law will take precedence. In other words, the relationship between EC Law and national law is one of the supremacy of Community Law. The European Court of Justice first established this view in Algemene Transporten Expeditie Onderneming van Gend en Loos v. Nederlandse Administratie der Belastingen [1963] CMLR 105, in which it stated “ ... the Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only member states but also their nationals,” at p. 129.

One of the areas in which this has occurred in the United Kingdom is sex equality, and, as mentioned in the comments of Professor Burcusson (quoted in the

introduction to this paper), this is an area in which the European Community has been particularly active.

European directives and judgements have certainly shaped English law in recent years, and it is true to say that the rather difficult and hide-bound approach under the UK discrimination statutes contrasts markedly with what many would see as the almost free rein of the European Court of Justice.

Additionally, not only does the legislature have to respond to Europe, but many European laws and judgements create a general climate of opinion which leads to a different approach to domestic obligations and responsibilities.

Within the UK, many were to attempt to use the Sex Discrimination Act to enforce their rights, but this proved extremely difficult before the courts, and it is striking to note that it took some nine years for this attitude to change, when in Webb v. EMO Air Cargo (UK) Limited [1994] ICR 770, the European Court of Justice finally put the 'sick male comparator' to the sword.

The latest wholesale revision to U.K. maternity rights came in October, 1994, following the implementation in the United Kingdom of the European Union Pregnant Workers Directive (92/85/EEC). (However, it should be noted that the Employment Relations Bill presently before Parliament will make various significant changes, and these will be addressed later in the paper).

Under the Pregnant Workers Directive, and the Equal Treatment Directive (76/207/EEC), a large part of Europe has had a very different approach to equality within the workplace.

This is an approach to which the U.K. Government has frequently been both doctrinally and legally opposed. Sometimes, this opposition has erupted into open hostility but, perhaps more worryingly, it has resulted in the Parliamentary draughtsman framing legislation or instruments which do not appear entirely to be in accord with the European Directives.

Occasionally, the Directives themselves require judicial interpretation, and lawyers and employers alike continually await many key European Court of Justice decisions, several of which do not necessarily appear to follow previous decisions in any logical manner. Moreover, the European Court of Justice itself continues to 'develop' the law in this area.

Even those maternity rights which came into force in October, 1994 are complicated and require clarification. What is undoubted is that all women irrespective of length of service or hours worked are now entitled to at least fourteen weeks maternity leave. We shall examine these provisions in detail later in this paper, as well as future developments in this area, but the outcome in the UK of the EU Pregnant Workers' Directive is as set out below.

Maternity rights are now governed by ss. 71 - 85, Employment Rights Act, 1996. The provisions are extensive, and it is essentially provided that:

- a) all pregnant female employees are now entitled to take a fourteen week maternity leave period irrespective of their length of service or hours of work; (s. 73)
- b) for those with more than two years continuous service at the eleventh week before the expected week of confinement, there is a right to take up to

eleven weeks before the expected week of confinement, and to return to work up to twenty nine weeks after the beginning of the week in which the baby was born; (s. 79)

- c) there is a right not to be unreasonably refused paid time off for ante-natal care, with this right being exercisable irrespective of length of service or hours of work; (ss. 55, 56)

- d) in conjunction with the Management of Health and Safety at Work (Amendments) Regulations 1994, there is a right to a Health and Safety Risk Assessment in respect of those who are pregnant, those who have recently given birth (i.e. within the last six months), or those who are breastfeeding. Various provisions are then provided in order to implement the health and safety requirements;

- e) there are special rights relating to dismissal, whereby an employee can claim automatically unfair dismissal irrespectively (importantly) of her length of service or her hours of work if the reason or the main reason for her dismissal is:
 - (i) because she is pregnant, or for any other reason connected with her pregnancy;

 - (ii) her maternity leave period is ended by dismissal, and the reason for the dismissal is that she has had a baby or for any reason connected with childbirth (note that this only applies during the maternity leave period);

-
- (iii) she was dismissed after the end of her maternity leave period and the reason for the dismissal is that she had taken maternity leave or the benefits of maternity leave;
 - (iv) the reason for the dismissal is a requirement or recommendation to suspend the woman on health and safety grounds;
 - (v) the woman's maternity leave period is ended by dismissal and the reason for the dismissal is that she is redundant and has not been offered suitable available employment (this only applies during and up to the end of the maternity leave period);
 - (vi) where the woman told her employer she would be unable to return to work at the end of her maternity leave period and before the end of her maternity leave period she provided the employer with a doctor's certificate stating she was unable to work for health reasons, and she was dismissed during the four weeks after the end of her leave whilst incapable of working and where she had a doctor's certificate for the period, and the reason for the dismissal was that she had given birth or for a reason connected to the birth; and
 - (vii) a woman with a right to extended maternity absence is denied her right to return because of redundancy and is not offered a suitable alternative vacancy. (s. 99)
- f) During the fourteen week maternity leave, a right to the preservation of her terms and conditions (excluding remuneration). In other words, her contractual benefits will continue as if she had not been absent. (s. 71)

One of the particular failures of United Kingdom maternity rights has been, at face value at least, the inability to address the changed circumstances of the new mother.

This is because UK maternity rights presently have no provision for employees to return to work on a part time or flexible basis following the birth of a child.

It has been argued in some quarters that this a good thing, because to provide specifically for the female to be able to return on a part time basis necessarily links her with childcare, and thus continues the vicious circle of inequality of treatment.

Notwithstanding this, whilst employers are not required to allow employees to return part time following maternity leave, there is a serious risk of a successful indirect sex discrimination claim if the employer insists upon full time working.

A claim may be brought under section 1(1)(b), Sex Discrimination Act 1975, on the basis that the employer has applied a requirement or condition to a woman which could apply equally to a man, but which is such that in practice fewer women than men can comply with the requirement or condition; that it is to the woman's detriment because she is unable to comply with it; and, that there is no justifiable reason irrespective of sex for the employer to apply the requirement or condition.

Even if the requirement or condition is something which may appear so straightforward as stating that a job is full time, this is capable of satisfying the first part of the indirect discrimination provisions.

Thus, from the original failure of UK maternity rights, there rises a phoenix under the sex discrimination laws which can, in many circumstances, enable women to bring claims where their employers refuse to allow them to return on a part time basis, or, alternatively, insist that the return is under very strict requirements as to the hours to be worked. In Home Office v. Holmes [1984] IRLR 299, the applicant was one of 250 Executive Officers employed under a contract of employment which required her to work full time. After the birth of her first child, she found it difficult to work full time, and had to avail herself of significant amounts of unpaid leave. After the birth of her second child, she requested that she be allowed to return to work on a part time basis. Her employers were unsympathetic to her request, and declined to allow it.

It was held that the requirement to work full time was a requirement or condition within the terms of the Sex Discrimination Act, and it was held also that she had been subjected to unlawful discrimination.

Even if the applicant can show that insisting that a job is full time or strictly prescribing the hours which must be worked constitutes a requirement or condition, then it will still be necessary to consider the issue of compliance.

In this respect, compliance is regarded as compliance in practice rather than absolute ability to comply.

For example, in Price v. Civil Service Commission [1978] IRLR3, where the EAT stated that a woman “is not obliged to marry, or to have children, or to mind children; she may find somebody to look after them, and as a last resort, she may put them into care.” But to say for those reasons that she is unable to comply with

a requirement to work full time would be “wholly out of sympathy with the spirit and intent of the act.” The test is whether the employee can comply in the light of “current usual behaviour of women in this respect, as observed in practice, putting on one side behaviour and responses which are unusual or extreme,” per PHILLIPS, J. at p. 293.

The pool for comparison can be an important issue, but “many tribunals are therefore prepared to accept, without any detailed analysis of statistical evidence, that a requirement to work on a standard basis disproportionately affects women, because they are aware that a large majority of those with primary responsibility for child care are women.”¹²

This is illustrated by a recent decision.

In London Underground v. Edwards (No. 2) [1998] IRLR 364 the pool was expanded to look at women in general who have child care responsibilities as opposed to men in general, who do not.

In this case, the applicant was employed as a train operator, working a shift system which she was able to organise to fit in with her responsibilities as a single mother. London Underground sought to introduce new rostering arrangements under which she would have to commence work at 4.45 a.m., and which would also involve excessively long hours.

Ms. Edwards, complained that this amounted to indirect sex discrimination, and her complaint was upheld by the court. It was held that the consideration was whether the proportion of women train operators who could comply with the requirements was significantly smaller than the proportion of male train operators

¹² Cox, Susan, Flexible Working After Maternity Leave: The Legal Framework, 78 EOR 10, p. 11

that could comply. Surprisingly, it was also held that the requirement was not justifiable, for the employer could have made provision for single mothers without significant detriment to its need to achieve savings or improve efficiency.

The decision is perhaps even more striking given that there were some 2,023 male drivers, and 21 female drivers. Of those female drivers, only Ms. Edwards was unable to comply with the re-rostering.

“The Industrial Tribunal was entitled to have regard to the large discrepancy in numbers between male and female numbers making up the pool for its consideration. Not one of the male component of just over 2,000 men was unable to comply with the rostering arrangements. On the other hand, one woman could not comply out of the female component of only 21. It seems to me that the comparatively small size of the female component indicated, again without the need for specific evidence, both that it was either difficult or unattractive for women to work as train operators in any event, and that the figure of 95.2% of women unable to comply was likely to be a minimum rather than a maximum figure,” per POTTER, L. J. at p. 369.

An employee is normally able to establish the issue of detriment by indicating the difficulties she will face by trying to combine her full time job and her new family responsibilities and it will then be for the employer to justify the requirement to work full-time, or on strictly specified hours, irrespective of sex.

Imposing a blanket policy against part-time working or job sharing has been shown to have been very likely to amount to indirect discrimination, and if the employer accepts that women can return to part time roles in certain parts of the organisation, it has proved very difficult to deny such a return to other roles.

For employers to counter a return to part-time working, significant practical evidence will be required based on the particular employment rather than on any generalised opposition.

The approach of the European Court of Justice to the issue of justification can be found in Bilka-Kaufhaus GmbH v. Weber von Hartz [1986] IRLR 317.

The European Court of Justice has stated that a practice which has a disproportionate and adverse impact on one sex is justifiable and corresponds to a real need on the part of the employer, if it is appropriate with a view to achieving the objective in question, and is necessary to that end. In other words, is it tantamount to a genuine material factor?

However, it should be remembered that the employer must achieve some sort of balance between its justification and the disproportionate impact which is being placed upon a group. The more severe the impact, the more likely it is that the employer may well have to shift and do something about matters.

In Hicks v. North Yorkshire County Council (COIT 1643/117), a school teacher sought to return to work part time following her maternity leave. The IT held that the Council's refusal to allow her to do so was indirectly discriminatory. The Council had stated that "there may be difficulties in obtaining a suitably qualified teacher in this area on a part-time basis". It was held that this objection was simply "a matter of principle against part-time teachers, nothing less and nothing more", and this was indicated by the fact the Council had previously used part-timers to cover for absentee teachers.

This back door route to a rather successful approach to providing the flexibility that is often required with new parenthood (but only for the mother) means that employers have to justify their insistence upon full-time working.

By way of example, this means that the employer may seek to argue that the seniority of the job requires that it can be done only on a full-time basis. This, in turn, is very difficult to prove, and the employer has to supply hard evidence on the need for continuity, special skills, and defined operational matters.

Frequently, the employee is able to challenge this purely on the basis that there has been no proper assessment of her particular duties, and any difficulties which might arise should the job be the subject of a job share.

In Guthrie v. Royal Bank of Scotland plc (COIT 1869/196), the employer refused to allow a woman to return from maternity leave on a part time basis. The bank stated that it was not its practice to allow such a return because of the disruption it would cause to working arrangements. It was held that this was indirectly sex discriminatory, for all that was needed was a "relatively minor adjustment" to allow Guthrie to undertake her duties on a part time basis.

In order to prove justification, the employer might have to show that the woman was the only person with specialist knowledge or a particular set of skills, and even if that question can be answered positively, the employer will still have to show proper commercial reasons for such skills or expertise to be continuously available. It should be remembered that this can still be rebutted by the employee raising the question of what happens when she is not there. For example, what was the position whilst she was away on maternity leave, or is away from the office visiting clients, suppliers, attending training, absent through sickness, or

away on holiday? Could the workload which was redistributed while she was away on maternity leave not be similarly redistributed now?

A case which shows how the employer can justify its insistence on full-time working is Eley v. Huntleigh Diagnostics Limited (unreported) in which the female applicant was employed as a receptionist in a business which relied primarily on telephone sales.

Whilst the applicant had been away on maternity leave, there had been a number of problems in respect of inaccurately recorded or directed telephone calls. The employers took the view fact that continuity of service had been imperilled during the applicant's absence, and that it was important to preserve this upon her return. The IT held the holder of Ms. Eley's job performed a vital role in dealing with telephone sales enquiries, and as such, the company's insistence upon continuity was justifiable.

The courts might still instruct an employer to recruit another part time employee.

In Given v. Scottish Power plc (S/3172/94), a female manager sought to return part time to her position. The company informed her that at her grade she could not job share. The employers argued that this was on the basis of an operational need, and that continuity was important given that the applicant dealt with customers in a "hands on" role. The IT held that the female employee had been indirectly discriminated against. It was accepted that if a customer were to telephone to speak to her the matter could be dealt with by someone else because there were detailed procedures, and notes would be kept. In particular, computerisation made it almost impossible for the employer to justify the need for continuity.

Women returning from maternity leave do not have a *carte blanche* in order to be able to insist that they must return part time because of their child care arrangements. The employee must still show that she has suffered some sort of detriment.

In Snook v. A.C. Electrical Wholesale plc (unreported), the female applicant failed to prove indirect sex discrimination in respect of a requirement to work full time. Her child care arrangements, by taking into account both her parents and her in-laws, made the requirement quite justifiable and gave her the ability to comply.

“EC sex discrimination law has been invoked more frequently before domestic courts and tribunals in the UK than in any other member state”¹³ but, on this occasion, it would seem that the UK approach to maternity rights is somewhat clearer than that of the European Court of Justice.

Both the UK courts and the European Court of Justice have not been prepared to accept that indirect discrimination can be justified on economic factors, but the European Court of Justice has been prepared to accept administrative convenience as an acceptable argument. In Kirshammer-Hack v. Sidal [1994] IRLR 185, it was accepted that German national legislation could exclude employees working less than ten hours per week from employment protection, even though this had an indirectly discriminatory effect upon women, because women comprised the bulk of those working less than ten hours per week. This was on the basis that it was necessary to restrict the administrative and legal burdens placed upon

¹³ Steiner, Josephine and Woods, Lorna, Text book on EC Law, (1998) Blackstone, p. 360

organisations employing fewer than five employees. This does not appear to coincide with accepted models of EU law.

Of course, the UK cases mentioned could easily have been fought on the basis of administrative convenience, but the UK courts have declined to accept that additional training, equipment, or national insurance costs, or even recruiting an additional member of staff, should be allowed to stand in the way of allowing female returners to take up their employment on a part-time or reduced hours basis.

“Indirect discrimination goes some way towards acknowledging the problematic male norm. Recognising that certain practices obstruct the free entry of women into the labour force, indirect discrimination addresses situations in which employment practices or conditions, although treating both sexes alike in a formal sense, have the effect of excluding more women than men. In this way, the principle of equality of treatment is extended to incorporate, *prima facie*, divergences from a strictly male norm. However, there are two major limitations on the reach of indirect discrimination. Firstly, disproportionate impact does no more than establish a *prima facie* case on indirect discrimination. The employer is still permitted to defend indirectly discriminatory practices by arguing that they are justified for reasons which are not due to the sex of the worker. In effect then, the anti-discrimination principle is not a ‘fundamental right’, as it is frequently proclaimed to be, but merely a presumption which can be trumped by other considerations. Secondly, in its practical application, indirect discrimination does not make sufficiently radical inroads into the male norm. Although it has some

redistributive effect, it does not demand a resolution of the underlying structural problems which disadvantage women in the workplace.”¹⁴

In some respects, this criticism can be viewed as valid, most particularly in that a man could not successfully have made the claims detailed previously, for example, in London Underground v. Edwards, and whilst it is difficult to “trump” the presumption mentioned, it is, by no means, impossible.

Of greater worry is that the back door approach does depend upon individual circumstances and cases, rather than a general legal right.

The redistributive effect mentioned is also subject, in those individual cases to whether the individual has the ‘fight’ in her to take on the employer at what is undoubtedly a difficult time with conflicting demands. The issue can also rise or fall on whether the employee has union membership, money in the bank, legal expenses insurance, or access to a good law centre or the Free Representation Unit. Hardly a successful or acceptable approach to the maternity rights of a major industrialised country.

One of the most contentious and core issues regarding UK maternity rights is that of a woman's right to return to work after maternity leave when such a right is obstructed by the woman's illness on the scheduled date of return, the illness in such case being for a non-pregnancy related reason.

Under S.82 (3), (4), (5), Employment Rights Act, 1996, an employee may postpone her return to work until a date not more than four weeks after her originally notified day of return if she is sick, and if she has provided her

¹⁴ Fredman, Sandra, European Community Discrimination Law: A Critique, (1992) 21 Industrial Law Journal 119, p. 125

employer with a medical certificate before the notified day of return. Under S.82 (5), Employment Rights Act 1996 she is permitted only one postponement or extension.

In Kelly v. Liverpool Maritime Terminals Limited [1988] IRLR 310, Mrs. Kelly suffered from the recurrence of an old back injury. This was towards the end of the extended maternity absence, and she forwarded her medical certificate to her employers indicating that she would not be able to return to work on the notified day of return. As time progressed, she sent three further certificates. At that stage, her employers stated that she had lost the right to return to her employment. The Court of Appeal held that a woman must physically return to work within the four week period. It was also upheld that there could be only one postponement.

This case gives rise to serious concerns regarding U.K. maternity laws. It is almost certainly the case that this decision represents a discriminatory position, for surely any other employee returning from leave could telephone to state that he was sick.

The extreme nature of this decision is illustrated by the fact that if the husband of the sick female employee were to dump her from a wheelbarrow onto the floor of her office, she were say to touch her computer screen, and thereafter crawl back into the wheelbarrow, then that, according to Kelly, would be acceptable.

In Crees v. Royal London Mutual Insurance Society Limited and Kwiksave Stores Limited v. Greaves [1998] ICR 849, the facts of both cases were almost identical, and a consolidated appeal was heard by the Court of Appeal.

Mrs. Heather Crees and Mrs. Janet Greaves took maternity leave from their respective employers, and after having given birth wrote to those appropriate

employers giving the required periods of notice in order to return to work. In both cases, the four week extensions permissible under the law were taken, but in both cases the employees were unable to return to work on the due dates because of temporary illness. The employers informed their respective employees that they had failed to exercise their rights to return, and accordingly had no jobs. In both cases, the ladies sought to claim unfair dismissal.

The Court of Appeal took the view that the employees qualified for the right to return to work, and that they had given all the necessary notices. The Court of Appeal held that under Section 42 (1) Employment Protection (Consolidation) Act 1978 (as it then was), the employees had exercised their rights to return to work by giving the appropriate written notice to their employers of their proposed dates of return. "Section 42 (1) sets out precisely what is required of an employee in order to exercise her right to return to work: "An employee shall exercise the right to return the work under Section 39 by giving written notice to the employer." Accordingly, the employees had completely and effectively exercised the right to return to work conferred on them when they gave written notices in accordance with Section 42 (1). Nothing more was required to be done for the right to be exercised. It follows that they had a right to claim that they had been unfairly dismissed, if they were not permitted by their employer to return to work," per LORD WOOLF, M. R. at p. 862.

The Court of Appeal pointed out that the only reason why they had not been allowed to return to work was because they had not physically been present at work. The court took the view that this would normally constitute a valid reason for absence, and would not constitute a fair reason for dismissal. Nonetheless, as the two ladies had given due notice, they had already exercised the right of return. "The machinery for postponement and extensions neither expressly nor impliedly

requires the employee to exercise the right by presence at the workplace to perform his work on the day originally notified or as postponed,” per LORD WOOLF, M. R. at p. 862.

It should be noted that this case is currently on appeal to the House of Lords.

Thus, whilst there might be a more broader definition of indirect discrimination under EU law, but with a wider blocking mechanism, the back door route which allows maternity (or more properly parenting) rights to be enforced with those with childcare responsibilities has proved very effective under the UK’s Sex Discrimination Act.

If the avenue of the Sex Discrimination Act does not appear appropriate, then it may well be important to consider a claim via the EU. Nonetheless, this is perhaps one of the more unintentional successes of unwritten UK maternity rights.

The ethos which has surfaced in this part of UK maternity rights is summed up well in the final part of this extract from the judgement in Brown v. Stockton on Tees Borough Council [1988] IRLR 263 “I have no doubt that it is often a considerable inconvenience to an employer to have to make the necessary arrangements to keep a woman’s job open for her whilst she is absent from work in order to have a baby, this is a price that has to be paid as part of the social and legal recognition of the equal status of women in the workplace,” per LORD GRIFFITHS, at p. 266.

Thus, women should be given both a social and legal recognition, but, as this chapter illustrates, some of the rights which are available are not maternity

specific, and certainly do not amount to cast-iron guarantees of how an employer must behave.

However, UK maternity rights frequently fail in that they are not prepared to pay the financial price necessary to ensure success. "Some of the poorest women with children, who most need to be included in the system of maternity pay, are currently excluded."¹⁵

¹⁵ House of Commons Employment Select Committee, "Mothers in Employment", (1995), Volume 1: Report and Proceedings of the Committee, HMSO

CHAPTER 3 THE EQUAL TREATMENT DIRECTIVE

It is contended that “the sex equality directives and their interpretation by the European Court reveal that the goals of the Equality Policy are limited: they strive, albeit with enthusiasm, to achieve a level playing field for competition between the parties (“equality of opportunity”) as opposed to tackling the more deep rooted of inequality between men and women (“equality of outcome”).¹⁶

This is probably a very valid criticism, which will be borne out in this chapter, but the contention of this paper is that it is better to do something on the ground rather than remain inactive and think about structural changes which will probably take hundreds of years to achieve. (For instance, the Equal Opportunities Commission has estimated that it will take approximately forty years for women’s pay to reach that of their male counterparts, and this, in spite of considerable legislation. But, headway is being made with that legislation). It is argued that whilst UK and European maternity rights may fail in many respects, they do, in fact, achieve a modicum of equality of outcome.

The primary directive on sex discrimination in employment law is, perhaps surprisingly, the Equal Pay Directive.

European Community Law has three other major directives which cover maternity and associated areas, namely, the Equal Treatment Directive, the Pregnant Workers Directive, and the Parental Leave Directive.

¹⁶ Barnard, Catherine, European Community Employment Law, (1996) Wiley, p. 245

The Equal Treatment Directive is Council Directive 76/207 of February 9th 1976 "on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions".

For the purposes of this paper, it is necessary to set out certain parts of the Directive in detail.

It is provided under Article 2:

"1. For the purpose of the following provisions, the principle of equal treatment shall mean that there shall be no discrimination whatsoever on grounds of sex either directly or indirectly by reference in particular to marital or family status.

2. This Directive shall be without prejudice to the right of member states to exclude from its field of application those occupational activities, and, where appropriate, the training leading thereto, for which, by reason of their nature or the context in which they are carried out, the sex of the worker constitutes a determining factor.

3. This Directive shall be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity.

4. This Directive shall be without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women's opportunities in the areas referred to in Article 1(1)."

The Equal Treatment Directive further provides under Article 3 that

“1. Application of the principle of equal treatment means that there shall be no discrimination whatsoever on grounds of sex in the conditions, including selection criteria, for access to all jobs or posts, whatever the sector or branch or activity, and to all levels of the occupational hierarchy.

To this end, member states shall take the measures necessary to ensure that:

- (a) any laws, regulations and administrative provisions contrary to the principle of equal treatment shall be abolished;
- (b) any provisions contrary to the principle of equal treatment which are included in collective agreements, individual contracts of employment, internal rules of undertakings, or in rules governing the independent occupations and professions shall be, or may be, declared null and void or may be amended;
- (c) those laws, regulations and administrative provisions contrary to the principle of equal treatment when the concern for protection which originally inspired them is no longer well founded;

and that where similar provisions are included in collective agreements, labour and management shall be requested to undertake the desired revision.”¹⁷

When trying to deal with maternity and sex discrimination, English law has traditionally adopted an approach that no ‘comparison’ was possible. The reasoning has been that as a man is unable to become pregnant, there can be no

¹⁷ Council Directive 76/207/EEC

male equivalent to a pregnant female employee and thus sex discrimination could never be proven.

This was followed by the sick male comparator approach, which involved comparing a similar man, i.e., one absent through illness, and preferably with prostate problems, with the pregnant woman.

This was to change dramatically when the European Court of Justice had referred to it a case from the Netherlands.

In Dekker v. Stichting Vormingscentrum voor Jonge Voowassenen (VJV - Centrum Plus) [1992] ICR 325. The European Court of Justice considered whether refusal of the employers to appoint the applicant was sex discrimination contrary to Articles 2 (1) and 3 (1) of the Equal Treatment Directive (76/207/EEC).

The facts of the case were that a number of female applicants applied for a post as instructor at a training centre for young adults.

Mrs. Dekker was considered to be the most suitable applicant for the position, and her name was put before the Board of Selection. Mrs. Dekker had informed her prospective employers that she was three months pregnant. Eventually, she was not appointed to the position, and the employers explained in writing that because she was pregnant at the time of application for the position, the employer's insurers would not reimburse any benefits, and that the employer itself would have to make payments to Mrs. Dekker during her maternity leave. In turn, this led to the fact that the employer would be unable to employ a replacement whilst Mrs. Dekker was away on maternity absence.

The European Court of Justice stated that “only women can be refused employment on the grounds of pregnancy and such a refusal therefore constitutes direct discrimination on the grounds of sex. A refusal of employment on account of the financial consequences of absence due to pregnancy must be regarded as based, essentially, on the fact of pregnancy. This discrimination cannot be justified on grounds relating to the financial loss which an employer who appointed a pregnant woman would suffer for the duration of her maternity leave,” at p. 329.

This landmark judgement therefore held that the employer was in direct contravention of both Articles 2 (1) and 3 (1) of the Equal Treatment Directive. All of this has swept away the comparable man idea so previously evident in English maternity theories. This is on the basis that the refusal to employ was based principally on the grounds of the woman's pregnancy. As a refusal to employ based on the grounds of pregnancy can be applied only to a woman, it was stated that such a refusal to employ was direct discrimination on the grounds of sex.

Direct discrimination permits no justification, but even if the line is blurred and justification is permissible, then loss of money will not be a justifiable reason.

The case is also authority for the proposition that there can be discrimination even where all the applicant are female. Such pregnancy related discrimination falls within the scope of what is prohibited by the Directive. This was put succinctly by Catherine Barnard - “unlike the English courts, the European court refuses to undertake the tortuous exercise of finding a male comparator ‘suffering from an equivalent problem’. Instead, it struck at the heart of the problem: since only

women can become pregnant, less favourable treatment on the grounds of pregnancy automatically constitutes direct discrimination.”¹⁸

On the face of it, Dekker would appear to provide that if the female employee can show that she would not have received less favourable treatment ‘but for’ pregnancy, then she can show breach of Article 2(1) of the Directive. The refusal to employ Dekker was based principally on the grounds of her pregnancy.

However, almost immediately, the European Court of Justice began to take away with the left hand what it had so amazingly given with the right, and it would now appear that the Directive is not always breached in a situation where a pregnant woman has received less favourable treatment.

The difficulty lies in what is an almost indistinguishable fine line between the pregnancy and the effects of the pregnancy.

The Dekker case was followed by Handels-og Kontorfunktionaerernes Forbund i Danmark v. Dansk Arbejdsgiverforening [1992] ICR332 (Hertz).

In this case, Mrs. Hertz was employed as a part time cashier and sales woman by Aldi Marked K/S. By all accounts, Mrs. Hertz suffered a very difficult pregnancy being absent on sick leave throughout the greater part of it. Following the expiry of her maternity leave, Mrs. Hertz resumed work for several months, but between June 1984 and June 1985 she took one hundred days of sick leave as a result of a pregnancy related illness. Mrs. Hertz was dismissed, and alleged that her dismissal was contrary to articles 2 (1) and 5 (1) of the Equal Treatment Directive.

¹⁸ Barnard, Catherine, European Community Employment Law (1996) Wiley, p. 204

The Court of Justice was asked to consider whether it was possible to equate a female employee with a male employee because a male employee could never suffer from a pregnancy related illness. In other words, a Dekker situation. The question, therefore, was whether dismissal due to illness attributable to pregnancy was contrary to the Equal Treatment Directive and, if it was, was there any time limit to the protection available?

It is undoubted that the European Court of Justice faced a very difficult question. Would it really be the case that the woman would be protected from dismissal because of a pregnancy related illness? If so, where would it all end?

The Court of Justice ruled against Mrs. Hertz confining itself to Article 2, and stating that there was no need to rule on the question before it under Article 5.

It stated that if the European Court of Justice were to accept that the dismissal of a female worker on account of pregnancy related illness would always infringe the principle of equal treatment, then "such a prohibition, which would apply to an employer for many years after the confinement, would be liable to entail not only administrative difficulties and unfair consequences for the employers, but also negative repercussions on the employment of women," at p. 334.

This is a decision on social rather than legal policy.

The European Court of Justice stated also that if a woman were to be dismissed for a pregnancy related illness during her maternity leave, then this would be a breach of the law. However, it was decided that "in the case of an illness manifesting itself after the maternity leave, there is no reason to distinguish an illness attributable to pregnancy or confinement from any other illness. The pathological condition is therefore covered by the general rules applicable in the event of illness," at p. 335.

The Court continued:

“Male and female workers are equally exposed to illness. Although certain disorders are, it is true, specific to one sex, the only question is whether a woman is dismissed on account of absence due to illness in the same circumstances as a man; if that is the case, then there is no direct discrimination on grounds of sex,” at p. 335.

The European Court of Justice took the view that the protection available to women on account of pregnancy related illness during the maternity period was to ‘slot in’ with the maternity leave provided by respective national laws. It stated “it is for every member state to fix periods of maternity leave in such a way as to enable female workers to absent themselves during the period in which the disorders inherent in pregnancy and confinement occur,” at p. 335.

The two above cases represent the start of the European Court of Justice’s approach to the ‘special’ condition of pregnancy, but also the two quite distinct categories of treatment which will be applied to the pre- and post- birth periods. It is not difficult to find criticism of the decision in Hertz.

“In Hertz, the Court of Justice has drawn an arbitrary distinction between action relating to a woman’s pregnancy and action taken after the pregnancy which may be equated with the treatment of an illness. In relation to the latter, member states are given discretion to determine how long post confinement protection should last and, once this has elapsed, the traditional comparison with the treatment of a male employee may play a part in deciding if sex discrimination has occurred.”¹⁹

¹⁹ Szyszczak, Erika, Community Law on Pregnancy and Maternity, in Sex Equality Law in the European Union, Hervey, Tamara and O’Keefe, David, (eds), (1996) Wiley, p. 54

To echo the words used in Dekker, presumably it should be observed that only women can have their employment terminated on the grounds of pregnancy related illnesses. The precise words in Dekker were “a refusal of employment on account of the financial consequences of absence due to pregnancy must be regarded as based, essentially, on the fact of pregnancy.” This, in turn, amounts to direct discrimination because the condition remains unique to women.

Economic grounds have been rejected as a supporting issue in Dekker, but surely the only basis for distinction between Dekker and Hertz is the economic difficulties which would be faced by employers.

It is easy to agree with Erika Szyszczak’s comments. “If we are beginning to recognise the special nature of pregnancy and motherhood, what justification is there for protecting the mother only before childbirth and not afterwards when she and her new born baby are equally as vulnerable?”²⁰

It is very difficult indeed to understand the decision in Hertz. It simply does not appear to make any legal sense to put in place what must be an artificial distinction designed only for political or business expediency. Catherine Barnard writes “whilst this decision can be justified by reference to practical necessity it can not be defended in terms of logic: if the dismissal of a female worker on account of pregnancy constitutes direct discrimination, the dismissal of a woman on a pregnancy related illness which only women can suffer should also automatically constitute direct discrimination.”²¹

²⁰ Szyszczak, Erika, Community Law on Pregnancy and Maternity, in Sex Equality Law in the European Union, Hervey, Tamara and O’Keefe, David, (eds), (1996) Wiley, p. 54

²¹ Barnard, Catherine, European Community Employment Law, (1996) Wiley, p. 205

Another commentator makes the point, "It is apparent that the Equal Treatment Directive is constructed wholly within the 'sameness' - 'difference' paradigm of equality. Gender neutrality - identical treatment - is the norm, but in certain areas where a gender difference has proved problematic, such as maternity and occupational requirements, a special exemption to the norm is permitted. The Equal Treatment Directive incorporates, therefore, both identical treatment and special standards, with man as the undeniable measure for both....."²²

"The decision in Hertz means that women are only guaranteed protection from dismissal relating to their pregnancy during the period of national statutory maternity leave. This leaves open 'abnormal' pregnancies, such as Mrs. Hertz', without protection - a decision justified in the Advocate General's Opinion on the basis that the possible 'financial difficulties' faced by the employer, and the risk to the 'efficient operation of the company' should override the interest of the exceptional case"²³

These viewpoints, it should be recalled, are unacceptable in a 'Dekker world'.

More's argument is developed further, and she states that if the issue of pregnancy were to be approached in an alternative way, however, and discrimination in law used as a way to remedy the disadvantages faced by pregnant women in the labour market, then the question of 'special rights' and of the point at which they are limited, would not arise (meaning, therefore, that 'abnormal pregnancies' could also be guaranteed protection). Yet, as long as legal protection from dismissal on grounds of pregnancy is conceptualised as preferential treatment for women, then women's disadvantaged status is obscured.

²² More, Gillian, Reflections on Pregnancy Discrimination under European Community Law, (1992) *Journal of Social Welfare and Family Law* 48, p. 53

²³ More, Gillian, Reflections on Pregnancy Discrimination under European Community Law, (1992) *Journal of Social Welfare and Family Law* 48, p. 54

Other commentators argue. "The other side of the principle that like should be treated alike is that those who are different should be treated differently. The Pregnancy Directive may be seen as recognition of one particular difference between men and women. While this approach may be welcomed in tackling an area of practical difficulty for female workers, it can be argued that it continues to uphold the male worker as the norm. Pregnant women are given specific employment rights because they are different from men. If different treatment for women is seen as an exception to the equality principle, it may be seen as providing women with a special advantage. The attentions are evident in the legislative measures themselves, in the decisions of the European Court and the National Courts and in the implementation in domestic law of the European provisions."²⁴

There seems to have arisen a very distinct difference between how the European Court of Justice will treat women. Those who are pregnant are entitled to extensive protection, but those who have given birth to children may well find themselves in a somewhat different position even if the matter which has normally brought things to a head is completely connected with pregnancy.

It would seem very much that the European Court of Justice has merely made a decision related to the doubtless staggering practical difficulties employers would suffer if female employees were to be given almost a carte blanche to take time off for sickness if that sickness could be shown to be pregnancy related.

²⁴ Burrows, Noreen and Mair, Jane, European Social Law, (1996) Wiley, p. 152

Robert Wintemute²⁵ argues that “Two consequences are often seen as flowing from Dekker: (i) a finding of direct sex discrimination does not require a comparison between the treatment of a woman and the treatment of an actual or hypothetical man, or vice versa; and (ii) pregnancy discrimination is always direct rather than indirect discrimination. These propositions are not well founded and they make the results in the ECJ’s pregnancy discrimination cases difficult to explain.”

Wintemute argues that a comparator is always necessary even for a direct sex discrimination claim, and that this was ultimately the case in Dekker, i.e., by looking towards those who are pregnant rather than those who are not pregnant (which could include both males and females). The important point about this is that he views discrimination against pregnant women as “prima facie indirect [my emphasis] sex discrimination.” It is suggested that the difference in treatment would never have occurred “but for”, and also that there has been “less favourable” treatment. This can only be so if there has been a comparison with the treatment meted out to another person.

The problem suggests Wintemute is “who the comparator should be”?

The author of that article suggests that the comparison between a pregnant woman and a non-pregnant person (male or female) does count as a comparison based on sex “if one recognises that ‘being (chromosomally) female’ and ‘being (chromosomally) male’ are each packages of physical characteristics and physical capacities to make choices, and that some of these characteristics and capacities may have no equivalent in the package of the opposite sex thus, comparison of

²⁵ Wintemute, Robert, When is Pregnancy Discrimination Indirect Sex Discrimination?, (1998) 27 *Industrial Law Journal* 23, p. 26

the sexes and a finding of direct sex discrimination remain possible where discrimination is based on one of these unique characteristics or capacities.”

The difficulty with this interpretation is that in Wintemute’s terms the European Court of Justice did not travel down such a route in Dekker.

Surely the easier (and possibly more correct) route is to suggest that the European Court of Justice (for whatever valid reasons) has effectively placed women on a pedestal because of the presently unique position a woman has in being able to give birth. If one uses Wintemute’s words this is not a “choice” in the same sense as “being male and growing a beard.”

The issue here is an all together exceptional set of circumstances, which have important ramifications for society as a whole. People are treated differently simply on the grounds they are pregnant. Whether or not the word ‘sex’ is the vehicle upon which to base complaints of such a nature may well be debatable, but if one goes against certain of the feminist theories of jurisprudence then something must be in place to deal with pregnancy.

As Wintemute states “the uniqueness of pregnancy is seen as such that it can not be compared with any other conditional situation, even if the latter gives rise to similar needs.”²⁶

By treating the pregnancy discrimination cases of the European Court of Justice as examples of indirect sex discrimination, the author states that he is able to make their outcomes easier to reconcile, but it may well be that these outcomes can not be reconciled other than to suggest that the ECJ realises the difficulty it

²⁶ Wintemute, Robert, When is Pregnancy Discrimination Indirect Sex Discrimination?, (1998) 27 *Industrial Law Journal* 23, p. 28

finds itself in with the economics of trying to ensure that women never suffer any detriment that is in some way pregnancy related.

In Webb v. EMO Air Cargo (U.K.) Limited [1994] ICR 770, the European Court of Justice was again asked to rule on Articles 2 (1) and 5 (1) of the Equal Treatment Directive.

Mrs. Webb was recruited on a permanent contract to replace another employee (Mrs. Stewart) who was taking maternity leave.

After Mrs. Webb had been employed for some two weeks, she informed her employers that she was pregnant. The applicant was dismissed a few days later.

It was argued that the dismissal was not, in fact, on the grounds of pregnancy, but on Mrs. Webb's inavailability to perform the function for which she had been employed.

It was stated "there can be no question of comparing the situation of a woman who finds herself incapable, by reason of pregnancy discovered very shortly after the conclusion of the employment contract, of performing the task for which she was recruited with that of a man similarly incapable for medical or other reasons," at p. 798.

"Pregnancy is not in any way comparable with a pathological condition, and even less so with unavailability for work on non-medical grounds, both of which are situations which may justify the dismissal of a woman without discriminating on grounds of sex," at p. 799.

"..... dismissal of a pregnant women recruited for an indefinite period cannot be justified on grounds relating to her inability to fulfil a fundamental condition of her employment contract. The availability of an employee is necessarily, for the

employer, a condition for the proper performance of the employment contract. However, the protection afforded by community law to a woman during pregnancy and after childbirth cannot be dependent upon whether her presence at work during maternity is essential to the proper functioning of the undertaking in which she is employed," at p. 799.

Much is made in the Webb case, and that of Habermann-Beltermann²⁷, of the duration of the contracts, and the suggestion is put both by the European Court of Justice and the House of Lords in Webb that matters might well have been different if the contract had been temporary. Indeed, the House of Lords goes so far as to suggest that it might be possible to ask questions of a female relating to her maternity status before entering into a temporary contract.

This would seem to fly in the face of all anti-discrimination law, and Jean Jacqmain makes the point "in certain national legislation such as in Belgium, there is no prohibition of fixed term contracts of employment concluded for a very long finite duration: would maternity leave affect such contracts differently from 'normal' open ended ones?"²⁸

If the contention of the European Court of Justice and the House of Lords is correct, then one can imagine that there would be a rush towards temporary contracts which might be able to exclude various maternity requirements.

It also seems somewhat bizarre that if it amounts to direct discrimination to refuse to recruit a prospective female employee on the grounds of pregnancy, then that direct discrimination can be side stepped on the grounds that the contract is temporary in nature. The courts seem to be attempting to suggest that there can

²⁷ Habermann-Beltermann v. Arbeiterwohlfahrt Bezirksverband Ndb/Opf e V [1994] IRLR 364

²⁸ Jacqmain, Jean, Pregnancy as Grounds for Dismissal, 23 Industrial Law Journal, 355, p. 356

be justifiability in direct discrimination. This has never met with any favour before, and it is surely incorrect.

It is difficult to understand how the possibility that an employee may not be present to perform her duties because of pregnancy can be completely unlawful in the case of a permanent contract, and yet may well be perfectly lawful for a fixed term or temporary contract.

Later in the article Jacqmain asks “imagine that an employer advertises a single position for recruitment; that this job necessarily entails exposure to the risks related to lead, which is prohibited for pregnant women under Article 6 Annexe II (A(1))(c) of the Directive; and that it is not possible technically for the employer to transfer a pregnant woman to another position within his business (under Article 5 (2) of the Directive). If a woman meets the required qualifications, but is visibly pregnant or spontaneously informs the employer that she is pregnant, is he still obliged to recruit her? Is he entitled to question her about her possible pregnancy, or even to ask her if she will undergo a pregnancy test? And if that employer knows that in the near or not so near future, no changes can be expected in the process of production or the possibilities of temporary transfer, does he have a right to question a female candidate on her wishes of having children?”²⁹

It would seem that Dekker, Hertz, and Webb have established beyond doubt that the Equal Treatment Directive deals with less favourable treatment accorded to a woman on the grounds of her pregnancy.

Essentially, the cases of Dekker and Webb have provided that the hypothetical man need no longer be considered when determining issues relating to possible

²⁹ Jacqmain, Jean, Pregnancy as Grounds for Dismissal, 23 Industrial Law Journal, 355, p. 358

discrimination on the grounds of pregnancy. Nonetheless, a nagging problem is contained in the Hertz case. In this case, action arising from the pregnancy (namely, a pregnancy related illness) can fall to be considered as against how a male employee would be treated by his employer when dealing with his sickness.

Erika Szyszczak³⁰ writes that "the Court of Justice has drawn an arbitrary distinction between action relating to a woman's pregnancy and action taken after the pregnancy which may be equated with the treatment of an illness". She poses the question of why there should be a difference between the protection before childbirth and not afterwards. She comments further "other than the fact that the former is of finite period, the rationale for distinguishing between the two can only be on policy, that is, economic grounds - precisely those grounds rejected in Dekker".

"Nor does it seem to me to be possible a fortiori to draw comparisons, although these were referred to in the course of the proceedings, between a woman on maternity leave and a man unable to work because, for example, he has to take part in a sporting event, even if it were the Olympic Games. Other considerations apart, a sportsman, even a champion (whether a man or a woman) is confronted with a normal choice reflecting his needs and priorities in life; the same can not be reasonably said of a pregnant woman, unless the view is taken - but it would be absurd - that a woman who wishes to keep her job always has the option of not having children." Per Advocate General Tesouro, in Webb v. EMO Air Cargo Ltd. [1994] ICR 770, at p. 794.

³⁰ Szyszczak, Erika, Community Law on Pregnancy and Maternity, in Sex Equality Law in the European Union, Hervey, Tamara and O'Keefe, David, (eds), (1996) Wiley, p. 54

It would seem that the European Court of Justice has been unable to reconcile the decision Hertz with its decision in Dekker, and that the court is so confused that it is trying to apply Dekker whilst travelling in a completely different direction.

In Dekker v. Stichting Vormingscentrum Voor Jonge Volwassenen (VJV - Centrum) Plus, the ECJ took the approach that pregnancy and sex cannot be separated and that choosing a woman differently on the grounds of her pregnancy is purely and simply direct discrimination on the grounds of sex.

In Hertz the ECJ found that the dismissal due to absences caused by illness, where those absences arise outside the protected period of maternity leave, is permissible, even where the illness is pregnancy related. Similarly, the Court's conclusion that the termination of Harbermann-Beltermann's contract was not "on the ground of pregnancy", but by reason of the statutory provision in the MSchG, opens the door to a narrow interpretation of the Dekker ruling that adverse treatment on grounds of pregnancy is direct discrimination.

"Thus, as a matter of principle, it is not possible to justify direct discrimination on the grounds of sex: such discrimination is, by definition, based upon sex and therefore prohibited. The fact that the discrimination is based upon sex makes it impossible to show that it is based upon some other factor. The Court of Justice has stated unequivocally that where the alleged discriminatory action is based upon a woman's pregnancy, this amounts to sex discrimination because of women's unique biological role."³¹

³¹ Szyszczak, Erika, Community Law on Pregnancy and Maternity, in Sex Equality Law in the European Union, Hervey, Tamara and O'Keeffe, David, (eds), (1996) Wiley, p. 54

Moreover, if Hertz and other cases such as Gillespie and Boyle (see later) and correct, where are the grounds in law to defend this position? The Pregnant Workers Directive imposes minimum standards, and the Equal Treatment Directive lays down the guidelines.

Under those Directives, any adverse treatment on the grounds of pregnancy is (Dekker) inherently discriminatory. The European Court of Justice continues to exercise its (Hertz) denial of this where there is illness.

There is illness (covered, say, by the common law), illness (which amounts to a disability), and a new third category (illness arising from pregnancy). This third category can change itself from a super-protected status in terms of dismissal (at least whilst on maternity leave), to a category all of its own when seeking a payment which equates to that granted to men absent on sick leave.

Susan Cox discusses the difficulties,³² “it would be wrong to conclude that the principle of automatic discrimination embodied in Dekker and Webb has made comparisons redundant. In order to establish whether an individual woman has been discriminated against on the grounds of her sex, it is still necessary to establish whether she has been “less favourably” treated and, if she has, whether that treatment was on the grounds of her pregnancy. It seems, however, that the relevant comparison is now between the way that the woman has been treated and the way that other employees or job applicants who are not pregnant were or would have been treated. The “but for” test of discrimination adopted in [James v. Eastleigh Borough Council] becomes: would this woman have received the same treatment but for her pregnancy?”

³² Cox, Susan, Maternity and Sex Discrimination Law: where are we now?, 75 EOR 23, p. 23

As Susan Cox identifies, the question now is “how closely does adverse treatment have to be connected with a woman’s pregnancy or maternity for it automatically to amount to sex discrimination?”.

With respect to the Court, it appears impossible to reconcile the reasoning in Dekker with that in Hertz. The essential reason for dismissal due to a pregnancy related illness can not be anything other than pregnancy, and if the Court of Justice has recognised that treatment arising on the grounds of pregnancy is direct discrimination, then the case does not sit very well with either The Pregnant Workers Directive, or our own Employment Rights Act 1996 which provides, under section 99, that dismissing a woman for a pregnancy connected reason (which is what a pregnancy related illness amounts to) is automatically unfair.

“The post-birth period exists in a twilight zone between pregnancy provision, maternity provision and young child care provision.”³³

Kilpatrick argues that the European Court of Justice’s approach to the post birth period is not due to any lack of coherence on its part, but is instead “a deliberate and coherent strain in its jurisprudential approach.”

Kilpatrick analyses the various approaches to sex discrimination and pregnancy, namely the no-comparison possible approach (because men cannot become pregnant); the sick male comparator approach (e.g., the man undergoing a prostate operation); the no comparison necessary approach namely, that taken in Dekker because there is an inextricable link between pregnancy and sex and the fourth

³³ Kilpatrick, Clare, How long is a piece of string? European legislation of the post birth period, in ‘Sex Equality Law in the European Union’, Hervey, Tamara and O’Keeffe, David, (eds), (1996) Wiley, p. 81

approach, which Kilpatrick argues combines the second and third approaches, but in “two very different methods”.

The first of these is the distinction between illness during the protected period, and illness thereafter, as illustrated in Hertz. One moves from a no comparison necessary to a sick male comparator approach.

Sandra Fredman argues³⁴, “If pregnancy is unique to women, so are its longer term consequences. It is difficult to see why a rigid dividing line should be drawn at the moment maternity leave ends, however short the leave may be.”

Kilpatrick criticises some of the feminist jurisprudential comments by asking what it was felt the European Court of Justice could have done.

With the greatest of respect, the fact that open-ended protection should be provided for pregnant employees may well be exceedingly difficult, but it is surely the only logical conclusion on the directive based on the decision in Dekker. It may well be that the maternity rights themselves should be developed, but as these rights are initially developed on a political basis which, in turn, has to ‘pander’ to national, regional, and sectional interests. The path to equality for many women has been to use laws which, it is admitted, were not primarily designed to ensure maternity rights, or any other of the many indirect discrimination routes which had been pursued by individual litigants and, in this country, the Equal Opportunities Commission.

“Viewed as cases of less favourable treatment of pregnant women, Dekker, Webb, Hertz and Gillespie do not make sense, particularly because of the explicit or implicit comparator ranges from a non-pregnant man with no need for leave in

³⁴ Fredman, Sandra, European Community Discrimination Law: A Critique (1992) 21 Industrial Law Journal 119, p. 122

Dekker and Webb, to an ill man in Hertz, to no-one (because comparison is not possible) in Gillespie.”³⁵

But, the courts are deeply troubled when trying to make determinations between pregnancy and its consequences.

In Berrisford v. Woodard Schools (Midlands Division) Limited [1991] ICR564, a matron at a girls boarding school became pregnant. She was unmarried, and informed her employer that she did not intend to marry in the near future.

She was dismissed because it was felt that she would convey a very bad example to her pupils. The EAT held that she had not been sexually discriminated against. She was dismissed not for becoming pregnant, but for the poor example she would convey and also because had a man acted similarly (i.e., by having an extramarital affair) then he too would have been dismissed.

In O’Neil v. Governors of St. More RCVA Upper School and Bedfordshire County Council [1997] ICR 33, the case again concerned an unmarried member (on this occasion a teacher) of a school. The applicant became pregnant following a relationship with a Roman Catholic priest, and as she was a teacher of Religious Education at a Roman Catholic school, it was felt that there were certain moral difficulties with her remaining in employment.

On this occasion the EAT held (per MUMMERY, J. at p. 47) that the pregnancy “precipitated and permeated the decision to dismiss” and that the ground for dismissal was pregnancy.

It is certainly difficult to distinguish between the pregnancy and its consequences, and it is a very fine line between these two cases. Pregnancy discrimination is

³⁵ Wintemute, Robert, When is Pregnancy Discrimination Indirect Sex Discrimination?, 27 Industrial Law Journal 23, p. 30

gender related discrimination and as such is direct discrimination. As direct discrimination, it can not be justified. If the consequences arise from the pregnancy, then surely that is a ground for pregnancy discrimination. The “but for” issue, again.

Turning to another aspect of EU maternity rights, Article 2(2) of the Directive provides that the sex of the worker may constitute a determining factor, and that the Directive can be excluded from “application [to] those occupational activities and, where appropriate, the training leading thereto, for which, by reason of their nature or the context in which they are carried out, the sex of the worker constitutes a determining factor:”

In Commission v. UK [1983] ECR4341, the European Court of Justice was prepared to allow the sex of the worker to constitute a determining factor as a derogation under Article 2(2) of the Equal Treatment Directive when considering the access of potential male employees to the post of midwife. The court took the view that the “personal sensitivities” involved in such a position could allow an exception to the principle of equal treatment.

In Johnston v. Chief Constable of the Royal Ulster Constabulary [1986] 3CMLR240 discussion took place as to the possibility of exclusions from the Equal Treatment Directive.

The European Court of Justice held “in determining the scope of any derogation from an individual right such as the equal treatment of men and women provided for by the directive, the principle of proportionality, one of the general principles of law underlying the community legal order, must be observed. That principle requires that derogations remain within the limits of what is appropriate and necessary for achieving the aim in view and requires the principle of equal

treatment to be reconciled as far as possible with the requirements of ... the context of the activity in question,” at p. 267.

Turning to the facts of the case, the Chief Constable of the RUC had deemed that police officers should be armed. However, he took the view that it was undesirable on grounds of public safety that female officers should carry firearms. If they were to do so, they would be more at risk of assassination than men, and it was also felt that female officers would be less effective in dealing with families and children if they were armed. It was contended that there would be public distaste for such a measure.

This led to the bizarre situation where the Chief Constable did not renew a number of contracts for female members of the full-time RUC Reserve. The European Court of Justice held that the sex of an employee could be a determining factor (and thus a derogation from the principle of equal treatment) and also that article 2(2) could allow a further derogation from the principle of equal treatment because “in a situation characterised by serious internal disturbances, the carrying of firearms by police women might create additional risks of their being assassinated and might therefore be contrary to the requirements of public safety,” at p. 266.

It was left to the national court to determine whether these issues did lead to the observance of the principle of proportionality.

This decision has been heavily criticised, and it has been suggested that female police officers could receive the appropriate training to enable them to use firearms as efficiently and effectively as their male police colleagues.³⁶

³⁶ More, Gillian, ‘Equal Treatment’ of the sexes: What does ‘equal’ mean?’ (1993) 1 *Feminist Legal Studies* 45

In Commission v. France [1988] ECR 3559, the European Court of Justice again considered whether the sex of the worker could constitute a determining factor. This was not too difficult a case, in which the Court accepted that it was legitimate to employ men in the lower grades in male prisons and women in the lower grades in female prisons. The Court was not prepared to accept that this should occur at senior levels, because those in senior positions had very little contact of a direct nature with prisoners.

The Directive provides "that there shall be no discrimination whatsoever of grounds of sex either directly or indirectly by reference in particular to marital or family status." But, the Directive provides for more favourable treatment for women in relation to pregnancy and maternity matters. "This Directive shall be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity."³⁷

This can be called either positive or affirmative action, and it was in the case of Hofman v. Barmer Ersatzkasse [1985] ICR731, that the European Court of Justice dealt with the issue of the more favourable treatment permitted for those who are pregnant or are relying upon maternity. It was stated that the Directive recognises the legitimacy of protecting two aspects of a woman's needs in connection with pregnancy:

- a) the protection of her biological condition during pregnancy and thereafter, until she has physically and mentally returned to normal, and

³⁷ Council Directive 76/207 Article 2, Sub-Article 3

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- b) the special relationship between a woman and her child over the period following pregnancy and childbirth, by preventing that relationship from being disturbed by the problems which would arise from the simultaneous pursuit of employment.

The circumstances of this case were somewhat complicated, with the father of a new-born baby seeking a payment which was normally reserved to the mother of the child. The facts were that the mother of the baby had taken eight weeks leave following childbirth (which she was legally obliged to take). She had only just commenced her job, and returned to work immediately after the eight week period. The father of the baby persuaded his employers to grant him leave to care for the child for the period after the eight weeks until the baby was six months old. This equated to the maternity leave which would have been available to the mother. Essentially, Hofmann wished to put himself in the position of the mother, and to claim the payment which would otherwise have been due to the mother.

German law provided that only the mother was entitled to the payment, and Hofmann brought proceedings stating that such an approach was incompatible with the Equal Treatment Directive.

The European Court of Justice stated "it is apparent from the above analysis that the directive is not designed to settle questions concerned with the organisation of the family, or to alter the division of responsibility between parents," at p. 764

"In principle, therefore, a measure such as maternity leave granted to a woman on expiry of the statutory protected period falls within the scope of article 2(3) of directive 76/207, in as much as it seeks to protect a woman in connection with the effects of pregnancy and motherhood. That being so, such leave may be legitimately be reserved to the mother to the exclusion of any other person, in

view of the fact that it is only the mother who may find herself subject to undesirable pressures to return to work prematurely,” at p. 764.

Positive discrimination has been heavily criticised as incorporating its own form of discrimination, and this judgement has been subject to some criticism in that it perpetuates the role of the mother as the primary carer.

“The responsibility of women for childbearing duties has been translated by the court in the Hofmann case as the recognition of the uniquely female experience of physically bearing children and the societally sanctioned function of women to rear the children they bear. By deeming maternity leave as an exception to equal treatment provisions, and ruling paternity leave is not legally required to be automatically granted to men who request it, discrimination against both women and men is perpetuated.”³⁸

“The granting of maternity leave only denies women the opportunity to return to previous employment once recovery from delivery and lactation responsibilities are complete, unless children are put into creche facilities or a child-minder is employed as [currently] fathers are not legally entitled to parental leave. It also denies men the opportunity to rear their children on a full-time basis without risking loss of employment as paternity or parental leave is not provided for in [some] member states. The Hofmann decision unfortunately perpetuates the stereotyped assumption because women bear children they are therefore, automatically the sex that is responsible for rearing them.”

Of course, the Parental Leave Directive makes some inroads into this viewpoint.

³⁸ Bovis, Christopher and Cnossen, Christine, Stereotyped assumptions versus sex equality: A socio-legal analysis of equality laws in the European Union, (1996) 12 International Journal of Comparative Labour Law and Industrial Relations 7, p. 19

One of the problems is that positive discrimination measures do re-inforce stereotyping, such that the female within the relationship is always the primary carer, or that the male within the relationship is always the main breadwinner. (Of course, these issues would statistically be borne out from annual labour force surveys, etcetera and have been used to the advantage of females in cases concerning overtime working or mobility, etcetera, for example, Meade-Hill v. The British Council [1995] IRLR 478).

In Commission v. Italy [1983] ECR 3273, Italian national law provided for a period of leave on the adoption of a child of less than six years of age. This leave was awarded only to women, for a period of three months, on a paid basis.

The court felt that it was acceptable not to allow such leave for fathers, stating that the distinction was justifiable because it was necessary to assimilate as much as possible to entry of the child into the family to those of the arrival of the newborn child during the initial delicate period.

It is difficult to understand why it is necessary that this should be with the female member of the family as opposed to the male member of the family, and feminist jurisprudential arguments in such a case as this, where there is no biological bond (as described by the European Court of Justice) do not seem hard to understand. Presumably, either adopted parent is capable of performing child caring responsibilities. This would seem to be a stereotype of the highest order, and presumably if one were to suggest at interview that a female would have either child-bearing or child-caring responsibilities, then this would result in an entirely different approach from the court.

Surely, as Tamara Hervey states³⁹, “After a certain point ... maternity rights should give way to equal rights for both parents.”

Addressing these issues, Sandra Fredman writes, “Such an argument correctly highlights the need for close examination of measures purporting to benefit women. Any measure giving advantages to a group defined according to gender runs the risk the over- or under- inclusiveness and may well perpetuate damaging stereotypes. However, this in itself does not imply that anti-discrimination legislation should aspire to neutrality and thereby ignore disadvantage. The risks referred to need to be balanced against the possible gains of such criteria in reducing gender disadvantage. It may well be that social security is too costly and administratively too complex to test each person on an individual basis. In that case, it may be more advantageous overall to define a group according to gender than not to offer the benefit at all. On the other hand, the perpetuation of a stereotype may be more damaging than the overall benefit. Thus, discriminatory criteria should not be rejected out of hand, but instead scrutinised closely to discover whether they perpetuate disadvantage, or go some way toward alleviating it.”⁴⁰

This is an argument with which, I suspect, many pregnant employees and mothers would have sympathy. It again comes back to having some benefit as opposed to no benefit.

Helen Fenwick discusses various arguments relating to the types of treatment afforded to women.⁴¹

³⁹ Hervey, Tamara, Justifications for sex discrimination in employment”, (1993) Butterworths

⁴⁰ Fredman, Sandra European Community Law: A Critique (1992) 21 *Industrial Law Journal* 119, pp. 129-130

⁴¹ Fenwick, Helen, Special Protections for Women in European Union Law, in *Sex Equality Law in the European Union*, Hervey, Tamara and O’Keeffe, David (eds), (1996) Wiley, p. 63

On the one hand, it is contended that treating protective provisions as entitlements is invidious if they carry with them a possibility of creating a negative impact on women's employment, and she reflects upon the argument put forward by Williams⁴² that special treatment has grave costs for women, as it permits unfavourable, as well as favourable, treatment of women where differences between women and men can be perceived.

However, it is recognised that there are difficulties here, not least with the biological issues, and the stress of the unborn child.

It seems difficult (if not impossible) to deny the biological differences although the post birth differences may well be social in their character.

This view is supported by other writers for it is difficult to rely upon the woman as the carer or upbringer of the child within a workplace environment without intrinsically suggesting that the woman is different from the man.⁴³

In Habermann-Belternann v. Arbeiterwohlfahrt Bezirksverband Ndb/opf eV [1994] IRLR364, the female employee in question worked nights in a home for the elderly. Shortly after the commencement of her employment, it was discovered that she was pregnant, and had been so at the time when she and the employers entered into the contract. German law prohibited night working whilst pregnant, and further provided that any contract which purported to permit night working would be treated as null and void. National law also provided that the employer

⁴² Williams, The Equality Crisis: Some Reflections on Culture, Courts and Feminism, (1991) in Bartlett and Kennedy, *Feminist Legal Theory*

⁴³ MacKinnon, Difference and Dominance: On Sex Discrimination (1991) in Bartlett and Kennedy, *Feminist Legal Theory*

could avoid the contract where there had been a mistake as to the personal characteristics of the candidate.

The European Court of Justice held that the provision in national law which resulted in the avoidance of a contract of employment which was not for a fixed term, was in breach of the Equal Treatment Directive. The court considered the intention of Article 2(3) and found that to allow the termination of an open ended contract of employment on the basis of the prohibition against night work would in practice undermine the aims of Article 2(3). The inability of the female employee to undertake night work was only a temporary situation.

“Having established that there is direct discrimination where the reason for the woman’s treatment is pregnancy, if the court was to reach a different decision in the context of a temporary contract, it would appear to be allowing justification of direct discrimination. This possibility throws into question the previously well established principle that there can be no objective justification of direct discrimination.”⁴⁴

Article 2(4) of Council Directive 76/207 states that “this Directive shall be without prejudice to measures to promote equal opportunity for men and women, in particular by removing existing inequalities which affect women’s opportunities in the areas referred to in Article 1 (1).”

Case law on this point is to be found in Commission v. France [1989] CMLR 663 under which a French law providing special rights for females (including leave when children were sick, extra days leave in respect of children at the start of the school year, time off for Mother’s day, and shorter working hours for women over 59) were held to be unlawful by the Court and not to equate to measures of

⁴⁴ Burrows, Noreen and Mair, Jane, European Social Law, (1996) Wiley, p. 156

positive discrimination permitted under article 2(4) of the Equal Treatment Directive.

The French government had not shown that the special provisions would promote equal opportunity for men and women.

The European Court has not fared well with this particular part of the Directive, but it is probably fair to say that there was something of the political about the decision. Presumably the leave days in respect of children were something which could easily have removed existing inequalities which affect women's opportunities. They decided to make a case out of shorter working hours for older women, or a day's holiday in respect of Mother's Day. However, the Court does not appear to be correct in its focus. Whilst equal opportunities should be promoted for men and women, it is a removal of existing inequalities and thus a positive statement in respect of women that is required.

The Court considered the position of positive discrimination again in the case of Kalanke v. Freie Hansestadt Bremen [1995] IRLR 660. A number of candidates sought a management post within the Bremen Public Service. After the due procedures had been followed, it was decided that there were two candidates of equal merit, namely Herr Kalanke and Frau Glismann. Local laws required that the female candidate should be given preference if females were under-represented in the employment.

Accordingly, the female candidate was promoted, but this did not sit well with the European Court of Justice. It was stated "national rules which guarantee women absolute and unconditional priority for appointment or promotion go beyond promoting equal opportunities and overstep the limits of the exception in Article 2(4)," at p. 667.

The judgement was extremely poorly received, and the matter was revisited in Marschall v. Land Nordrhein-Westfalen [1998] IRLR 39. This case concerned a quota regarding promotion. Two teachers had sought promotion, and a female teacher who was equally qualified against a male teacher was promoted in order that the women's quota could be satisfied. The male applicant took exception to this, and the matter was referred to the European Court of Justice.

However, in this case, the European Court of Justice declared that positive action could fall within Article 2(4) "If such a rule may counteract the prejudicial effects on female candidates a national rule which contains a saving clause does not exceed those limits if, in each individual case, it provides for male candidates who are equally as qualified as the female candidates a guarantee that the candidatures will be the subject of an objective assessment which will take account of all criteria specific to the individual candidates and will override the priority afforded to the female candidates when one or more of the criteria tilts the balance in favour of the male candidate," at p. 48.

In other words, 'we got it wrong', says the Court. All the European Court of Justice seems to be stating is that because of a hostility towards positive discrimination (perhaps akin to the current backlash in the United States) that the true meaning of the words in Article 2(4) was not applied in the Kalanke decision. The present case merely states that if the one candidate is better qualified than the other, then that candidate will receive the position.

Let us return to sickness. Handels-Og Kontorfunktionaerernes Forbund i Danmark (Larson) v. Dansk Handel and Service [1997] IRLR 643. In this case Ms. Larson took issue with Fotex Supermarked A/S following her dismissal due to a pregnancy related illness.

The facts of this case are interesting in that they pose the question whether it is contrary to the Equal Treatment Directive to dismiss a woman while her pregnancy related illness develops during her pregnancy, and continues after the expiry of her maternity leave.

The brief facts are that Ms. Larsson was off sick shortly after informing her employers that she was pregnant. Her first period of sick leave was relatively short, but her second period of sick leave lasted almost 4½ months until the commencement of her maternity leave. Having given birth, the employee took some twenty four weeks maternity leave, and tagged her annual leave onto the end of this. After this, she remained absent due to sickness associated with the pregnancy related illness which caused her to be absent for the second period.

The period of annual leave finished on 16th October 1992, but it was determined that the employee would not be able to return to work until 4th January 1993. In between those two periods, on 10th November 1992, Ms. Larsson's employment was terminated.

The European Court of Justice held that it is not discriminatory to dismiss a woman after her maternity leave has ended due to her pregnancy related illness, even if that illness arose during the pregnancy itself.

However, it should be borne in mind that this case was decided before The Pregnant Workers Directive came into force, and this was particularly noted by the European Court of Justice.

“The principle of equal treatment enshrined in the Directive does not, therefore, preclude account being taken of a woman's absence from work between the beginning of her pregnancy and the beginning of her maternity leave when calculating the period providing grounds for her dismissal under national law.

“It must, however, be noted that, in view of the harmful effects which the risk of dismissal may have on the physical and mental state of women who are pregnant, have recently given birth or are breast feeding, including the particularly serious risk of pregnant women may be prompted voluntarily to terminate their pregnancy, the Community Legislator subsequently provided, pursuant to Article 10 of Council Directive 92/85/EEC of 19th October 1992, on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have previously given birth or are breast feeding, for special protection to be given to women, by prohibiting dismissal during the period from the beginning of their pregnancy to the end of their maternity leave, save in exceptional cases unconnected with their condition. It is clear from the objective of that provision that absence during the protected period other than for reasons unconnected with the employee’s condition, can no longer be taken into account as grounds for subsequent dismissal. However, Directive 92/85 had not yet been adopted when Ms. Larsson was dismissed,” at p. 650.

In truth, this was an astonishing decision. Ms. Larsson was dismissed after effectively only four weeks of sickness, leaving aside her absence during the pregnancy period, the maternity leave, and her annual leave.

Relying on Hertz, it seems impossible to conceive that a so called comparable man would have been dismissed following the maternity leave period after a sickness absence of only four weeks.

Furthermore, as stated above, The Pregnant Workers Directive would now lead to a completely different outcome to this case, and the case has also been disapproved by the European Court of Justice itself.

One interesting point to consider is the United Kingdom’s possible difficulty with this decision in the light of Section 99, Employment Rights Act 1996, which

provides for automatically unfair reasons for dismissal in pregnancy connected reasons.

It is the cause of the unavailability for work which is important, not the unavailability for work itself. This does not seem such a difficult argument to unravel. After all, whilst it is perfectly possible to dismiss sick employees, those who conform to the definition of 'disabled' under the Disability Discrimination Act are allowed a significantly greater protection than those who do not, and they must not be treated differently simply on the grounds of the disability, unless there is significant justification, and unless the employer has complied with the duty to make reasonable adjustments.

It is admitted that this does differ from direct discrimination (where no justifiability is supposedly available), but it shows that the physical condition can move.

A person with significant absenteeism who is not disabled, is in a much worse position than one who is. Surely this is akin to the position of pregnancy.

If one were to accept the arguments in Wintemute's paper, then one can not imagine the difficulties that would flow in respect of justifiability. Most employers are already far from keen to incur additional cost, and many would willingly dispose of a pregnant employee rather than wait for her to return following her maternity leave.

The current disappointing position is summed up well by Bovis and Cnossen "From a social perspective, stereotyped assumptions have appeared as guiding rationale for continuing sex discrimination and unequal treatment and undermine full labour integration in the common market. From a legal perspective, the refusal to accept the legality of paternity leave; recognise full rights of part-time

workers; establish adequate schemes to implement equal pay for work of equal value in employment including female dominated occupations which have no male comparator; eliminate sex as a determinant factor for employment; and to end different pensionable ages for men and women all demonstrate that sex discrimination persists despite measures to eliminate it.”⁴⁵

Several of the problems highlighted in the paragraph above are now being addressed by the UK and European legislatures, and the recent decision in Levez v. T. H. Jennings [1999] IRLR 36 could have a dramatic effect upon the establishment of equal pay between men and women.

In Gillespie v. Northern Health and Social Services Board [1996] ICR498, the European Court of Justice was asked to rule on matters concerning both equal pay and equal treatment.

Essentially, the case concerned Mrs. Joan Gillespie and sixteen of her colleagues who had taken maternity leave from various health authorities in Northern Ireland.

Whilst away on maternity leave, the applicants received full weekly pay for four weeks, 90% of their pay for two weeks, and 50% of their pay for twelve weeks. Whilst the applicants were away on maternity leave, a backdated pay increase was made, and the applicants did not receive the increase. Furthermore, the applicants claimed that their pay should not have been reduced whilst they were away on maternity leave, stating that they should have received full pay.

So, the court was asked to rule on an issue which basically was political dynamite.

⁴⁵ Bovis, Christopher and Cnossen, Christine, Stereotyped assumptions versus sex equality: A socio-legal analysis of equality laws in the European Union, (1996) 12 International Journal of Comparative Labour Law and Industrial Relations 7, p. 23

The Court of Justice held that neither article 119 nor the directive required that women should continue to receive full pay during their maternity leave, and nor did it 'lay down any specific criteria for determining the amount of benefit to be paid to them during that period.... [so long as...] the amount payable could not, however, be so low as to undermine the purpose of maternity leave, namely the protection of women before and after giving birth,' at p. 513.

The Court of Justice took the view that there could be no comparison between a woman who was absent on maternity leave and a man who was absent on sick leave in terms of the pay that both would receive. It would not be possible to compare the situation of a man at work with that of a woman on maternity leave - 'they are in a special position which requires them to be afforded special protection, but which is not comparable either with that of a man or with that of a woman actually at work,' at p. 513.

But, it appears in itself discriminatory to suggest that the various types of leave can be treated differently. Surely the Court is confused in its assertion that one type of absenteeism is to be singled out for what, in many cases, is a lower rate of pay. The special treatment should afford no less status than the disabled man, even if he is not to be used as a comparator.

"The reasoning in the case is thin; the outcome inevitable. The Pregnant Workers' Directive in general, and, in particular, the levels of maternity pay which employers should be obliged to pay, was the outcome of a compromise between the member states; for the European Court of Justice to hold that, after all, full pay was payable throughout the pregnancy would have been politically unthinkable."⁴⁶

⁴⁶ Townshend-Smith, Richard J., Discrimination Law: Text Case and Materials, (1998) Cavendish, p. 201

This, of course, is the central issue. Women are unable to take advantage of maternity leave if the pay is inappropriate. The court's reluctance to set this level of pay at something approaching a sensible level is, to say the least, a dramatic hindrance.

In this country, the statutory entitlement is to six weeks at 90% of pay, with twelve weeks at about £57, and thereafter nothing.

In Brown v. Rentokil Limited [1998] ICR790, the applicant became ill some eight weeks after becoming pregnant. She was absent and never returned to work.

The employer's contract of employment contained a clause that anyone who was incapable of work for a period of more than 26 weeks would be dismissed, and Mrs. Brown was subsequently dismissed.

Mrs. Brown argued that she had been dismissed contrary to Articles 2(1) and 5(1) of the Equal Treatment Directive, and also that she had been unfairly dismissed contrary to the Employment Protection Consolidation Act 1978 (as it then was).

The employer argued that all were treated in the same manner under the contract of employment, which provided for dismissal after 26 weeks of ill health. The Court stated that the Directive "recognises the legitimacy, in terms of the principle of equal treatment, first, of protecting a woman's biological condition during and after pregnancy and, secondly, of protecting the special relationship between a woman and her child over the period which follows pregnancy and childbirth," at p. 824.

"It was precisely in view of the harmful effects which the risks of dismissal may have on the physical and mental state of women while pregnant, women who have

recently given birth or women who are breastfeeding, including the particularly serious risk that pregnant women may be prompted voluntarily to terminate their pregnancy, that the community legislature, pursuant to article 10 of council directive (92/85/EEC) of 19th October, 1992 on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently given birth or are breast feeding (10th individual directive adopted within the meaning of article 16 (1) of Directive (89/391/EEC)), which was to be transposed in to the laws of the member states no later than two years after its adoption, provided for special protection to be given to women, by prohibiting dismissal during the period from the beginning of their pregnancy to the end of their maternity leave. Article 10 of directive (92/85/EEC) provides that there is to be no exception to or derogation from, the prohibition of dismissal of pregnant women during that period, save in exceptional circumstances not connected with their condition,” at p. 825.

The Court continued “although pregnancy is not in any way comparable to a pathological condition (Webb, para. 25), the fact remains, as the Advocate General stresses in paragraph 56 of his opinion, a pregnancy is a period during which disorders and complications may arise compelling a woman to undergo strict medical supervision and, in some cases, to rest absolutely for all or part of her pregnancy. Those disorders and complications, which may cause incapacity for work, form part of the risks inherent in the condition of pregnancy and thus are a specific feature of that condition,” at p. 825.

“ ... dismissal of a female worker during pregnancy for absences due to incapacity for work resulting from her pregnancy is linked to the occurrence of risks inherent in pregnancy and must therefore be regarded as essentially based on the fact of pregnancy. Such a dismissal can affect only women and therefore constitutes direct discrimination on the grounds of sex,” at p. 826.

The European Court of Justice went on to state that dismissing a female worker at any time during her pregnancy would clearly be in breach of both articles 2(1) and 5(1) of the Equal Treatment Directive.

Interestingly, the European Court of Justice went on to consider the Larsson case, Handels-Og Kontorfunktionaerernes Forbund i Danmark v. Dansk Handel and Service [1997] ECR I - 2757, stating that that case had been disapproved.

The Court stated the contrary to its ruling in the Larsson case, "where a woman is absent owing to illness resulting from pregnancy or childbirth, and that illness arose during pregnancy and persisted during and after maternity leave, her absence not only during maternity leave but also during the period extending from the start of her pregnancy to the start of her maternity leave cannot be taken in to account for computation of the period justifying her dismissal under national law. As to her absence after maternity leave, that may be taken in to account under the same conditions as a man's absence, of the same duration, through incapacity for work," at p. 826.

It was also held that the contractual term permitting dismissal of employees of both sexes after 26 weeks would, in these circumstances, constitute direct discrimination.

Whilst the Court of Justice has served only to confuse itself, and subject itself to considerable criticism, the United Kingdom maternity rights now seem to be outstripping those of the previously less hostile European Court. Good examples of this are to be found in the following cases (although it is conceded that Halfpenny is not outstanding).

In Caledonia Investment and Property v. Caffrey [1998] IRLR 110, Mrs. Sandra Caffrey was dismissed by her employers following a bout of post-natal depression.

The contract of employment had continued to subsist, and the Employment Appeal Tribunal held “that if a pregnancy related illness arises during the relevant period, that is to say the period of maternity leave whether extended or not, which is the direct cause of dismissal in due course, as is the situation in the present case, then section 99(1) (a) is able to cover that position, even if it leaves an employer exposed for a considerable period of time to the consequences of having to keep such an employee who is ill for a pregnancy related reason on his books,” per LORD JOHNSTON, at p. 112.

The EAT went on to hold that if a woman is dismissed for an illness related to giving birth or being pregnant or both, then if that illness has arisen during the maternity leave period (even if the dismissal takes place after that period) it is a discriminatory dismissal. This is on the basis that at the time of the dismissal Mrs. Caffrey was suffering from an illness from which a man could not suffer, and thus she was being treated differently from her male counterparts.

In Halfpenny v. IGE Medical Systems Limited [1999] IRLR 177. Mrs. Marion Halfpenny was employed as a Regional Administrator. She became pregnant, and began to suffer from complications. Her contract of employment entitled her to paid sick leave of 30 weeks in any twelve month period, and she remained unfit to return to work.

She gave notice to the employers that she intended to return to work 29 weeks after the birth of the baby, and she gave further appropriate notice of her intention to return, being informed by the employers that that would be on 30th October, 1995.

Approximately a fortnight before that return date the applicant sought to delay her return to work on the grounds of her ill health, confirming that she was suffering from post-natal depression. Her employers allowed her to delay her return until 27th November, but she informed them that she doubted she would be able to return in November.

The employers declined to extend her period of absence any further, and they further declined to hold open her position.

The applicant claimed automatically unfair dismissal, wrongful dismissal, and sex discrimination.

The Court of Appeal held that Mrs. Halfpenny was correct in all respects. Following the decisions in Kwiksave Stores Limited v. Greaves and Crees v. Royal London Mutual Insurance, the process of exercising the right to return to work is complete once the appropriate notices have been given for the notified date of return. The appellant had therefore been dismissed when her contract was treated as having come to an end. Additionally, the Court of Appeal held that the company should have held open Mrs. Halfpenny's contract after the expiry of her maternity absence.

Furthermore, she had been "unlawfully discriminated against in that the employers made no attempt to procure medical evidence as to the likelihood of returning to work, and refused to allow her paid sick leave to which she was contractually entitled as they would have done with a man, as evidenced with the actual man with whom she sought to compare herself. That finding of unlawful discrimination is not and can not be challenged," per WARD, L. J. at p. 183.

But, the special protection available under UK law in s.99, relating to the employee taking maternity leave extended only to the 14 week period, although

this was on a strict construction of the statutory meaning of the maternity leave period.

Whilst this element of the decision may have merit, it is, once again, difficult to comprehend the basis on which the UK and EU maternity rights seek to apply different rules to what is essentially the same situation, i.e., a return to work.

Sandra Fredman⁴⁷ discusses the special protections available in terms of the type of equality which European Community Law seeks to achieve between men and women.

Formal equality, it is argued, is based upon a male model of employment, and is thus intrinsically discriminatory.

This means that the protective measures under European Law can perpetuate stereotypical ideas about male and female roles, and to remove all such protective legislation may advance formal equality between the sexes, but may not improve the real position of female employees on the ground.

I am inclined to agree with Sandra Fredman's observations that equality should be replaced by "directives containing specific rights thus pregnancy attracts rights for its own sake rather than on the basis of artificial comparisons" ⁴⁸

In Hofmann, the European Court of Justice stated that Article 2(3) dealt not only with the protection of the mother's biological condition during or after pregnancy until such time as her physiological and mental functions have returned to normal, but also at the special relationship between a woman and her child which may be

⁴⁷ Fredman, Sandra, European Community Discrimination Law: A Critique, (1992) 21 Industrial Law Journal 119

⁴⁸ Fredman, Sandra, European Community Discrimination Law: A Critique, (1992) 21 Industrial Law Journal 119, p. 134

disturbed by the multiple burdens which would ensue from simultaneous pursuit of employment.

Thus, the court recognises that the mother will have a certain biological condition during or after pregnancy, or both. It also accepts that the mother's physiological and mental functions will need time to return to normal.

Given these comments, (and leaving aside the fact that such comments would appear to perpetuate stereotyping), one finds it difficult to accept that the Court in Hertz can draw a line in the sand quite simply at the end of the maternity leave period.

On this wording, it would seem that the Court of Justice is arguing against itself, and one is led yet further down the route that Hertz was an economic response to an incredibly difficult question.

It is conceded that the Parental Leave Directive will go some way towards changing the position here, although it is unpaid within the United Kingdom. Our partners often have a different approach.

“All types of leave in the post birth period do not have to be labelled as either maternity or parental leave. For example, under Italian law, while maternity law lasts twelve weeks after the birth, dismissal of a woman on grounds related to pregnancy is outlawed for twelve months after the birth.”⁴⁹

Perhaps very worryingly, after over 20 years of development within the UK, the law surrounding pregnancy and maternity rights remains unclear, and there is a regular stream of cases before the national courts and the European Court of

⁴⁹ Kilpatrick, Clare, How long is a piece of string? European legislation of the post birth period, in 'Sex equality law in the European Union', Hervey, Tamara and O'Keeffe, David (eds), (1996) Wiley, p. 95

Justice seeking clarification of what are major issues to both employers and pregnant employees. An excellent insight into one of the factors which has led to this state of affairs is found in the following article:

“ the equal treatment principle leads to an inadequate consideration of the question of who should bear the social cost of pregnancy and childbearing. Because the principle translates into an obligation placed upon the individual employer, the courts are prompted to require justification for placing the cost of pregnancy on that employer. But this ignores the fact that sparing an ‘innocent’ employer leaves the whole cost with the woman and prevents any consideration of the potential cost-spreading role of the state.”⁵⁰

The rapid growth area of sex discrimination law is in the indirect field and we have lately heard much of the word ‘institutionalised’ in respect of discrimination issues.

In Griggs v. Duke Power Company 401US424(1971), Chief Justice Warren Burger stated “Congress has now provided that tests or criteria for employment or promotion may not provide equality of opportunity merely in the sense of the fabled offer of milk to the stork and the fox. On the contrary, Congress has now required that the posture and condition of the job seeker be taken in to account. It has - to resort again to the fable - provided that the vessel in which the milk is proffered be one all seekers can use. The ... act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation,” at p. 853 (para. 431).

This is much more difficult in practice, and calls (obviously) for a more US like approach, rather than that which has been favoured throughout the EU. The latter

⁵⁰ Fredman, Sandra, A difference with distinction: Pregnancy and Parenthood Reassessed, (1994) 110 LQR 106, p. 111

has been subject to great criticism by the feminist jurisprudential movement in that the special treatment which might need to be afforded to certain groups within society serves only to segregate those groups, and to confirm their position as 'underperformers'.

The special treatment afforded often "treats women as victims and devalues them."⁵¹ A further feminist jurisprudential criticism of equality laws is that they lead to female employees being offered equality with their male counterparts. This therefore makes the male position the norm.

As this chapter has shown, female jurisprudential writers have hit at the very heart of the problem: the role of the female. As Lucinda Findlay has said, "The fact that women bear children and men do not has been the major impediment to women becoming fully integrated into the public world of the workplace."⁵²

Considering Dekker, Sandra Fredman writes⁵³ that the argument that pregnancy is a condition affecting only women and as such dismissal constitutes sex discrimination on those grounds. This is surely not on the basis that it applies only to women.

If this is the case, would a man be able to claim special protection if having to take time off for a prostate operation? Does the law in effect fail to recognise the role that women play in social terms, and the interest that society as a whole should have in that? The answer is probably yes.

⁵¹ Lacey, N., Legislation against sex discrimination: questions from a feminist perspective, (1987) 14 *Journal of Law and Society* 411, p. 416

⁵² Findlay, Lucinda, Transcending Equality Theory: A Way Out of The Maternity and Workplace Debate, (1986) 86 *Columbia Law Review* 1118, p. 1119

⁵³ Fredman, Sandra, A Difference with Distinction: Pregnancy and Parenthood Reassessed (1994) 110 *LQR* 106

