

1992

Sex Discrimination on Grounds of Pregnancy in European Community Law: The Case of Great Britain

Ellen E. Hodgson

Follow this and additional works at: <https://ir.law.fsu.edu/jtlp>



Part of the International Trade Law Commons

Recommended Citation

Hodgson, Ellen E. (1992) "Sex Discrimination on Grounds of Pregnancy in European Community Law: The Case of Great Britain," *Florida State University Journal of Transnational Law & Policy*. Vol. 2: Iss. 1, Article 8.

Available at: <https://ir.law.fsu.edu/jtlp/vol2/iss1/8>

This Article is brought to you for free and open access by Scholarship Repository. It has been accepted for inclusion in Florida State University Journal of Transnational Law & Policy by an authorized editor of Scholarship Repository. For more information, please contact efarrell@law.fsu.edu.

SEX DISCRIMINATION ON GROUNDS OF PREGNANCY IN EUROPEAN COMMUNITY LAW: THE CASE OF GREAT BRITAIN

ELLEN E. HODGSON*

I.	INTRODUCTION.....	246
II.	EUROPEAN COMMUNITY AND BRITISH LEGISLATION GOV- ERNING SEX DISCRIMINATION RELATED TO PREGNANCY ..	247
	A. <i>The Equal Treatment Directive</i>	247
	B. <i>The Sex Discrimination Act 1975</i>	249
	C. <i>The Employment Protection (Consolidation) Act 1978</i>	251
III.	EUROPEAN COMMUNITY AND BRITISH CASE LAW RE- GARDING SEX DISCRIMINATION IN EMPLOYMENT ON GROUNDS OF PREGNANCY	254
	A. <i>The Test of Comparability: Turley v. Alders De- partment Stores Ltd.</i>	254
	B. <i>Substantial Equivalence: Hayes v. Malleable Working Men's Club</i>	255
	C. <i>The Protected Status Approach</i>	256
	1. <i>Stockton-on-Tees Borough Council v. Brown</i> .	257
	2. <i>The European Court of Justice and the Pro- tected Status of Pregnancy: Hertz and Dekker</i>	260
	3. <i>Dekker</i>	263
	D. <i>The Primacy of European Law and the Principle of Indirect Effect</i>	266
	E. <i>The Approach of the British Courts: Avoiding Distortion of the Meaning of British Statutes</i>	270
	1. <i>Webb v. EMO Air Cargo (UK) Ltd.</i>	272
	2. <i>Shomer v. B & R Residential Lettings Ltd.</i>	280
IV.	THE PREGNANCY DIRECTIVE.....	286

* Faculty of Law, University of Alberta. Member of the Alberta Bar. B.A., LL.B., University of Alberta; LL.M., University of Edinburgh.

I would like to thank Dr. Robert Lane of the Europa Institute at the University of Edinburgh for his comments on an earlier draft of this article. I appreciate the assistance given by Heidi E. Julien and Ernest D. Hodgson in proofreading an earlier manuscript.

A.	<i>Provisions of the Unamended Draft Pregnancy Directive</i>	288
B.	<i>January 1991 Amendments to the Draft Pregnancy Directive</i>	290
C.	<i>Council of Ministers Amendments in December 1991</i>	291
D.	<i>May 1992 Developments Regarding the Proposed Pregnancy Directive</i>	293
E.	<i>The Pregnancy Directive</i>	293
F.	<i>Comments on the Pregnancy Directive</i>	297
V.	CONCLUSION.....	300
VI.	ENDNOTE	301

I. INTRODUCTION

SEX discrimination law on account of pregnancy is an area of vital importance to working women and their employers in Great Britain.¹ Unfortunately, the extraordinary array of domestic statutory provisions and their interplay with European Community Law,² together with inconsistent interpretation of these provisions in the courts, make it a challenge for pregnant women to claim their statutory employment rights. This has important consequences to both women and their employers. If women do not return to work, their skills are lost or may become downgraded,³ and their employers will have to incur the cost of training other employees.

This Article examines the statutory provisions of British and Community Law regarding protection for women against sex discrimination by employers on grounds of pregnancy. A discussion follows of some recent cases in the European Court of Justice and the British courts, which argues that the interpretation of the Sex Discrimination

1. "Great Britain" means England, Scotland, and Wales due to the provisions of the Union with Scotland Act, 1706, ch. 11, preamble, art. 1 (Eng.). 17 HALSBURY'S STATUTES, EUROPEAN COMMUNITIES at 30 (4th ed. 1986). See also the Union with England Act, 1707, ch. 7 (Scot.), 22 STAIR MEMORIAL ENCYCLOPEDIA, THE LAWS OF SCOTLAND 55 (Thomas Smith ed., 1987). The "United Kingdom" means Great Britain and Northern Ireland. Interpretation Act, 1978, ch. 30, § 5, sched.1 (Eng.). Throughout this article a distinction is maintained between legislative provisions and statistics pertaining to Great Britain and those pertaining to the United Kingdom.

2. The term "Community Law" will be used throughout this Article to refer to the law of the European Community. The United Kingdom joined the European Economic Community in 1973 and thereafter became obliged to enact various provisions to comply with the (Treaty Establishing the European Economic Community), Mar. 25, 1957, No. 4300, reprinted in 298 U.N.T.S. 3 [hereinafter EEC TREATY].

3. SUSAN McRAE & W.W. DANIEL, POLICY STUDIES INSTITUTE, FIRST FINDINGS MATERNITY RIGHTS: THE EXPERIENCE OF WOMEN AND EMPLOYERS 6 (1991).

Act 1975 (1975 Act)⁴ by British courts is not congruent with Community Law. In addition, this Article presents possible challenges to British law and suggestions for reform in this area. It is further argued that British legislation regarding prohibition against sex discrimination in employment related to pregnancy, and its interpretation by the British courts, does not satisfy the obligations under the Equal Treatment Directive. Finally, a brief discussion ensues of the history of the Pregnancy Directive, with an analysis of its importance to the protection of the employment rights of pregnant women.

II. EUROPEAN COMMUNITY AND BRITISH LEGISLATION GOVERNING SEX DISCRIMINATION RELATED TO PREGNANCY

A. *The Equal Treatment Directive*

The Equal Treatment Directive⁵ was adopted by the Council of the European Communities in 1976 with the purpose of putting the principle of equal treatment for men and women into effect regarding access to employment, promotion, vocational training, working conditions, and social security.⁶ The Equal Treatment Directive was intended to regulate the areas not covered by the Equal Pay Directive⁷ in carrying out the Council's social action program objectives.⁸ The Equal Treatment Directive has vertical effect, meaning that individuals may rely on its provisions directly to enforce their rights against the state, its emanations, organs, and agencies.⁹

Articles 2(1) and 2(3) of the Equal Treatment Directive are critical provisions in sex discrimination law related to pregnancy. They state:

1. For the purposes 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.

4. Sex Discrimination Act, 1975, ch. 65 (Eng.).

5. Council Directive 76/207, 1976 O.J. (L 39) 123 [hereinafter Equal Treatment Directive].

6. *Id.* at art. 1.

7. Council Directive 75/117, 1975 O.J. (L 45) 19 [hereinafter Equal Pay Directive].

8. The Council passed a resolution on January 21, 1974, regarding a social action program. See *Council Resolution Concerning a Social Action Programme*, 1974 O.J. (C 13) 1; EVELYN ELLIS, EUROPEAN COMMUNITY SEX EQUALITY LAW 134 (1991). The preamble to the Equal Treatment Directive stated that the definition and implementation of the principle of equal treatment in matters of social security was to be addressed in later instruments.

9. Directives are a type of secondary Community Law which are addressed to Member States, rather than being of general application. Directives do not create binding legal obligations within Member States as they stand, but require Member States to enact legislation and put them into effect by a stipulated date. See ELLIS, *supra* note 8, at 38-39.

3. This Directive shall be without prejudice to provisions concerning the protection of women, particularly as regards pregnancy and maternity.¹⁰

Article 3 of the Equal Treatment Directive prohibits sex discrimination for access to employment, and requires Member States to take the necessary measures to ensure that legislation, collective agreements, and individual contracts of employment that are contrary to the principle of equal treatment are abolished or amended.¹¹ Significantly, with respect to dismissal of women for reasons related to pregnancy, Article 5(1) of the Directive stipulates:

1. Application of the principle of equal treatment with regard to working conditions, including the conditions governing dismissal, means that men and women shall be guaranteed the same conditions without discrimination on grounds of sex.¹²

The United Kingdom is obliged as a Member State under Article 6 of the Directive to introduce measures needed to enable persons who consider themselves wronged by the failure to apply the principle of equal treatment as provided in Articles 3, 4, and 5 to pursue their claims by judicial process. This is significant since, arguably, the statutory conditions stipulated in the Employment Protection (Consolidation) Act 1978 (EPCoA),¹³ which create qualifying periods in order for a pregnant woman to have the right to claim compensation for unfair

10. Equal Treatment Directive, *supra* note 5, at arts. 2(1), 2(3).

11. Article 3 of the Equal Treatment Directive states:

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 of activity, and to all levels of the occupational hierarchy.

2. 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 shall be revised; and that where similar provisions are included in collective agreements labour and management shall be requested to undertake the desired revision.

12. *Id.* at art. 5(1).

13. 1978, ch. 44 (Eng.).

dismissal, are a violation of the U.K.'s obligations under the Article.¹⁴ There is no statement in the Directive permitting Member States to set conditions for eligibility to claim these rights under national legislation.

B. *The Sex Discrimination Act 1975*

The 1975 Act¹⁵ prohibits discrimination in all aspects of employment and requires equal opportunities generally. The concept of indirect sex discrimination was introduced into British law by section 1(1)(b) of the Act. The concept of indirect discrimination in equal treatment law, as it pertains to employment, refers to an instance where an employer's policy does not differentiate on the forbidden ground of sex, but the policy has the effect of doing so.¹⁶ Direct discrimination occurs in the instance where a person is less favorably treated on the grounds of sex or marital status. Section 1(1) of the 1975 Act provides that:

- (1) A person discriminates against a woman in any circumstances relevant for the purposes of any provision of this Act if -
- (a) on the ground of her sex he treats her less favourably than he treats or would treat a man, or

14. See *R. v. Secretary of State for Employment ex parte Equal Opportunities Comm'n, 20 INDUS. REL. L. REP. 493 (Q.B. Div'l Ct. 1991)* [hereinafter *R. v. Secretary of State*] wherein the Equal Opportunities Commission sought judicial review of a decision by the Secretary of State declining to accept that the U.K. is in breach of its Community Law obligations due to the provisions of the EPCoA. The E.O.C. took the position that the qualifying conditions for: (1) the right not to be unfairly dismissed, (2) compensation for unfair dismissal, and (3) statutory redundancy payments for part-time workers under the EPCoA, are discriminatory and conflict with the U.K.'s obligations under Community Law. *Id.* at 495. The Divisional Court held that the Secretary of State had objectively justified the scheme and that Article 119 of the EEC Treaty, the Equal Pay Directive, and the Equal Treatment Directive had not been infringed. *Id.* at 505. The court did accept that the E.O.C. has standing to challenge the Secretary of State's decision not to introduce legislation changing the statutory qualifying conditions, and accepted that statutory dismissal compensation is "pay" under Article 119 of the EEC Treaty and is challengeable under Community Law. *Id.* at 497, 505; see also *Highlights: December 1991, 20 Indus. Rel. L. Rep. 485, 486 (1991)*. Arguably, a challenge could also be brought with respect to the statutory conditions for claiming statutory redundancy pay and compensation for unfair dismissal related to pregnancy on the basis that they contravene the Equal Treatment Directive, arts. 5 and 6. See: *EC Law Reaching the Parts UK Law Cannot Reach, EQUAL OPPORTUNITIES REV.*, Sept./Oct. 1991, at 19, 24-25.

15. Sex Discrimination Act, 1975, ch. 65 (Eng.). This statute amended the Equal Pay Act, 1970, ch. 41 (Eng.). The two statutes are supposed to be read together, so far as possible, to obtain a harmonious result. See T.K. Hervey, *Justification for Indirect Sex Discrimination in Employment: European Community and United Kingdom Law Compared*, 40 INT'L & COMP. L.Q. 807, 817 (1991). Section 87 of the 1975 Act and section 11(3) of the Equal Pay Act 1970 each provide that the 1975 Act does not pertain to Northern Ireland. Accordingly, they pertain only to Great Britain.

16. Hervey, *supra* note 15, at 807.

(b) he applies to her a requirement or condition which he applies or would apply equally to a man but -

(i) which is such that the proportion of women who can comply with it is considerably smaller than the proportion of men who can comply with it, and

(ii) which he cannot show to be justifiable irrespective of the sex of the person to whom it is applied, and

(iii) which is to her detriment because she cannot comply with it.¹⁷

It should be noted that section 2(1) of the Act provides that section 1 and the provisions in Parts II and III pertaining to sex discrimination against women are to be read as applying equally to the treatment of men.¹⁸ However, this is subject to the proviso in section 2(2) that no account is to be taken of special treatment afforded to women regarding pregnancy or childbirth in the application of this principle. Sections 1(1) and 3(1)¹⁹ are subject to section 5(3), which provides that the comparison of the cases of persons of different sex or marital status "must be such that the relevant circumstances in the one case are the same, or not materially different, in the other."²⁰

Section 6 sets out the requirement of equal treatment in employment. It provides that:

(1) It is unlawful for a person, in relation to employment by him at an establishment in Great Britain, to discriminate against a woman -

(a) in the arrangements he makes for the purpose of determining who should be offered that employment, or

(b) in the terms on which he offers her that employment, or

(c) by refusing or deliberately omitting to offer her that employment.

(2) It is unlawful for a person, in the case of a woman employed by him at an establishment in Great Britain, to discriminate against her

(a) in the way he affords her access to opportunities for promotion, transfer or training, or to any other benefits, facilities or services, or by refusing or deliberately omitting to afford her access to them, or

(b) by dismissing her, or subjecting her to any other detriment.²¹

17. Sex Discrimination Act, 1975, ch. 65, §1(1) (Eng.).

18. *Id.* at § 2(1).

19. *Id.* at §§ 1(1), 3(1). These sections prohibit employment discrimination on grounds of marital status against married persons of either sex.

20. *Id.* at § 5(3).

21. *Id.* at § 6.

Interestingly, section 6 previously excluded the application of these subsections in a situation where the person was employed in a private household or by an employer with five or fewer employees, other than with regard to employment provisions regarding death or retirement. However, the U.K. had to delete these provisions after the European Commission successfully argued in the European Court of Justice that these provisions contravened the U.K.'s obligations under the Equal Treatment Directive.²²

C. *The Employment Protection (Consolidation) Act 1978*

The provisions of the EPCoA are tremendously complex and contain many notice requirements that are traps for the unwary, as failure to comply strictly with them deprives a woman of the right to return to work following maternity leave.²³ This Article will not exhaustively canvas the provisions of this extraordinarily complex statute.²⁴ For our purposes, it is important to observe that the EPCoA provides three types of maternity rights.

First, sections 33(1) and 45 of the EPCoA provide that an employee, who is absent from work wholly or in part due to pregnancy or childbirth, has the statutory right to return to the same job or an equivalent job within twenty-nine weeks of confinement.²⁵ Section 56 of the EPCoA provides that the failure to permit a woman to return to work in accordance with the Act is treated as a dismissal. The right to return to work is subject to provisions excluding the application of the deemed dismissal provisions to employers with five or fewer em-

22. Case 165/82, *Commission v. United Kingdom*, 1983 E.C.R. I-3431. The European Court of Justice declared that the U.K. had failed to fulfill its obligations under the treaty by excluding employment in a private household, or in cases where the number of persons employed does not exceed five from the application of the principle of equal treatment in the Equal Treatment Directive. *Id.* at I-3450. The U.K. had also failed to adopt measures necessary to ensure that provisions violating this principle in collective agreements and rules governing independent professions and occupations be declared void or amended. *Id.* Various provisions restricting access by men to training and the occupation of midwifery were held not to contravene the U.K.'s obligations under the Directive. *Id.* The amending statute, the Sex Discrimination Act 1986, ch. 59, § 1(1), provides that the subsections excluding undertakings of five employees or less from the provisions of § 6(1) and (2) of the Sex Discrimination Act 1975 shall cease to have effect.

23. For example, see the Employment Appeal Tribunal decision in *Institute of the Motor Industry v. Harvey*, 21 INDUS. REL. L. REP. 343 (EAT 1992) (U.K.). The case is discussed in *Constructive Dismissal and Maternity Rights*, EQUAL OPPORTUNITIES REV., July/Aug. 1992, at 39.

24. The EPCoA also contains complex provisions regarding maternity pay. A discussion of maternity pay and maternity allowance is outside the parameters of this Article. See THE HOUSE OF COMMONS HEALTH COMMITTEE, *1 Maternity Services Report Together With Appendices and the Proceedings of the Committee*, Feb. 13, 1992.

25. *Maternity Rights: The Right to Return to Work*, EQUAL OPPORTUNITIES REV., May/June 1990, at 10, 10.

ployees in certain circumstances. This is the case where the employer has five or fewer employees immediately prior to a woman's maternity leave, and it is not reasonably practical for the employer to allow her to return to work or for him or an associated employer to offer her employment under an employment contract meeting certain conditions.²⁶

Second, the Employment Act 1980²⁷ amended the EPCoA so that pregnant workers have the right to leave with pay to obtain antenatal care. This particular right does not have any minimum hours of work, length of employment, or level of pay requirements to qualify.²⁸

Third, there is a general right not to be dismissed due to pregnancy or for reasons associated with pregnancy, which is subject to various exceptions. Section 60(1) of the EPCoA stipulates that dismissal of a woman because she is pregnant or for any reason connected with her pregnancy is unfair, except for one of the following reasons:

- (a) that at the effective date of termination she is or will have become, because of her pregnancy, incapable of adequately doing the work which she is employed to do;
- (b) that, because of her pregnancy, she cannot or will not be able to continue after that date to do that work without contravention (either by her or her employer) of a duty or restriction imposed by or under any enactment.²⁹

In order for a pregnant woman to have the right to be protected against dismissal under section 60(1), there are important minimum lengths of employment and hours of work conditions set down in the EPCoA. The protection only arises where the woman has continu-

26. Employment Protection (Consolidation) Act, 1978, ch. 44, § 56 A(1) (Eng.). In addition to this exception which applies only to small firms, there is a further exception to section 56 provided in section 57(2) which applies to all firms. *Id.* This provides that section 56 does not apply if it is not reasonably practicable for the employee to adequately do the work she was employed to do or the employer or an associated employer offers her employment and the woman accepts or unreasonably refuses that offer. Sections 60 (1) and (2) require that the work to be performed under the contract is of a kind which is suitable in relation to the employee under the circumstances; and that the provisions of the contract regarding the capacity and place where she is to be employed, and the other terms and conditions of her employment, are not substantially less favorable to her than if the woman had returned to work in accordance with section 45(1) of the EPCoA. *Id.* at § 60.

27. 1980, ch. 42, § 13 (Eng.).

28. HOUSE OF LORDS, SELECT COMMITTEE ON THE EUROPEAN COMMUNITIES, PROTECTION AT WORK OF PREGNANT WOMEN AND WOMEN WHO HAVE RECENTLY GIVEN BIRTH, AND CHILD CARE, Memorandum by the Equal Opportunities Commission on the EC's Proposed Directive on Pregnant Women at Work 16, 17 (1991) [hereinafter PROTECTION OF PREGNANT WOMEN].

29. Employment Protection (Consolidation) Act, 1978, ch. 44, § 60(1)(a)-(b) (Eng.).

ously been employed by the same employer for two years if she worked more than sixteen hours per week, and where she has been employed by the same employer for five years if she worked between eight and sixteen hours per week.³⁰ If these conditions are met and the various exceptions to this right do not apply, then the dismissal is automatically unfair, and the burden of proof is on the employer to establish that he acted reasonably in dismissing her.³¹

Arguably, a case could be made that these qualifying periods contravene Articles 5 and 6 of the Equal Treatment Directive.³² The Conservative Government committed itself, in its April 1992 election manifesto, to eliminating these qualifying periods³³ for unfair dismissal due to pregnancy, but no legislation has yet been introduced to implement the promised change.

Surely, the mere fact that the employer is a small business cannot justify excluding the right of a woman to return to work following childbirth. Refusal to hire a pregnant woman due to the adverse financial consequences to the employer was held to violate Articles 2 and 3 of the Equal Treatment Directive in *Dekker v. Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus*,³⁴ discussed below. Surely, the same reasoning applies to a small business that refuses to permit a woman to return to work. Also, a case could be made that this exception for businesses with five or fewer employees, which is analogous to the one held to contravene the Equal Treatment Directive in *Commission v. United Kingdom of Great Britain and Northern Ireland*,³⁵ violates the principle of equal treatment in the Directive.³⁶

30. *Id.* at §§ 33(3)-(4); *id.* at sched. 13, ¶¶ 5-6.

31. PROTECTION OF PREGNANT WOMEN, *supra* note 28, at 17.

32. See *R. v. Secretary of State*, *supra* note 14, and accompanying text.

33. See *Not in Labour: Cab Evidence on Pregnancy, Dismissal and Employment*, NAT'L ASS'N OF CITIZENS ADVICE BUREAUX, E/4/92, 1 (June 1992).

34. Case 177/88, 1990 E.C.R. I-3941, I-3973 [hereinafter *Dekker*].

35. Case 165/82, 1983 E.C.R. at I-3431.

36. The importance of this provision should not be underestimated, as many working women are employed by small businesses. In his evidence before the European Communities Committee on the Draft Pregnancy Directive, Hon. Eric Forth, Parliamentary Under-Secretary of State, Department of Employment, expressed the desire to have maximum flexibility in employing people in the interim where there is a provision for return to work:

It is also certainly the case that even under our present arrangement these provisions bear down much more heavily on small firms than they do on large. If you have a payroll of only seven people or only five people — most businesses in this country in fact do, and two-thirds of all businesses have only one or two people, and 96 per cent of all businesses have fewer than 20 employees — in that circumstance, if you have a woman employee who then becomes pregnant and has to leave in order to have the child and then wishes to exercise her right to return, it is obviously more difficult and

III. EUROPEAN COMMUNITY AND BRITISH CASE LAW REGARDING SEX DISCRIMINATION IN EMPLOYMENT ON GROUNDS OF PREGNANCY

A. *The Test of Absolute Comparability: Turley v. Allders Department Stores Ltd.*

At one time, British courts took the position that a woman could not bring a sex discrimination claim against her employer based on pregnancy. For example, the majority decision of the Employment Appeal Tribunal (EAT) in *Turley v. Allders Dept. Stores Ltd.*³⁷ held that dismissal of a woman due to pregnancy was not covered by the definition of discrimination against women set out in the 1975 Act, section 1; thus, it did not constitute unlawful discrimination. The majority held that it was not possible to compare "like with like" to see if the woman was less favorably treated than a man since a pregnant woman is no longer just a woman but is "with child," and there was no masculine equivalent.³⁸

This approach has been described as a requirement of "absolute comparability," but has now been discredited. On this view, detrimental treatment of a woman related to her pregnancy cannot be discrimination because the 1975 Act requires comparison of the man's and the woman's situation, which is impossible because only women can become pregnant.³⁹

In contrast, the approach of the minority in *Turley* is that the dismissal of a woman on the ground of pregnancy may constitute direct or indirect sex discrimination under the 1975 Act. On this view, it should be asked whether the woman's pregnancy incapacitated her in her job, and whether the employer would have treated differently a man who required time off from his job for a medical condition, but

more burdensome for a small employer to cope with this and to make the appropriate arrangement than it is for a very large one. Since I also have another hat as the minister responsible for small businesses, I am very conscious of this, my Lord Chairman. I therefore would always want to minimize the potential burden or inconvenience caused to small businesses as far as it is reasonable to do so. That is bearing in mind that that is not to say that small businesses should be allowed to escape responsibilities in the health and safety area particularly or in this kind of area. I do not say that for a moment. There is however a matter of balance. It applies particularly, I think, to the small businesses and probably particularly at a time like this when it is so difficult for business of all kinds to survive and to prosper. That is a very real factor in our judgment.

PROTECTION OF PREGNANT WOMEN, *supra* note 28, Minutes of Evidence, at 11.

37. 9 INDUS. REL. L. REP. at 4 (EAT 1979) (U.K.) [hereinafter *Turley*].

38. *Id.* at 5.

39. Ivan Hare, Commentary, *Pregnancy and Sex Discrimination*, 20 INDUS. L.J. 124 (1991).

was not incapacitated in his job. No protection would be given to the woman under section 1(1)(a) of the 1975 Act — the direct sex discrimination section — if the employer proves that the man would not be treated more favorably.⁴⁰

Dismissal based on pregnancy could also constitute indirect discrimination under section 1(1)(b) of the 1975 Act. In this case, the question to ask is whether an employer's dismissal for pregnancy places an implied term into the woman's contract which is such that the proportion of women who can comply with it is considerably smaller than the proportion of men who can comply with it. If so, the woman has been indirectly discriminated against. Ms. Smith, the sole dissenter in *Turley*, maintained the protection afforded to a woman who successfully brought a claim under sections 1(1)(a) or 1(1)(b) of the 1975 Act would apply from the first day of her employment, in contrast to a woman who brought a claim under the EPCoA, which has a length of service requirement.⁴¹ In her view, the protection under the EPCoA differs from that given under the 1975 Act. The 1975 Act would give a more limited right than the EPCoA, in that the 1975 Act protection rests on a comparison with other employees. It is "a right not to be singled out for dismissal for pregnancy — a female condition — as distinct from other medical conditions."⁴² The protection given under section 60 of the EPCoA is automatic, provided the service requirements are met, unless the exceptions under section 60(a) or (b) are applicable.⁴³

*B. Substantial Equivalence: Hayes v. Malleable
Working Men's Club*

Arguably, the 1975 Act does not require the test of "absolute comparability" adopted by the majority in *Turley*, but instead requires "substantial equivalence." This is because section 2(2) of the 1975 Act makes express reference to pregnancy, and it stipulates that in the application of subsection (1), which provides that various provisions regarding sex discrimination against women are to be read as applying equally to men, that "no account shall be taken of special treatment afforded to women in connection with pregnancy or childbirth."⁴⁴

If Parliament had intended that a test of absolute comparability adopted by the majority in *Turley* be used, this section would not have been included in the 1975 Act. As well, section 5(3) requires that

40. *Turley*, 9 INDUS. REL. L. REP. at 6.

41. *Id.*

42. *Id.*

43. *Id.*

44. Sex Discrimination Act, 1975, ch. 65, § 2(2) (Eng.).

comparisons under section 1(1) "must be such that the relevant circumstances in the one case are the same, or not materially different, in the other."⁴⁵ On this argument, the 1975 Act requires substantial comparability between the situation of the man and the woman.⁴⁶

This was the approach of the EAT in *Hayes v. Malleable Working Men's Club and Institute*⁴⁷ which was discussed and approved by the English Court of Appeal in *Webb v. EMO Air Cargo (UK) Ltd.*,⁴⁸ discussed below. *Hayes* pertained to two appeals by female employees dismissed from their work after they informed their employer that they were pregnant. Neither woman had sufficient service to meet the length of employment requirements for their dismissal to be rendered statutorily unfair under sections 60 or 57 of the EPCoA. Accordingly, their rights for redress depended on their ability to claim sex discrimination under the 1975 Act⁴⁹ and Community Law.

The EAT distinguished the reasoning of the majority in *Turley* on the basis that it was too bare of factual content to be applied by analogy to the circumstances of any other case. Alternatively, the EAT decided the minority approach in *Turley* is appropriate, which is that dismissal of a woman on grounds of pregnancy may constitute direct or indirect sex discrimination under the 1975 Act. The requirement in section 5(3) of the 1975 Act that the situations of the comparators be the same or not materially different can encompass the circumstances of a sick male employee and a pregnant woman which, although not strictly the same, may be regarded as situations that lack any material difference.⁵⁰ Thus, no principle of law prevented the application of the 1975 Act to claims by a woman based on direct or indirect sex discrimination on grounds related to her pregnancy. The EAT did not find it necessary to address additional arguments based on European law in the circumstances.

C. *The Protected Status Approach*

There is an additional approach to the requirement of absolute comparability in *Turley*, and the test of substantial comparability involving comparing a sick man to a pregnant woman adopted in *Hayes* and *Webb*. The third view is that unfavorable treatment of a woman due to pregnancy is a distinction based on sex and is therefore unlaw-

45. *Id.* at § 5(3).

46. Hare, *supra* note 39, at 126-27.

47. 14 INDUS. REL. L. REP. at 367 (EAT 1985) (U.K.).

48. 1 C.M.L.R. 793 (H.L. 1992) (U.K.).

49. *Hayes*, 14 INDUS. REL. L. REP. at 368.

50. *Id.* at 370.

ful. Under this view, pregnant women are a protected group.⁵¹ Arguably, the "protected status" approach is the correct approach because it is the view taken in two decisions of the European Court of Justice. As well, an argument can be made that it is also the approach of the House of Lords on sex discrimination based on pregnancy in employment situations.

1. *Stockton-on-Tees Borough Council v. Brown*

The House of Lords' decision in *Stockton-on-Tees Borough Council v. Brown*⁵² pertained to the unfair dismissal of a pregnant woman under sections 57(3) and 60 of the EPCoA. Mrs. Brown commenced employment in 1983. Her employer then invited all staff to apply for positions under a revised scheme employing fewer people. Mrs. Brown was one of four applicants for three positions, and one person would have to be made redundant. She was pregnant at the time of her interview and was made redundant, although there was no criticism of her performance. Also, a successful applicant had less seniority than Mrs. Brown. The principal reason for her redundancy was that for six or eight weeks, while she was on maternity leave, she would have been unable to perform her duties under the new twelve month contract.

Section 57(1) of the EPCoA provides that the employer must justify the reason for dismissal of the employee in order to determine whether the dismissal was fair or unfair. Section 57(3) is subject to section 60, and states that determination of the issue concerning the fairness of the dismissal depends on whether the employer acted reasonably under the circumstances in treating it as a sufficient reason for dismissing the employee.⁵³ As we have seen, section 60 automati-

51. Michael Rubenstein, *Understanding Pregnancy Discrimination: A Framework for Analysis*, EQUAL OPPORTUNITIES REV., Mar./April 1992, at 22, 24-25.

52. [1988] 2 All E.R. 129 (H.L. 1988).

53. Section 57 of the EPCoA reads:

(1) In determining for the purposes of this Part whether the dismissal of an employee was fair or unfair, it shall be for the employer to show - (a) what was the reason (or, if there was more than one, the principal reason) for the dismissal, and (b) that it was a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which that employee held.

(2) In subsection (1)(b) the reference to a reason falling within this subsection is a reference to a reason which - (a) related to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do, or (b) related to the conduct of the employee, or (c) was that the employee was redundant, or (d) was that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of

cally makes a dismissal based on pregnancy unfair, subject to various exceptions, including the case where the woman would have been incapable of adequately doing her work at the date of termination, or if she would not be able to do her work without contravention of a duty or restriction imposed by enactment.

The Industrial Tribunal found in Mrs Brown's favor regarding her complaint of unfair dismissal. However, in the EAT and the Court of Appeal, her argument that the dismissal was deemed unfair by virtue of section 60 of the EPCoA was rejected. It was held that where the principal reason for dismissal was redundancy, the fairness of the dismissal was to be determined by section 57(3) without considering section 60.⁵⁴

In the House of Lords, Griffiths, L.J., rejected this construction of the EPCoA. He held that the combined effect of sections 57 and 60 is that when an employer decides which of various employees to make redundant, the inconvenience that will result from the fact that one of them is pregnant, and will require maternity leave, must be ignored. If the employer makes that absence the factor which determines a pregnant woman's dismissal, the dismissal is deemed unfair.

Griffiths held specifically that:

Section 34 (now s.60) must be seen as a part of social legislation passed for the specific protection of women and to put them on an equal footing with men. 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, but this is the price that has to be paid as a part of the social and legal recognition of the equal status of [sic] women in the workplace. If an employer dismisses a woman because she is pregnant and he is not prepared to make the arrangements to cover her temporary absence from work he is deemed to have dismissed her unfairly. I can see no reason why the same principle should not apply if in a redundancy situation an employer selects the pregnant woman as the victim of redundancy in order to avoid the inconvenience of covering her absence from work in the new employment he is able to offer others who are threatened

a duty or restriction imposed by or under an enactment.

(3) Where the employer has fulfilled the requirements of subsection (1), then, subject to sections 58 to 62, the determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend on whether the employer can satisfy the tribunal that in the circumstances (having regard to equity and the substantial merits of the case) he acted reasonable [sic] in treating it as a sufficient reason for dismissing the employee.

54. *Stockton*, [1988] 2 All E.R. at 130-31.

with redundancy. It surely cannot have been intended that an employer should be entitled to take advantage of a redundancy situation to weed out his pregnant employees.⁵⁵

On the facts of this case, the employee's need for maternity leave was the reason for her selection for dismissal on grounds of redundancy. Since this was a reason connected with her pregnancy within the meaning of section 60 of the EPCoA, it was deemed to be an unfair dismissal. Accordingly, the appeal was allowed and the case remitted to the Industrial Tribunal to determine compensation.⁵⁶

Several facts are noteworthy regarding this case. First, the House of Lords did not find it necessary to draw comparisons between how a pregnant woman was treated compared to an ill man. Instead, the dismissal was deemed unfair since the employer selected the pregnant woman for redundancy because of the inconvenience that would result because of her requirement for maternity leave. Admittedly, the House of Lords did not hold that the effect of section 60 is to make every instance of dismissal of a pregnant woman as redundant as an unfair dismissal. It held that some instances of redundancy are not connected with pregnancy, such as where her job ceases to exist and no possible alternative employment exists, or where she is chosen for dismissal by the application of a criterion such as last in, first out.⁵⁷

However, the principle established in the case — that an employer is forbidden under the EPCoA from selecting a pregnant employee for redundancy because of her need for maternity leave — shows a disposition by the House of Lords to treat pregnancy as a protected status. Griffiths rejected the view of Croom-Johnson, L.J., in the Court of Appeal that the pregnancy was only a remote cause of the dismissal: "The employee was selected for dismissal on the ground of redundancy because she needed maternity leave to give birth, and if that is not a reason connected with her pregnancy I do not know what is."⁵⁸ Although the 1975 Act and Community Law were not at issue in this case, and since the length of service requirement to be afforded protection under the EPCoA was met, it is arguable that this case shows a disposition by the House of Lords to interpret social legislation passed specifically to protect women so as to place pregnant employees on an equal footing with men.

55. *Id.* at 133.

56. *Id.* at 134.

57. *Id.*

58. *Id.* at 132.

2. *The European Court of Justice and the Protected Status of Pregnancy: Hertz and Dekker*

There are two cases of the European Court of Justice which establish that pregnancy provides a "protected status" under the Equal Treatment Directive. They are *Handels- og Kontorfunktionærernes Forbund i Danmark v. Dansk Arbejdsgiverforening (Hertz)*⁵⁹ and *Dekker*.⁶⁰ These cases establish that a dismissal based on pregnancy is regarded as direct discrimination *per se* under the Equal Treatment Directive, and that a refusal to employ a woman because of the financial consequences to the employer of her maternity leave also constitutes direct sex discrimination. The problem arises in the approach taken by the Court of Appeal in *Webb*⁶¹ discussed below, wherein the Court of Appeal distinguished *Dekker* and *Hertz*. It is contended that the Courts in the United Kingdom are obliged under Community Law to follow the decisions in *Dekker* and *Hertz* which give a protected status to pregnancy, and not to follow the substantial comparability approach used by the Court of Appeal in *Webb*.

Hertz is a significant case regarding the applicability of the Equal Treatment Directive to dismissals resulting from absences due to illness originating in pregnancy or confinement. The facts of this case were that Mrs. Hertz gave birth following a pregnancy involving complications which required her to be on sick leave, in addition to maternity leave, with the consent of her employer. After returning to work at the expiration of her maternity leave, Mrs. Hertz had no health problems for some months. She then took sick leave totalling 100 days during a one year period for an illness which was a consequence of her pregnancy and confinement.⁶² Her employer terminated her contract of employment, subsequently stating that it was normal practice to dismiss employees who were frequently absent due to illness. Mrs. Hertz brought an action against her employer in the national court in Copenhagen. Her attorney argued that the dismissal violated Paragraphs 1 and 4 of the Danish national law on equal treatment.⁶³

The Højesteret (the Supreme Court of Denmark) referred a preliminary question to the European Court of Justice,⁶⁴ regarding the interpretation of the Equal Treatment Directive. The first issue was

59. Case 179/88, 1990 E.C.R. at I-3979 [hereinafter *Hertz*].

60. 1990 E.C.R. I-3941.

61. *Webb v. EMO Air Cargo (UK) Ltd.*, 1 C.M.L.R. 793 (H.L. 1992) (U.K.).

62. *Hertz*, 1990 E.C.R. at I-3996.

63. *Id.* at I-3981.

64. References seeking a preliminary ruling (*renvoi préjudiciel*) on points of Community Law are made under Article 177 of the EEC Treaty to the European Court of Justice.

whether the provision of Article 5(1), in conjunction with Article 2(1) of the Directive, pertains to dismissal as a consequence of absence due to illness caused by pregnancy or confinement. If the first question was answered affirmatively, the second issue was whether such protection against dismissal is unlimited in time.⁶⁵

The European Court of Justice observed that Article 1(1) of the Directive states that the purpose of the Directive is to put the principle of equal treatment for men and women regarding access to employment, vocational training and promotion, and working conditions into effect in Member States.⁶⁶ The court quoted the provisions of Articles 2(1) and 2(3) of the Directive which provide that the principle of equal treatment means that there is to be no sex discrimination, either directly or indirectly, by reference to family or marital status, and that the Directive does not prejudice provisions for the protection of women, particularly regarding maternity and pregnancy. Reference was also made to the requirement in Article 5(1) that the principle of equal treatment regarding working conditions means that men and women are to be guaranteed the same conditions without regard to gender. This includes conditions governing dismissal.⁶⁷

The European Court of Justice stated that these provisions mean that dismissal of a female worker due to pregnancy constitutes direct sex discrimination, as does the refusal to hire a pregnant woman. It made reference⁶⁸ to the decision in *Dekker*,⁶⁹ making it clear that *Dekker* and *Hertz* are meant to be read together. The Court held that dismissal of a female worker because of repeated sick leave, which is not attributable to pregnancy or confinement, does not constitute direct sex discrimination since this would lead to dismissal of a male worker in similar circumstances.

Each Member State has discretion to determine the amount of maternity leave to be accorded to women in order to protect them against dismissal due to absence. Each Member State is to determine periods of maternity leave so female workers may be absent during the time when the disorders inherent in pregnancy and confinement occur. The Court stated:

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. Such a pathological condition

65. See *Hertz*, 1990 E.C.R. at I-3997.

66. *Id.* at I-3998.

67. *Id.*

68. *Id.*

69. See 1990 E.C.R. at I-3941.

is therefore covered by the general rules applicable in the event of illness.⁷⁰

The Court went on to state that:

Male and female workers are equally exposed to illness. Although certain disorders are, it is true, specific to one or other 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.⁷¹

The Court stated that there was no reason in such a case to consider whether indirect sex discrimination existed on the basis that women are absent due to illness more often than men.⁷²

Accordingly, the Court held that Articles 5(1) and 2(1) of the Equal Treatment Directive did not preclude dismissals "which are the result of absences due to an illness attributable to pregnancy or confinement."⁷³ The Court held there was no need to rule on the second question in the reference.

This decision is important because it limits the duration of the protection extended to women against dismissal resulting from absences due to illness caused by pregnancy or confinement. Evidently, the Court wished to limit this protection to the maternity leave period created by the statutes of the Member States, rather than to have an open-ended period in which dismissal on this basis would be forbidden.

It seems that the Court based its decision on an assumption which may or may not be true, that male and female workers are equally exposed to illness.⁷⁴ The Court then continues to dismiss the need to consider whether women are absent due to illness more frequently than men, and whether, therefore, indirect discrimination exists against women.

If women are absent due to illness more often than men, in particular for illness related to pregnancy and confinement which by definition could only be illness experienced by women, then there could be direct or indirect sex discrimination against women in the circumstances of this case. The report states that the European Commission submitted that there is nothing to suggest that women are absent more

70. *Hertz*, 1990 E.C.R. at I-3999.

71. *Id.*

72. *Id.*

73. *Id.* at I-4000-01.

74. *Id.* at I-3999.

frequently than men, or vice versa, unless pregnancy is treated as an illness.⁷⁵ There is no indication in the report that evidence was adduced on this point. Of course, there could be unfortunate effects on the employment of women if it turned out to be the case that there is a significant problem. However, it seems rather peculiar to assert that male and female employees are equally exposed to illness. In any case, the decision establishes an important principle in Community Law that dismissal on grounds of pregnancy constitutes direct discrimination.

3. *Dekker*

The second important Community Law decision on pregnancy discrimination is *Dekker*.⁷⁶ The facts are that Mrs. Dekker applied for a position with the VJV, a private sector employer, and informed the employer's selection committee shortly thereafter that she was three months pregnant. Mrs. Dekker was subsequently notified by letter that she would not be hired, despite the fact that the committee had informed the board of management that she was the most suitable candidate for the position.⁷⁷ The letter based the rejection on the fact of her pregnancy at the time of her application, and that the VJV would not have been able to recover the cost of her daily benefits from its insurers during her absence. This would have made it financially impossible for it to hire a replacement, and a staff shortage would result.⁷⁸

Mrs. Dekker brought an application for an order requiring the VJV to pay damages for her loss of income. The application was dismissed at two levels of the courts in the Netherlands. The Supreme Court of the Netherlands then decided to refer various questions regarding the interpretation of the Equal Treatment Directive to the European Court of Justice. The first question was whether Articles 2(1) and 3(1) of the Directive were breached by an employer if the employer refused to enter into a contract of employment with a suitable, but also pregnant, candidate solely for the reason that the candidate's condition was anticipated to cause the employer to bear adverse consequences. The European Court of Justice must consider the above question in conjunction with rules regarding unfitness for work, established by a public authority, which equate inability to work due to pregnancy and

75. *Id.* at I-3987.

76. 1990 E.C.R. at I-3941.

77. *Id.* at I-3945-46.

78. *Id.* at I-3970.

confinement with inability to work due to sickness.⁷⁹ The Supreme Court of the Netherlands also asked whether it made any difference that there were no male candidates. In addition, the Court asked, if a breach of Articles (2)(1) and (3)(1) of the Directive is established whether it is compatible with these articles to first find fault with the employer before a claim based on the breach can be upheld. The Court also asked whether the employer may nevertheless plead justification where the breach is established, even if none of the cases envisaged by Articles 2(2) through (4) apply.⁸⁰

The European Court of Justice observed that the purpose of the Directive stated in Article 1(1) is to put into effect the principle of equal treatment for women and men regarding access to employment, vocational training, promotion, and working conditions. Article 3(1) prohibits sex discrimination in the conditions for access to jobs or posts, including the selection criteria. Article 2(1) provides that the principle of equal treatment prohibits sex discrimination "either directly or indirectly by reference in particular to marital or family status."⁸¹

The Court observed that the employer's reason for refusing to appoint Mrs. Dekker was essentially that he could not have obtained reimbursement for the benefits which he would have been obligated to pay her during her maternity leave, and he would have been obliged to hire a replacement. This was because the internal rules of the insurer pertaining to sickness benefits did not contain a provision excluding pregnancy from the cases in which the insurer is entitled to refuse reimbursement of daily benefits; the national scheme in the Netherlands equated pregnancy to sickness.⁸²

The Court stated that a refusal to employ on grounds of pregnancy could only pertain to women, and that such a refusal constituted direct sex discrimination. The refusal to employ a woman due to the financial consequences of the maternity leave must be viewed as based

79. *Id.* at I-3970-71.

80. *Id.* at I-3971. There was a fourth issue which was not addressed by the Court of Justice, namely,

[i]f fault as referred to in Question 3 above may be required or grounds of justification may be pleaded, is it then sufficient, in order for there to be absence of fault or for a ground of justification to exist, that the employer runs the risk referred to in the summary of the facts, or must Articles 2 and 3 be interpreted as meaning that he must bear those risks, unless he has satisfied himself beyond all doubt that the benefit on account of unfitness for work will be refused or that posts will be lost, and he has done everything possible to prevent that from happening?

Id. at I-3971-72.

81. Equal Treatment Directive, *supra* note 5, at art. 2(1).

82. *Dekker*, 1990 E.C.R. at I-3972-73.

on the fact of pregnancy. Thus, this discrimination cannot be justified on the basis of the financial loss that the employer who hired a pregnant woman would suffer during her maternity leave.⁸³

The Court further stated these facts, that the pregnancy was equated with sickness and the provisions of the relevant legislation on sickness insurance were not the same as the internal rules of the insurer governing daily sickness benefits, could not be viewed as evidence of sex discrimination within the meaning of the Directive. It was not considered necessary to determine whether national policies, such as those in this case, exert pressure on employers, prompting them to refuse to hire a pregnant woman, and thus lead to discrimination within the meaning of the Directive.

Accordingly, the ECJ found that an employer contravened Articles 2(1) and 3(1) of the Equal Treatment Directive if he refused to enter into a contract of employment with a suitable female candidate, where such refusal is based on possible adverse consequences of employing a pregnant woman, due to rules regarding fitness for work adopted by public authorities that equate inability to work on account of pregnancy and confinement with inability to work due to illness. The Court reasoned that the fact that no male applied for the position did not change the outcome. Whether the refusal to employ a woman constitutes direct or indirect discrimination depends on the reason for the refusal. If the reason is that the person is pregnant, then the decision is directly linked to the candidate's sex, and the lack of male candidates does not change the answer.⁸⁴

With respect to the third issue, the Court decided that once a Member State selects a civil sanction, the infringement of the prohibition on discrimination is sufficient to impose liability on the discriminator. This is true even though the Directive gives Member States freedom to select various solutions appropriate to penalize infringement of the prohibition on discrimination. In addition, the Member States may not regard exemptions under national law.⁸⁵

Accordingly, *Dekker* stands for the principle that the refusal to enter into a contract of employment with a suitable pregnant candidate, because of possible adverse consequences of employing her due to public authority rules on unfitness for work that equate pregnancy and confinement to illness, constitutes direct sex discrimination. The Directive requires that civil sanctions must be imposed for violations of the prohibition on discrimination. These sanctions must make the

83. *Id.* at I-3973.

84. *Id.* at I-3974.

85. *Id.* at I-3976.

discriminator fully liable without regard to the grounds of exemption provided by national law.⁸⁶

Obviously, an argument can be made that the decision is limited to a very specific fact situation. First, Mrs. Dekker was considered to be the most suitable candidate for the position, and the employer wished to hire her but for the insurance difficulties preventing reimbursement. Second, the insurer's scheme did not contain a provision excluding pregnancy from instances where it is entitled to refuse reimbursement of benefits. Finally, the national scheme in the Netherlands equated pregnancy to illness. Clearly, there is a wide scope for arguing that the decision is limited to this particular set of facts.

Nevertheless, *Dekker* is the strongest case for supporting a "protected status" approach to pregnancy sex discrimination. A powerful argument can be made that United Kingdom courts are obligated to follow *Dekker* by treating a dismissal based on pregnancy as direct discrimination in preference to the approach of the Court of Appeal in *Webb*. In that case, it was held that a woman's dismissal due to pregnancy may constitute direct sex discrimination if she was treated less favorably than a man with a medical condition that required leave from work.

D. The Primacy of European Law and the Principle of Indirect Effect

The reasons why *Dekker* should be followed instead of *Webb* are the principle of the primacy of European law and the principle of "indirect effect." Primacy dictates that provisions in United Kingdom law which conflict with Community law must be disregarded. This principle was first established in *Costa v. ENEL*.⁸⁷ It has been developed in a line of cases including *Internationale Handelsgesellschaft*,⁸⁸ *Simmenthal*,⁸⁹ and most recently *Factortame*.⁹⁰ The principle of the primacy of Community law obligates national courts to apply Community law so as to ensure the full effect of its measures, and to di-

86. *Id.* at I-3977.

87. Case 6/64, 1964 E.C.R. at I-585. For a full discussion of the issue of the primacy of Community law, see JOHN USHER, *EUROPEAN COMMUNITY LAW AND NATIONAL LAW: THE IRREVERSIBLE TRANSFER?* (1981).

88. Case 11/70, *Internationale Handelsgesellschaft, Mblt v. Einfuhr and vorratss telle für Gettiede und Puttermittel* 1970 E.C.R. 1125.

89. Case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal Spa*, 1978 E.C.R. I-629.

90. Case 213/89, *R. v. Secretary of State for Transport, ex parte: Factortame*, 1990 E.C.R. I-2433.

sapply contrary provisions of national legislation without waiting until the national legislation is removed.⁹¹

The difficulty is that the European Court of Justice has held that directives are vertically effective, but are not horizontally effective.⁹² The Court denied the horizontal effect of directives in *Marshall v. Southampton & South West Hampshire Area Health Authority (Teaching)*⁹³ on the basis that Article 189 of the EEC Treaty obligates Member States to implement directives. The Court also concluded that directives in themselves may not impose obligations on individuals, and provisions in directives may not be relied on against individuals.⁹⁴

In addition, the decision in *Marshall* established important principles regarding the vertical direct effect of directives.⁹⁵ The European Court of Justice held that Article 5(1) of the Equal Treatment Directive (which provides that application of the principle of equal treatment regarding working conditions means that men and women are to be guaranteed the same conditions without sex discrimination) was sufficiently clear and unconditional to be relied on by individuals before national courts and tribunals.⁹⁶ The provisions of Article 5(1) of the Directive could thus be set against section 6(4) of the 1975 Act which related to compulsory retirement. The Court held that individuals could rely on the provisions of the Directive against organs of the State, regardless of whether the State acts in the capacity of an

91. See *Nimz v. Freie und Hansestadt Hamburg*, 20 INDUS. REL. L. REP. 222, 225 (E.C.J. 1991), wherein the E.C.J. quoted a passage from Simmenthal pertaining to this duty of national courts with approval. The principle has recently been affirmed in Case 157/83, *Murphy v. Bord Telecom Eireann*, 1988 E.C.R. I-673.

92. It should be noted that the Equal Pay Directive is unique in that it is both vertically and horizontally directly effective. It has been held simply to elucidate the material scope of Article 119 of the EEC Treaty and is not the source of new rights or obligations. See ELLIS, *supra* note 8, at 97-98.

93. Case 152/84, 1986 E.C.R. at I-723. This case considered whether the hospital authority's policy that male and female employees be required to retire at age 65 and 60 respectively, due to the same differential ages at which they qualified for the State retirement plan, was in accordance with the 1975 Act and with the Equal Treatment Directive. It should be noted the plaintiff is currently appealing a decision with respect to the compensation awarded to her in this case. At issue is whether section 65 of the 1975 Act, which sets a statutory limit on compensation which may be awarded by an Industrial Tribunal, is overridden by Article 6 of the Equal Treatment Directive, due to the principle of direct effect. See *Marshall v. Southampton & South West Hampshire Area Health Authority (Teaching)*, 3 C.M.L.R. 425 (H.L. 1990) (U.K.), referred by the House of Lords to the European Court of Justice as Case 271/91, *Marshall* (pending).

94. LAWRENCE COLLINS, *EUROPEAN COMMUNITY LAW IN THE UNITED KINGDOM* 83 (4th ed. 1990).

95. The principle of the vertical direct effect of directives was first established in Case 41/74, *Van Duyn v. Home Office*, 1974 E.C.R. I-1337.

96. *Marshall*, 1986 E.C.R. at I-747.

employer or a public authority. If this was not the case, the State would be able to take advantage of its own failure to comply with Community Law by not implementing the Directive correctly.⁹⁷

The principle of the vertical effect of directives was further developed in *Johnston v. Chief Constable of the Royal Ulster Constabulary*.⁹⁸ In this case, the Court of Justice held that Article 3(1) of the Equal Treatment Directive, which concerned the conditions for access to employment, had direct effect in conjunction with Article 2(1).⁹⁹ The decision also held that Article 6, which pertained to judicial control, had direct effect against the State. The Court stated that national courts, including industrial tribunals, must interpret national legislation in light of the provisions of the Equal Treatment Directive in order to give the Directive full effect:

In this context it should be observed first of all that, as the Court has already stated in its judgments of 10 April 1984 (Case 14/83, *von Colson and Kamann v. Land Nordrhein-Westfalen* [1984] ECR 1891 and Case 79/83, *Harz v. Deutsche Tradax GmbH* [1984] ECR 1921) the Member States' obligation under a directive to achieve the result envisaged by that directive and their duty under Article 5 of the Treaty to take all appropriate measures, whether general or particular, to ensure the fulfillment of that obligation, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts. It follows that, in applying national law, and in particular the provisions of national legislation specifically introduced in order to implement Directive No 76/207, national courts are required to interpret their national law in the light of the wording and the purpose of the directive in order to achieve the result referred to in the third paragraph of Article 189 of the EEC Treaty. It is therefore for the Industrial Tribunal to interpret the provisions of the Sex Discrimination Order, and in particular Article 53(1) thereof, in the light of the provisions of the directive, as interpreted above, in order to give it its full effect.¹⁰⁰

The parameters of the principle of the vertical effect of directives were delineated recently in *Foster v. British Gas Corporation*.¹⁰¹ This case clarified the criteria for a government body which has been made responsible for providing a public service under the control of the

97. *Id.* at I-748-49.

98. Case 222/84, *Johnston v. Chief Constable of the Royal Ulster Constabulary*, 1986 E.C.R. I-1651.

99. ELLIS, *supra* note 8, at 137-38.

100. *Johnston*, 1986 E.C.R. at I-1690.

101. Case 188/89, 1990 E.C.R. at I-3313.

State to be liable to vertical effect. Also, the parameters were further delineated in *Doughty v. Rolls Royce Plc.*¹⁰² which is a case consistent with *Foster*, and applied the *Foster* criteria to a situation where a commercial company was wholly owned by the Crown.

The principle of indirect effect, or *interprétation conforme*, means that national legislation enacted to implement directives must be interpreted by national courts in light of the directives.¹⁰³ This was first established in *Von Colson*,¹⁰⁴ but was recently developed dramatically by the Court of Justice in the case of *Marleasing SA v. La Comercial Internacional de Alimentación SA.*¹⁰⁵

The facts of the case are not important as they concerned Spanish company law on the grounds of nullity. The significance of the case is the principle it established regarding the issue of the direct effect of Community directives on relations between private persons where the directives have not been implemented by a Member State by the stipulated time. This case raised the question of the obligation of national courts to interpret national laws in light of the purpose and wording of a directive. The European Court of Justice held that although directives themselves may not impose obligations on an individual, Member States are obliged to achieve the result envisaged by directives, and they are obliged by Article 5 of the EEC Treaty to ensure fulfillment of this obligation. This is binding on all "authorities" of Member States, including the courts regarding matters within their jurisdiction.¹⁰⁶ The court held:

[i]t follows that, in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of Article 189 of the Treaty.¹⁰⁷

102. *Doughty v. Rolls Royce Plc.*, 1 C.M.L.R. 1045 (H.L. 1992) (U.K.). The Court of Appeal held that Rolls Royce was not touched by the vertical effect of the Equal Treatment Directive, as the triple test in *Foster* was not met because Rolls Royce was not responsible for providing a public service. *Id.* at 1058. In addition, it lacked special powers beyond those that result from the normal rules applicable to relations between individuals. *Id.*

103. *EC Law: Reaching the Parts U.K. Law Cannot Reach*, EQUAL OPPORTUNITIES REV., Sept./Oct., 1991, at 19, 29.

104. Case 14/83, *Von Colson and Kamann v. Land Nordrhein-Westfalen*, 1984 E.C.R. I-1891.

105. Case 106/89, 1990 E.C.R. at I-4135.

106. *Id.* at I-4159.

107. *Id.* at I-4160-61. The Court held that a national court deciding a case under the ambit of Directive 68/151 is required to interpret its national law in light of the wording and purpose of the Directive so as to preclude a declaration of nullity of a public limited company on grounds other than those enumerated in Article 11 of the Directive.

The importance of the decision was the principle that it obligated national courts to interpret national law, whether prior to or subsequent to Community legislation — in this case directives — to assist in achieving the result pursued by the directive.¹⁰⁸ The decision has aroused comment, and it is possible that it may be reconsidered when the opportunity arises again. Article 5 of the EEC treaty obliges Member States to take appropriate measures to ensure fulfillment of obligations arising out of the Treaty, or resulting from action taken by the institutions of the Community. Arguably, it would be more appropriate if the principle in *Marleasing* only applied retroactively to the date it was incumbent upon Member States to enact legislation to put a directive into effect, rather than requiring national courts to interpret legislation which was passed in some instances hundreds of years ago, to comply with the objectives pursued by directives.

In *Francovich and Bonifaci v. Italian Republic*,¹⁰⁹ the European Court of Justice established a different remedy to achieve the same result as the *Marleasing* judgment. In *Francovich*, the Court held that citizens may sue a Member State for damages for failure to implement a directive if the objective of the directive includes the creation of rights for individuals, the content of the rights is ascertainable from the directive, and a causal link exists between the Member States' failure to implement the directive and the loss incurred by the individual.¹¹⁰ Obviously, this decision has important ramifications for the United Kingdom if individuals can prove that the provisions of the 1975 Act and the EPCoA do not comply with the Equal Treatment Directive, and that there is a causal link between such failure to achieve the objectives of the Directive and the loss incurred by the individual. It should be noted that the Court of Justice did not bar the retrospective effect of the decision. The Advocate-General, however, submitted that this would be appropriate.¹¹¹

E. The Approach of the British Courts: Avoiding Distortion of the Meaning of British Statutes

The British courts have taken a very different approach from that of the European Court of Justice. The approach has its history in the

of Directive 68/151 is required to interpret its national law in light of the wording and purpose of the Directive so as to preclude a declaration of nullity of a public limited company on grounds other than those enumerated in Article 11 of the Directive.

108. Kenneth Miller, *The Role of European Law as a Source of Rights in Equality Cases*, 22 SCOTS L. TIMES 195, 198 (1992).

109. Cases 6/90 and 9/90, 21 INDUS. REL. L. REP. at 84 (1992).

110. Miller, *supra* note 108, at 199.

111. *Francovich*, 21 INDUS. REL. L. REP. at 100.

House of Lords decision in *Pickstone v. Freemans*.¹¹² In this case, it was held that the equal value claim provisions in section 1(2)(c) were added to the Equal Pay Act 1970 in order to bring the Act into compliance with the European Court of Justice decision in *Commission v. United Kingdom*.¹¹³ The Parliament had already passed regulations to give effect to Community Law, meaning that the House of Lords was obliged to construe the provisions consistent with Community legal standards.¹¹⁴ Thus, the House of Lords chose to interpret Regulations amending the Equal Pay Act 1970 against their literal meaning so as to achieve a result compatible with Community Law.

In *Duke v. GEC Reliance*,¹¹⁵ however, the House of Lords refused to construe the 1975 Act in a manner which would give effect to the Community obligation. The House of Lords refused to do so because Parliament had not passed the amending Sex Discrimination Act 1986 at the relevant time, and the amending Act did not have retrospective effect. Accordingly, no remedy was available where there was no parliamentary activity. The Court observed that *Marshall* had determined that the Equal Treatment Directive does not have direct effect between individuals. It was satisfied that the 1975 Act was not meant to give effect to the Equal Treatment Directive as subsequently construed in *Marshall*, and that the words of section 6(4) of the 1975 Act were not reasonably capable of being limited to the meaning advocated by the appellant.¹¹⁶ The Court held that section 2(4) of the European Communities Act 1972¹¹⁷ did not "enable or constrain a British court to distort the meaning of a British statute in order to enforce against an individual a Community directive which has no direct effect between individuals."¹¹⁸

This approach was later confirmed by the House of Lords in *Finnegan v. Clowney Youth Training Programme Ltd.*¹¹⁹ In that case it was

112. [1989] 1 App. Cas. 66 (H.L. 1988) (involving an equal value claim under the Equal Pay Act 1970).

113. Case 61/81, 1982 E.C.R. 2601. In this case, the European Commission brought proceedings against the U.K. alleging that the U.K. was in breach of Article 119 of the EEC Treaty by not introducing legislation necessary to comply with the Equal Pay Directive. *Id.* at 2605. Article 119 obliges Member States to adopt measures permitting employees to claim equal pay for work of equal value free of sex discrimination. *Id.* at 2603. The U.K. passed amendments to the Equal Pay Act to give effect to this obligation after it lost the case.

114. JOSEPHINE STEINER, TEXTBOOK ON EEC LAW 40-41 (2d ed. 1990). It should be noted that the House of Lords has further developed the principle of interpretation established in *Pickstone* in *Litster v. Forth Dry Dock & Engineering Co. Ltd.*, 18 INDUS. REL. L. REP. 161 (H.L. 1989) (U.K.).

115. 1 C.M.L.R. 719 (H.L. 1988) (U.K.).

116. *Id.* at 719-20.

117. European Communities Act, 1972, ch. 68, § 2(4) (Eng.).

118. *Duke*, 1 C.M.L.R. at 732.

119. 2 C.M.L.R. 859 (H.L. 1990) (U.K.) (appeal taken from N. Ireland). This decision pertained to the difference in retirement ages between men and women.

held that where the U.K. law was enacted prior to the directive, it would be artificial to treat the legislation as having been made with the purpose of implementing Community Law.¹²⁰ The Court's holding is notwithstanding that domestic law enacted to implement a directive must be applied so as to achieve its purpose.

This then is the basis for the Court of Appeal's decision in *Webb v. EMO Air Cargo (UK) Limited*.¹²¹ In that case, the Court followed the decisions in *Duke* and *Finnegan*, and distinguished the decisions of the European Court of Justice in *Dekker*¹²² and *Hertz*.¹²³

1. *Webb v. EMO Air Cargo (UK) Limited*

The Court of Appeal decision in *Webb* is important because it indicates an unwillingness to apply the principles in *Dekker* and *Marleasing*¹²⁴ to pregnancy sex discrimination cases in the United Kingdom. EMO was a small private employer which needed to hire a replacement for one of its clerks, Mrs. Stewart, who was about to go on maternity leave. It was anticipated that the replacement clerk would likely stay in employment upon the expiration of Mrs. Stewart's leave. Ms. Webb was hired for the position and advised that she was needed to replace Mrs. Stewart during her maternity leave. Two weeks after commencing training, Ms. Webb told Mrs. Stewart that she thought she might be pregnant. She also informed her employer of this possibility, who dismissed her and later advised her by letter, stating "[s]ince you have only now told me that you are also pregnant I have no alternative other than to terminate your employment with our company."¹²⁵

The Court of Appeal observed that pregnant women in employment may have rights under the Employment Protection Act 1975, the Employment Protection (Consolidation) Act 1978, and the 1975 Act. Ms. Webb was unable to avail herself of the protection given under the Employment Acts since she had been employed for one only month at the date of dismissal, and thus she did not meet the qualifying period for rights under these statutes.¹²⁶ Her action was brought under sec-

120. Miller, *supra* note 108, at 198.

121. 1 C.M.L.R. 793 (H.L. 1992) (U.K.).

122. Case 177/88, *Dekker v. Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus*, 1990 E.C.R. I-3941.

123. Case 179/88, *Handels- og Kontorfunktionærernes Forbund i Danmark (acting for Hertz) v. Dansk Arbejdsgiverforening*, 1990 E.C.R. I-3979.

124. Case 106/89, *Marleasing SA v. La Comercial Internacional de Alimentación SA*, 1990 E.C.R. I-4135.

125. *Webb*, 1 C.M.L.R. at 797.

126. *Id.* at 797-98.

tion 6(2) of the 1975 Act,¹²⁷ which prohibits discrimination against a woman by her dismissal. She argued that this constituted either direct discrimination under section 1(1)(a) or indirect discrimination under section 1(1)(b) of the 1975 Act.¹²⁸

The Court of Appeal observed that the Industrial Tribunal had decided that dismissal on the ground of pregnancy can constitute direct discrimination under section 1(1)(a), but is not *ipso facto* discrimination by virtue of sections 6(2)(b) and 1(1)(a) of the Sex Discrimination Act 1975 except in rare instances, such as moral objection to the pregnancy by the employer. In the Tribunal's view, one would have to consider not only whether the applicant was treated less favorably than a man, but also whether the treatment was on the ground of her sex. Both elements were necessary to constitute direct discrimination according to the court. The Tribunal concluded that

the real and significant reason for the dismissal of the applicant was her anticipated inability to carry out the primary task for which she was recruited. Her pregnancy was the particular physical reason for giving rise to the anticipation, but was in this context no different to any other physical reason, whether relating to a woman or a man. Therefore the treatment of the applicant was not on the ground of her sex or of any matter related to her sex. Further the respondents did not treat her less favourably than they would have treated a man. It follows that the respondents did not directly discriminate against the applicant under section 1(1)(a) by dismissing her.¹²⁹

Thus, the dismissal did not constitute sex discrimination because if a man had been recruited instead of Ms. Webb, and had required a leave of absence for a comparable period, he would also have been dismissed.¹³⁰

The Tribunal then considered whether Ms. Webb had suffered indirect discrimination pursuant to section 1(1)(b) of the 1975 Act. It concluded that she had suffered detriment. The Tribunal reasoned that she was dismissed because she was unable to comply with the requirement or condition that she not be in a physical condition such that it was anticipated that she would not be able to perform the task for which she was recruited.¹³¹

However, the Tribunal held that EMO had not indirectly discriminated against her because they had shown that the condition required

127. Sex Discrimination Act, 1975, ch. 65, § 6(2) (Eng.).

128. *Webb*, 1 C.M.L.R. at 799.

129. *Id.*

130. *Id.*

131. *Id.* at 800.

by them was justified to meet the reasonable needs of their business. The anticipated delivery date for Mrs. Stewart was three weeks before that of Ms. Webb. Therefore, Ms. Webb could not have covered Mrs. Stewart's absence on maternity leave.

The Tribunal applied the test of justification from *Ojutiku v. Manpower Services Commission*,¹³² stating that "[i]f a person produces reasons for doing something, which would be acceptable to right-thinking people as sound and tolerable reasons for so doing, then he has justified his conduct."¹³³ It then held that the provisions of paragraph 1(1)(b)(ii) of the 1975 Act did not apply and that there was no indirect discrimination.

The EAT judgment pertained solely to direct discrimination, and upheld the tribunal's decision.¹³⁴ In the Court of Appeal, both direct and indirect discrimination under the 1975 Act were argued on behalf of Ms. Webb. One issue was whether dismissal of a pregnant woman for a reason related to, or arising out of, her pregnancy could constitute direct sex discrimination pursuant to section 1(1)(a) of the 1975 Act. If the answer was affirmative, there was the further question of whether dismissal under these conditions constituted direct discrimination *per se*.¹³⁵

The Court of Appeal reviewed the conflicting EAT decisions in *Turley*¹³⁶ and *Hayes*.¹³⁷ The Court of Appeal concluded that the EAT decision in *Hayes* and the minority decision in *Turley* were the correct interpretation of the law:

In my judgment, if a woman is dismissed from employment for a reason arising out of pregnancy, and claims that she was discriminated against in breach of the Act of 1975, it is necessary for the IT which hears her complaint to decide whether a man with a condition as nearly comparable as possible which had the same practical effect upon his ability to do the job would, or would not, have been dismissed. I therefore conclude that dismissal of a pregnant woman for a reason arising out of, or related to, her pregnancy can in law be, but is not necessarily, direct discrimination under section 1(1)(a)¹³⁸

132. 1982 INDUS. CASES REP. 661 (C.A. 1982) (U.K.).

133. *Webb*, 1 C.M.L.R. at 810.

134. *Id.* at 800.

135. *Id.* at 801.

136. *Turley v. Allers Dept. Stores Ltd.*, 9 INDUS. REL. L. REP. 4 (EAT 1979) (U.K.).

137. *Hayes v. Malleable Working Men's Club and Institute*, 14 INDUS. REL. L. REP. 367 (EAT 1985) (U.K.).

138. *Webb*, 1 C.M.L.R. at 804.

Glidewell, L.J., rejected various submissions made on behalf of Ms. Webb regarding direct discrimination. He accepted that the appropriate test for determining whether sex discrimination has occurred is "whether the woman would have received the same treatment as a man but for her sex,"¹³⁹ as set out in *Birmingham City Council v. Equal Opportunities Commission*¹⁴⁰

However, Glidewell rejected two key submissions. The first was the argument that pregnancy is intrinsic to the female sex, and accordingly, a woman who is dismissed for a reason pertaining to her pregnancy "would not have been dismissed but for her sex and is thus discriminated against on the ground of her sex."¹⁴¹ He also rejected the contention that it is incorrect to make a comparison with an ill man or one who is suffering from a medical condition because pregnancy is not an illness.¹⁴²

It was further submitted that if a pregnant woman applies for a position, and she is the best qualified applicant, the potential employer is required to disregard her pregnancy and hire her. Glidewell rejected this last contention and stated:

In my view, such a result would be so lacking in fairness and in what I regard as the proper balance to be struck in the relations between employer and employee that we should only adopt Mr. Sedley's second and third arguments if we are compelled by the wording of the Act of 1975 to do so.¹⁴³

Glidewell's conclusion was that there is no problem in comparing a pregnant woman to a man with a medical condition requiring his absence for the same period of time and at the same time as a woman's pregnancy.

Glidewell rejected the alternative argument that, even if not every instance of dismissal of a pregnant woman for reasons related to her pregnancy amounts to discrimination, EMO had nevertheless discriminated against Ms. Webb. This argument was based on the possibility that she might have miscarried and thus become physically able to replace Mrs. Stewart. Under these conditions, the employer could not have validly dismissed her until it became evident that she was physi-

139. *Id.* at 802.

140. *Birmingham City Council v. Equal Opportunities Comm'n*, [1989] 1 App. Cas. 1155, 1194 (1989), *dismissing appeal from Regina v. Birmingham City Council, Ex parte Equal Opportunities Comm'n*.

141. *Webb*, 1 C.M.L.R. at 802.

142. *Id.* at 803.

143. *Id.* at 804.

cally unable to replace Mrs. Stewart.¹⁴⁴ Glidewell rejected the argument on the basis that the Tribunal was entitled to assume that, if all went well, Ms. Webb would eventually give birth, and accordingly, she would be unable to perform the task for which she had been hired at the relevant time.¹⁴⁵

With regard to the effect of Community law, Glidewell noted that the Equal Treatment Directive is addressed to governments. In doing so, he noted the statement in *Dekker* that "[a]s employment can only be refused because of pregnancy to a woman, such a refusal is direct discrimination on grounds of sex."¹⁴⁶ However, he distinguished *Dekker* on the facts by noting that the case did not deal with a woman who was not capable of performing the job offered to her, or for which she had been hired, due to pregnancy. He then rejected the argument that the Court was obliged to interpret the 1975 Act in the manner contended by counsel for Ms. Webb. He reasoned that such an interpretation would distort the meaning of the British statute. Also, he did not find it necessary to refer to the judgment in *Hertz*, as it concerned a different issue. Accordingly, he chose to follow Lord Templeman's speech in *Duke* that the European Communities Act 1972 does not require a British court to distort the meaning of a British statute in order to enforce a Community directive that does not have horizontal effect against an individual.¹⁴⁷

Glidewell rejected the contention that the judgment in *Dekker* meant that any refusal to employ a pregnant woman who is, apart from her pregnancy, otherwise qualified for the position is necessarily discriminatory.¹⁴⁸ He expressed a similar view toward the argument that every dismissal of a pregnant woman due to her pregnancy is necessarily discriminatory.¹⁴⁹ The Court of Appeal was free to adopt its interpretations of sections 1(1) and 5(3) of the 1975 Act without conflicting with *Dekker* or the Equal Treatment Directive. He went on to state that even if this view was incorrect, the Court could only adopt the construction of the provisions of the 1975 Act contended by counsel for Ms. Webb by distorting the meaning of the British statute.¹⁵⁰

In a concurring judgment,¹⁵¹ Balcombe, L.J., agreed that the dismissal did not amount to direct or indirect discrimination under the

144. *Id.* at 803.

145. *Id.* at 803-04.

146. *Dekker*, 1990 E.C.R. at I-3973 (quoted in *Webb*, 1 C.M.L.R. at 806).

147. *Duke*, 1 C.M.L.R. at 721-34. For a discussion of vertical and horizontal direct effect of directives, see JOSEPHINE STEINER, *TEXTBOOK ON EEC LAW* 20-23 (2d. ed. 1990).

148. *Webb*, 1 C.M.L.R. at 809-10.

149. *Id.*

150. *Id.* at 810.

151. *Id.* at 811.

1975 Act. He expressed his opinion that it would be unjust if Ms. Webb's dismissal was classified as sex discrimination for which her employers were financially liable, and stated that the issue was "whether the law, whether domestic or European, compels us to arrive at a conclusion contrary to the justice of the case."¹⁵² In his view, dismissal of a pregnant woman for a reason arising from her pregnancy can be direct sex discrimination under section 1(1)(a) of the 1975 Act, but it is not necessarily direct discrimination. If the employer treated or would treat a man who needed leave due to a medical condition more favorably, it would be direct sex discrimination.

Balcombe distinguished the decision in *Dekker* on the basis that *Dekker* was not concerned with a woman's pregnancy affecting her availability for the post. He did not accept the view that *Dekker* required the Equal Treatment Directive to be interpreted such that the dismissal in this case contravened its provisions.¹⁵³ He then acknowledged that the Court should construe domestic legislation as consistently as possible with Community law. However, Balcombe stated that the principle in *Von Colson*¹⁵⁴ and *Marleasing*¹⁵⁵ "does not constrain us to distort the meaning of the 1975 Act in order to enforce against EMO the Equal Treatment Directive which has no direct effect between individuals,"¹⁵⁶ due to the decisions in *Duke*¹⁵⁷ and *Finnegan*.¹⁵⁸ Thus, in Balcombe's view, even if *Dekker* required the court to interpret the Equal Treatment Directive so that Ms. Webb's dismissal contravened its provisions, the interpretation of the 1975 Act in that manner with regards to direct discrimination would amount to a distortion of the 1975 Act.

The Court in *Webb* held that the Industrial Tribunal had applied an incorrect test of justification, through no fault of its own. However, the Court went on to conclude that application of the appropriate test would have led to the same result (e.g., the indirectly discriminatory condition was justified). The correct test was set out in *Hampson v. Department of Education and Science*,¹⁵⁹ which held that the term "justifiable" requires "an objective balance between the discrimina-

152. *Id.*

153. *Id.* at 813.

154. Case 14/83, *Von Colson v. Land Nordrhein-Westfalen*, 1984 E.C.R. 1891.

155. Case 106/89, *Marleasing SA v. La Comercial Internacional de Alimentación SA*, 1990 E.C.R. I-4135.

156. *Webb*, 1 C.M.L.R. at 814.

157. 1 C.M.L.R. at 719.

158. 2 C.M.L.R. at 859.

159. 1989 INDUS. CASES REP. 179 (C.A. 1988) (U.K.).

tory effect of the condition and the reasonable needs of the party who applies the condition'¹⁶⁰

In his concurring opinion in *Webb*¹⁶¹, Beldam, L.J., stated that, in determining whether treatment of a person based on his or her sex is less favorable than the treatment of a person of the opposite sex in the relevant circumstances, the requisite comparison is to be based on relevant circumstances that are the same or not materially different. If they are not identical, the relevant circumstances are those that are material for the purpose of the comparison and the approach of the EAT in *Hayes*,¹⁶² and the minority decision in *Turley* can be applied.¹⁶³ Section 1 of the 1975 Act does not compel the conclusion that the employer in this case directly discriminated against Ms. Webb on the basis of her sex.¹⁶⁴

With respect to Community law, it was held that the Court was not obliged to interpret national legislation, such as the 1975 Act, in a manner that distorts its meaning. Beldam noted that the ruling in *Dekker* was confined to its facts. He subsequently questioned whether the European Court of Justice would regard the objectives of the Directive as significantly impaired if pregnancy was not considered the most important reason for refusal to recruit in similar circumstances. Nevertheless, such an interpretation would require a distortion of section 1(1) of the 1975 Act, and accordingly, he rejected the argument that the dismissal constituted direct discrimination.¹⁶⁵ He concurred that indirect discrimination had not been proven.

The fallacy in the reasoning of the Industrial Tribunal and the Court of Appeal lies in their factual conclusions. The courts concluded that "the real and significant reason for the dismissal of the applicant was her anticipated inability to carry out the primary task for which she was recruited."¹⁶⁶ The courts also reasoned that the pregnancy was a mere "physical reason" giving rise to this anticipation no different from any other reason; thus, her dismissal was not due to her sex, and the employer had not directly discriminated against her.

Apparently, any time a woman requires pregnancy leave from work one may anticipate that this will make her temporarily unable to

160. *Webb*, 1 C.M.L.R. at 814.

161. *Id.* at 815.

162. 14 INDUS. REL. L. REP. at 367.

163. 9 INDUS. REL. L. REP. at 4.

164. *Webb*, 1 C.M.L.R. at 817.

165. *Id.* at 817-19.

166. *Id.* at 799.

“carry out the primary task for which she was recruited.”¹⁶⁷ Granted, the Court of Appeal and the Industrial Tribunal defined the task for which she was recruited as to replace Mrs. Stewart while she was on maternity leave, but arguably the duties and responsibilities of her position constituted the primary task for which she was recruited. Under this view, she was hired for a particular job, and the fact that she became pregnant could not justify her dismissal since the decision in *Hertz* established that dismissal of a pregnant woman on grounds of pregnancy constitutes direct sex discrimination.

Arguably, the decision in *Webb* is incorrect because it does not comply with the principle of indirect effect in *Marleasing*. The Court should have applied *Hertz* to the facts. If it had, the Court would have held the dismissal was based on the employee's pregnancy and thus it was *per se* direct sex discrimination. The countervailing argument that *Duke* and *Finnegan* deny the obligation of national courts to construe legislation in a manner that gives effect to the Equal Treatment Directive in private sector actions is unconvincing. It can be contended that *Marleasing* instead obligates British courts to interpret British legislation so as to effectuate the objectives of the directive regardless of whether the British legislation predates or postdates the directive, or whether the case involves the state or the private sector.¹⁶⁸ Based on this line of reasoning, the Court should have applied the decisions in *Hertz* and *Dekker*, and given Ms. Webb the broad degree of protection they afford a pregnant woman in cases of detrimental treatment by her employer.¹⁶⁹ Her appeal should have been allowed on the basis that this treatment constituted direct sex discrimination under *Hertz*, which cannot be justified on the basis of the financial loss that the employer would suffer due to her maternity leave, according to *Dekker*.¹⁷⁰ It should also be observed that it does not appear from the case report that the House of Lords decision in *Stockton*¹⁷¹ was argued in *Webb*. Although that case dealt with the EPCoA, rather than the 1975 Act, it did indicate an unwillingness to permit employers to dismiss pregnant women where the dismissal is based on the inconvenience to the employer of keeping a woman's job open for her while she is on maternity leave.

167. *Id.*

168. *Redundancy and Discrimination*, EQUAL OPPORTUNITIES REV., May/June 1991, at 16, 18-19.

169. *Pregnant Woman to be Compared with Sick Man*, 443 INDUS. REL. LEGAL INFO. BULL. 2, 4 (Feb. 1992).

170. *Dekker*, 1990 E.C.R. at I-3973.

171. *Stockton-on-Tees Borough Council v. Brown*, [1988] 2 All E.R. 129 (H.L. 1988).

2. *Shomer v. B & R Residential Lettings Limited*

The Court of Appeal in England recently expanded the test for claims of direct sex discrimination on grounds of pregnancy under sections 1(1), 5(3) and 6(2) of the 1975 Act. In *Shomer v. B & R Residential Lettings Limited*,¹⁷² Mrs. Shomer brought an action claiming that her employers had unfairly dismissed her, or, alternatively, that she had been discriminated against on the grounds of her sex. At the time of her dismissal, Mrs. Shomer had been employed for just under eighteen months. Thus, she lacked the ability to make an unfair dismissal claim under the EPCoA because she had not met the minimum two years of employment necessary to claim compensation or unfair dismissal under that act. Accordingly, her application proceeded solely on the complaint of sex discrimination under the 1975 Act.¹⁷³

Mrs. Shomer was a negotiator for B & R Residential Lettings Ltd., a firm of leasing agents for residential property. Her employment commenced in April 1986. Mrs. Shomer informed the managing director in September 1987 that she was pregnant and expected confinement in April 1988. Both parties agreed that there was no discussion of the possibility of her returning to work after giving birth. There was a dispute in the evidence regarding whether the parties had agreed on a date for leaving her employment. According to Mrs. Shomer, there was no agreement since she was concerned about choosing an optimum date for a maternity benefit claim and had not yet worked it out.¹⁷⁴

Shortly afterwards, Mrs. Shomer informed the managing director that she planned to take a two-week vacation, commencing the following week. An angry discussion occurred with respect to the short notice, and with respect to use of the company car which had been provided to her. Ultimately, Mrs. Shomer left on vacation, leaving the car at the airport, contrary to her employer's instructions to return it so that a new chauffeur could drive it temporarily. She had driven the car uninsured because she lacked the firm's consent.¹⁷⁵ On return from her vacation, a letter of dismissal was waiting for Mrs. Shomer, together with a check for pay, holiday pay, and pay in lieu of notice. Another negotiator commenced work with the firm three weeks following Mrs. Shomer's dismissal.¹⁷⁶

172. 21 INDUS. REL. L. REP. at 317 (C.A. 1992) (U.K.).

173. *Id.* at 319.

174. *Id.*

175. *Id.* at 318-19.

176. *Id.* at 319.

Mrs. Shomer succeeded in her claim of direct sex discrimination in the Industrial Tribunal, but the employer's appeal was allowed in the EAT. Unfortunately, the decisions were divided in both Tribunals. The divided decisions were most likely the result of the difficulty presented by Mrs. Shomer's misconduct; it was not a simple instance of a pregnancy sex discrimination dismissal. It is evident that the Tribunal members and the Court of Appeal were straining to arrive at a decision congruent with their perception of what was fair in the circumstances.

The majority decision in the Industrial Tribunal¹⁷⁷ was that Mrs. Shomer would not have been dismissed if she had not been pregnant. Although the Tribunal accepted that Mrs. Shomer was guilty of quite serious misconduct in taking the car to the airport, it did not think such misconduct would have resulted in her dismissal had she not been pregnant. In the Tribunal's view, the issue was whether Mrs. Shomer was dismissed because of her pregnancy. This involved a determination of whether she was dismissed solely for serious misconduct, or because of her pregnancy.¹⁷⁸ The latter conclusion would mean that she would not have been dismissed under the circumstances if she had not been pregnant.

The majority of the Tribunal did not believe that a non-pregnant negotiator of her ability would have been put in a position with respect to the car resulting in dismissal. The Court reasoned that the firm was anxious to replace her. They had a suitable replacement available and were concerned whether she would remain available when Mrs. Shomer finished work in the new year. Accordingly, an issue was made with respect to the car because it would facilitate the dismissal of Mrs. Shomer and allow for the immediate hiring of her replacement. The Industrial Tribunal applied the test from *Hayes*.¹⁷⁹ The test inquired whether she was less favorably treated than a man with a condition not materially different from the circumstances of pregnancy, but with the same practical effect regarding his ability to perform his work. The Tribunal unanimously held that the dismissal was partly due to Mrs. Shomer's contributory fault, and accordingly reduced her award by one-third.¹⁸⁰ The Court of Appeal in *Shomer* noted that the test in *Hayes* had been approved in *Webb*,¹⁸¹ and, as a result, the EAT and the Industrial Tribunal were correct in their adoption of this test.

177. *Id.* at 318.

178. *Id.* at 320.

179. 14 INDUS. REL. L. REP. at 367.

180. *Shomer*, 21 INDUS. REL. L. REP. at 322.

181. 1 C.M.L.R. at 793.

The EAT was greatly divided in its reasons to allow the employer's appeal. Three members adopted different reasons. One member was in favor of dismissing the appeal since she was of the view that the Tribunal made a reasonable finding. A second member concluded that the decision was one that no Tribunal could in fact reasonably and properly reach, and thus favored allowing the appeal. Mr. Justice Wood also favored allowing the appeal, but on the basis that an error of law had been made with respect to the comparison with a hypothetical man. Alternatively, he was of the view that the decision was perverse, and that no reasonable Tribunal, properly directing itself regarding the law, could have reached it.

The Court of Appeal observed that the right to appeal to the EAT from an Industrial Tribunal and the right to appeal to the Court of Appeal from the EAT is for questions of law only.¹⁸² The Court of Appeal further held that a Tribunal is entitled to find discrimination if there is some evidence from which it can properly draw an inference that a woman was dismissed on the grounds of her pregnancy, whereas she would not have been dismissed if she were not pregnant, nor would a man in comparable circumstances have been dismissed. Glidewell agreed with the Tribunal that unless a Tribunal is prepared to draw that sort of inference regarding the treatment of a man in analogous circumstances, a woman's chances of satisfying a Tribunal that a dismissal on account of pregnancy was discriminatory would be nearly insurmountable. However, the Court of Appeal was of the view that there was no direct evidence in this case to support the conclusion of the majority of the Industrial Tribunal.¹⁸³

Glidewell stated that it was unclear whether the majority in the Industrial Tribunal took into account the misconduct by the hypothetical man. The passage indicating the majority's view that the hypothetical man would not have been dismissed, but would have remained employed until fit to return, did not refer to misconduct at all. Accordingly, it appeared that the Industrial Tribunal did not consider all relevant circumstances in making the comparison.

Glidewell stated "what is relevant is whether an employee who was going to suffer from a disability and was then guilty of misconduct would have been dismissed if he had been a man."¹⁸⁴ In his view, it appeared that the Tribunal had not considered the misconduct be-

182. *Shomer*, 21 INDUS. REL. L. REP. at 321.

183. *Id.*; see also *Using the Comparative Test for Pregnancy Discrimination*, EQUAL OPPORTUNITIES REV., July/Aug. 1992, at 33.

184. *Shomer*, 21 INDUS. REL. L. REP. at 322.

cause the Tribunal concluded that the dismissal was due to her pregnancy "albeit that an element of misconduct entered into the matter."¹⁸⁵ This suggested that the misconduct was not part of the comparison because the majority had already dealt with the comparison. Accordingly, the Tribunal erred in law.

Alternatively, if this analysis was incorrect, and the Tribunal did include the misconduct as a factor common to both the hypothetical man and Mrs. Shomer, then, although the Tribunal could draw inferences, Glidewell could

find no material on which they could conclude on the balance of probabilities that the hypothetical man guilty of misconduct would not have been dismissed. There is no direct evidence about it because the situation has not arisen before. In other words, knowing that Miss Simmons was waiting in the wings as a replacement, with Mr. Brown anxious to engage her as soon as possible, if the person under consideration had been a man who was about to leave work in three months' time because of disability and he was then guilty of the same misconduct as that of which Mrs. Shomer was guilty, it seems to me to be likely that B & R would have dismissed him. Certainly I can find nothing that can be drawn from the conclusion that they would not. If they would have dismissed the hypothetical man, then it cannot be said that there was discrimination within the meaning of the Act. That being so, the decision of the Industrial Tribunal would be perverse, as the majority of the EAT found that it was.¹⁸⁶

The Court of Appeal refused leave to appeal to the House of Lords,¹⁸⁷ but granted Mrs. Shomer's counsel leave to amend her notice of appeal to the EAT, and address the *Dekker*-based argument that dismissal for any reason arising out of a woman's pregnancy is automatically discriminatory.¹⁸⁸ The Court of Appeal rejected that particular argument, following its decision in *Webb*.¹⁸⁹ Ultimately, this case may be appealed to the House of Lords, depending on the disposition of *Webb*.

This case demonstrates the absurdity of comparing a pregnant woman to an ill man in situations of a dismissal involving allegations

185. *Id.* at 321.

186. *Id.* at 322.

187. *Id.*

188. *See Dekker*, 1990 E.C.R. at I-3946.

189. 1 C.M.L.R. at 793.

of sex discrimination. It is not likely that many precedents will exist of how an actual ill man who was guilty of misconduct would have been treated. Thus, if this decision is correct, courts in the future will have to enter into conjecture, not only about how a hypothetical ill man would have been treated, but also on how a hypothetical ill man guilty of misconduct would have been treated. How many levels of conjecture should we be prepared to consider before we begin to move more in the realm of fiction, rather than logical inference? Arguably, it is more appropriate to treat pregnancy as a genuine difference between the sexes without trying to achieve conformity with a male norm.¹⁹⁰

The *Webb* case raises an important point. The National Association of Citizen's Advice Bureaux indicated in a recent report that employers often dismiss women upon learning that they are pregnant, and then claim the dismissal is for other reasons.¹⁹¹ These claims may involve allegations of incompetence or misconduct.

Evidently, the Court of Appeal and the majority in the EAT were of the opinion that Mrs. Shomer's conduct should bar her from recovering in this instance, and thus disagreed with the Industrial Tribunal's finding of fact.¹⁹² Unfortunately, the Court of Appeal's main finding — that it appeared the Tribunal had not taken all relevant circumstances into account in making the comparison involving misconduct by a hypothetical man — is not particularly convincing. This is because Glidewell quotes the Tribunal's decision, which includes a passage indicating that the misconduct actually was taken into account:

Both my colleagues take the view that the applicant would not have been dismissed if she had not been pregnant, in the sense that while they accept that she was guilty of quite serious misconduct in relation

190. Sandra Fredman, *European Community Discrimination Law: A Critique*, 21 *INDUS. L.J.* 119, 121 (1992).

191. *Not in Labour: CAB Evidence on Pregnancy, Dismissal and Employment*, NAT'L ASS'N OF CITIZENS ADVICE BUREAUX, E/4/92, 7-9, 15-16 (June 1992). This type of case arises more often than one might suppose. For example, see the EAT decision in *Leeds Private Hospital Ltd. v. Parkin*, 1992 *INDUS. CASES REP.* 571, in which a cook brought an action alleging that her employer had discriminated against her by dismissing her, contrary to sections 1(1)(a) and 6(2)(b) of the 1975 Act. Miss Parkin had been employed for a short time before she informed her employer that she was pregnant. Her position as a cook was advertised shortly afterwards. She was later dismissed after not appearing for work for several days due to illness. Her employer alleged that her absence due to illness without notification was misconduct. The EAT and the Industrial Tribunal conjectured about how a hypothetical ill man, who did not inform his employer that he would be absent from work, would have been treated, compared with a pregnant woman. The EAT concluded that the tribunal had made a proper inference that a man with a known sickness disability would not have been so badly treated and dismissed the employer's appeal.

192. See *Shomer*, 21 *INDUS. REL. L. REP.* at 321.

to using the car to take her to the airport and not making it available to her employers as she had agreed to do, this would not have resulted in her dismissal if she had not been pregnant.¹⁹³

In fact, the Industrial Tribunal preferred Mrs. Shomer's evidence regarding the disputed facts to those of her employer. Since the Tribunal had the benefit of observing the witnesses, surely it was entitled to conclude that Mrs. Shomer's dismissal made it too convenient for the employer to hire her replacement.

As well, even if the Court of Appeal is correct in postulating the test of the hypothetical ill man guilty of misconduct, the Court itself agreed with the Tribunal that it was entitled to draw an inference from the evidence regarding the treatment of a man under analogous circumstances. To hold otherwise would confront a woman, dismissed on account of pregnancy, with a nearly insurmountable barrier in attempting to establish that the dismissal was discriminatory.¹⁹⁴ Yet, the Court of Appeal held in the alternative that, while the Tribunal was entitled to draw inferences, it could find no material with which it could conclude that the hypothetical ill man would not have been dismissed. It stated that there was no direct evidence about whether a hypothetical ill man guilty of misconduct would have been dismissed because the situation had not arisen before.¹⁹⁵ With respect, the inference was about a "hypothetical" man exactly because the situation had not arisen before.

The Court of Appeal also concluded that the Tribunal erred in relying on evidence that a seventy-three year old male employee was not dismissed, although the manager had hoped he would retire. The court stated "[s]o far as I can see, that was totally irrelevant because nobody suggested that he was guilty of misconduct, and the fact that an employee who was not very useful was not dismissed is not a relevant consideration."¹⁹⁶

The Industrial Tribunal heard evidence from the employer itself that it was a firm that did not "sack" people, and in fact the firm had never before sacked anyone. The fact that a seventy-three year old man was kept on past retirement,¹⁹⁷ and the evidence heard indicated that no other employee had ever been required to give up the use of a company car while on holiday,¹⁹⁸ are surely relevant to whether Mrs. Shomer was treated as favorably as a man. Surely, there was ample

193. *Id.* at 320 (quoting the Industrial Tribunal decision at ¶ 4).

194. *Id.* at 321.

195. *Id.* at 322.

196. *Id.*

197. *Id.* at 319.

198. *Id.* at 319-20.

evidence for the Tribunal to hold that Mrs. Shomer had been discriminated against on the basis of sex due to her pregnancy.

It may be contended there was ample evidence on which the Tribunal could make the findings of fact that it did, and for it to make the inference that a hypothetical man would not have been treated as Mrs. Shomer was in this case. It appears from the extract of the Tribunal's decision that the Tribunal did actually consider the misconduct of a hypothetical man. Arguably, the Court of Appeal's decision is wrong.

In addition, an argument can be made that the decision is wrong because it does not follow *Dekker*. The opinion expressly rejects the view that a dismissal for any reason arising out of pregnancy is automatically discriminatory. It should be noted that the Court of Justice stated in *Hertz* that dismissal of a female employee due to pregnancy constitutes direct discrimination on grounds of sex.¹⁹⁹ Obviously, the result of the appeal of *Webb* in the House of Lords will help settle this matter.

Alternatively, an argument could be made, based on the precedent set in *Hertz*, that a dismissal of a female worker due to sick leave which is not attributable to pregnancy or confinement is not discriminatory because this would lead to dismissal of a male worker in the same circumstances. This could be used to argue that dismissal of a pregnant worker for serious misconduct is not directly discriminatory because it would lead to dismissal of a male worker under the same circumstances. Accordingly, the employer would be required to prove that there were substantiated grounds for the dismissal. Perhaps this is the best middle ground which could be reached between the rights of employers and pregnant employees in cases such as this one. It would avoid the contortions necessary to use the test of the hypothetical ill man guilty of misconduct.

IV. THE PREGNANCY DIRECTIVE

It appears that the position in the U.K. on maternity pay and maternity leave will soon change due to the recent adoption of the Directive on Protection of Pregnancy and Maternity²⁰⁰ (Pregnancy Directive). The Member States of the European Community, with the exception of the U.K., adopted the Community Charter of the Funda-

199. 1990 E.C.R. at I-3998.

200. Council Directive 92/85, 1992 O.J. (L 348) 1 [hereinafter Pregnancy Directive]. It should be noted that there is also a Proposal for a Recommendation on Child Care, 1991 O.J. (C 242) 3, and a Proposal for a Council Directive on Parental Leave and Leave for Family Reasons, 1983 O.J. (C 333) 6, amended by COM (84) 631 final, at 1984 O.J. (C 316) 7, which lie beyond the scope of this Article.

mental Social Rights of Workers²⁰¹ (Social Charter) in December 1989. This demonstrated a commitment to social policy in the Community along with concerns about the competitive aspects of the Single European Market.²⁰² Point 16 of the Social Charter includes the statement “[m]easures should also be developed enabling men and women to reconcile their occupational and family obligations.”²⁰³

The Action Programme pertains to implementation of the Social Charter.²⁰⁴ It states that existing proposals for directives pertaining to the protection of women in the workplace against risks due to exposure to carcinogens, and with respect to health and safety requirements for work with visual display units, “have not taken sufficient account of the specific problems of pregnant women.”²⁰⁵ The Action Programme also states that, due to current demographic trends and the goal of greater competitiveness, it is essential to make better use of women workers and adapt the workplace so that women can carry out both their work and maternal responsibilities. This requires improved protection of pregnancy and maternity.²⁰⁶

The European Commission then proposed the Draft Directive on Pregnancy and Maternity in September 1990.²⁰⁷ The proposal was made as an individual directive within the meaning of Article 16(1) of the Council Directive on the Introduction of Measures to Encourage Improvements in the Safety and Health of Workers at Work.²⁰⁸ The stated purpose of implementing the Directive was to “encourage improvements in the safety and health of pregnant workers and women workers who have recently given birth.”²⁰⁹ The basis for the proposal was Article 118a of the EEC Treaty, which permits adoption by qualified majority voting of directives to ensure protection of the health and safety of workers.

Given the U.K. government’s steadfast opposition to widening the ambit of social policy measures in Community law, it appears that the

201. Community Charter of the Fundamental Social Rights of Workers, OFFICIAL PUBLICATIONS OF THE EUROPEAN COMMUNITIES (1990) [hereinafter Social Charter].

202. Joanne Conaghan, *Statutory Maternity Pay and the European Dimension*, 20 *INDUS. L.J.* 314, 314-15 (1991).

203. Social Charter, *supra* note 201, at 17.

204. Action Programme to Implement the Community Charter of the Fundamental Social Rights of Workers, COM (89) 568 final, *reprinted in* SOCIAL EUROPE, Jan. 1990, at 51.

205. *Id.* at 68.

206. *Id.*

207. Proposal for a Council Directive Concerning the Protection at Work of Pregnant Women or Women Who Have Recently Given Birth, 1990 O.J. (C 281) 3 [hereinafter Unamended Draft Pregnancy Directive].

208. Council Directive 89/391, 1989 O.J. (L 183) 1.

209. *Id.* at art. 1.

Commission might have had problems proceeding with the Pregnancy Directive under Article 100 of the EEC Treaty, which requires unanimity for adoption by Council.²¹⁰ If the Maastricht Treaty is passed by the Member States, it could break such an impasse, and the U.K. could then opt out of future improvements with respect to social policy.²¹¹ The other eleven Member States could then proceed with respect to the Pregnancy Directive and further implementation of the Social Charter without the U.K.

A. Provisions of the Unamended Draft Pregnancy Directive

The Unamended Draft Pregnancy Directive made various provisions for the protection of pregnant women at work, including an assurance that health and safety authorities would evaluate possible risks to their pregnancy created by their particular job duties.²¹² This would involve changes in working conditions and working hours, or transfer to different duties in situations where the pregnant or breast-feeding woman's health and safety was endangered. Pay and employment rights were to be maintained in this case. The Unamended Draft Pregnancy Directive would have obliged Member States to take measures to ensure that an alternative to night work was made available, before and after childbirth, for a period of at least sixteen weeks, eight of which must be before the anticipated confinement date.²¹³ If necessary, a transfer to day work, an extension of social security benefits, or maternity leave without prejudice to employment rights would have to be given.

More controversially, the Unamended Draft Pregnancy Directive obliged Member States to ensure that pregnant workers, and women who have recently given birth, would receive at least fourteen weeks of maternity leave, or a corresponding allowance on full pay. If the woman became ill during this leave, the period of illness would not be considered part of the fourteen weeks,²¹⁴ but would be dealt with under the scheme applicable in cases of sickness.

210. Conaghan, *supra* note 202, at 316.

211. See Treaty Establishing the European Community (Maastricht Version), reprinted in 1 C.M.L.R. 573 (1992). The Maastricht Treaty will amend the EEC Treaty if it is passed. The Protocol on Social Policy, attached to the Maastricht Treaty and found at page 776, allows eleven of the twelve Member States to use the institutions of the Community to make Community law binding only in eleven Member States. The U.K. would not be included.

212. Unamended Draft Pregnancy Directive, *supra* note 207, at arts. 3-4. There are detailed provisions in the draft, and in amendments to the draft, regarding exposure to various chemical, physical and biological agents and processes and regarding posture, movements, and mental and physical fatigue relating to their work which will not be discussed here.

213. *Id.* at art. 3.

214. *Id.* at art. 5.

A leave longer than fourteen weeks could be granted, not on full pay, so long as the pay or allowance for the entire period was a minimum of 80% of the woman's salary. This could include a ceiling defined by national regulation. The Draft Directive also required a minimum paid leave of at least two weeks before the presumed delivery date.²¹⁵ The issue of who would pay for the proposed leave entitlement was not addressed.²¹⁶

Member States would also be obliged to prohibit dismissal from the beginning of the pregnancy to the end of the fourteen weeks of maternity leave. No qualifying period of employment was stipulated. Employment rights could not be diminished during the maternity leave.²¹⁷ This would be an important extension of employment rights to pregnant women since it would obligate the United Kingdom to eliminate the qualifying periods under the EPCoA for the right to be protected against dismissal under section 60(1) of that act.²¹⁸

The Draft Directive also gave the right to obtain prenatal care, without pay deductions, in the event that the care could only be obtained during working hours. In addition, Article 7 referred to cases of a dispute connected with implementation of the Directive and obliged Member States to ensure that the rules of procedure "take into account the specific situation of the workers concerned, notably as regard [sic] the burden of proof."²¹⁹ Various aspects of the Unamended Draft Pregnancy Directive caused concern and required clarification. For example, it was unclear whether the proposal would extend protection to part-time workers.

It can be argued that unemployed workers are covered since Article 5(4) refers to the ability of Member States to restrict leave to those women who have worked or who are registered as unemployed since the start of their pregnancy, except with regard to the compulsory two week paid leave before birth.²²⁰ The only further reference to unemployed pregnant workers is in the Recital. The Recital states it is advisable to leave to the Member States "the faculty of subjecting the eligibility regarding the maintenance of the remuneration or the payment of the allowance to the existence of a working relationship since the beginning of the pregnancy, or, by extension, to the pregnant workers who, at the beginning of their pregnancy, were registered as

215. *Id.*

216. Conaghan, *supra* note 202, at 317.

217. Unamended Draft Pregnancy Directive, *supra* note 207, at art. 6.

218. PROTECTION OF PREGNANT WOMEN, *supra* note 28, pt. 3, at 11.

219. Unamended Pregnancy Draft Directive, *supra* note 207, at art. 7.

220. Conaghan, *supra* note 202, at 316-17.

unemployed.”²²¹ Thus, it appeared that protection was to be extended to unemployed workers, but the Member States were to have some discretion in setting conditions with respect to eligibility.

In addition, the provisions of Article 7, regarding the burden of proof, were by no means clear. Was it intended that the burden of proof be reversed so that the employer must prove that the disputed action was not based on grounds of pregnancy? This required clarification.²²²

B. January 1991 Amendments to the Draft Pregnancy Directive

Amendments were made to take into account the views of the European Parliament in early 1991.²²³ The amendments increased the number of women covered by the Unamended Draft Pregnancy Directive by including women who are breastfeeding. As well, they provided that any period of sickness unrelated to pregnancy or childbirth during the leave would not form part of the fourteen weeks, but would be dealt with under the applicable sickness scheme. Member States were obliged to ensure that pregnant workers have the right to time off for prenatal care, without loss of pay, if such examinations occur during working hours. Also, a new Article was added requiring Member States to pass legislation enabling women who believe that their rights under the Directive have been infringed to seek legal redress in the courts or other competent bodies.²²⁴

The January 1991 amendments broadened the protection given during the period of leave from work. They required that “maintenance of work-related rights” be ensured, rather than limiting protection to “employment rights,” as was provided in the Unamended Draft Pregnancy Directive. In addition, the period of leave, during which these rights were to be ensured and measures were to be taken to prevent dismissal for reasons related to the condition of the women protected, was broadened from the fourteen week leave set out in Article 5(1) to cover the period of leave defined in Article 5 in its entirety. This meant that the protection extended to periods of sickness that were unrelated to the woman’s condition and to periods of leave which were longer than fourteen weeks.

221. Unamended Draft Pregnancy Directive, *supra* note 207, at 4.

222. It should be noted that there is a draft Directive which, if adopted, will modify the burden of proof. See Draft Sex Discrimination (Evidence) Directive COM(88)269 final, reprinted in 3 C.M.L.R. 272, 274, art. 3(1) (1988). The proposal is opposed by the United Kingdom.

223. Amendment to the Proposal for a Council Directive Concerning Measures to Encourage Improvements to the Safety and Health of Pregnant Workers, Women Workers Who Have Recently Given Birth and Women Who Are Breastfeeding, 1991 O.J. (C 25) 9.

224. *Id.* at art. 8.

C. Council of Ministers Amendments in December 1991

The European Community Council of Ministers for Social Affairs considerably narrowed the ambit of protection provided by the draft Directive in a text agreed to in December 1991.²²⁵ The most controversial change was the drastic reduction in the level of maternity pay. This involved a reduction in the original proposal of fourteen weeks maternity leave at full pay to ensure employment rights relating to the employment contract, including a payment or an adequate allowance "in accordance with national legislation and/or national practice"²²⁶ It further provided that maintenance of a payment to workers covered by the Directive would be deemed adequate "if it guarantees income at least equivalent to that which the worker concerned would receive in the event of a break in her activities on grounds connected with her state of health, subject to any ceiling laid down under national legislation"²²⁷ Also, it provided that entitlement to pay or, to such an allowance, can be made conditional if the worker meets conditions for eligibility set out in national legislation. The eligibility for pay, however, cannot exceed a period of more than twelve months employment prior to the anticipated date of confinement.²²⁸ This is an important departure from the Unamended Draft Pregnancy Directive which did not contemplate such length of service requirements for women to qualify for protection.

Significant changes were made to the Article prohibiting dismissal. The January 1991 draft prohibited dismissal of pregnant women, women who have recently given birth, and women who are breastfeeding from the start of their pregnancy until the end of their leave. The directive contemplated a period of sickness and leave greater than fourteen weeks. The Council of Ministers Amendments greatly reduced this protection since their draft prohibited dismissal of pregnant workers only from the beginning of their pregnancy to the end of their fourteen weeks leave and did not contemplate extending the leave by any periods of sickness. There was still ample room for dismissing pregnant women since Article 10 provided that dismissal of pregnant workers was prohibited "save in exceptional cases not connected with their condition which are permitted under national legislation and/or

225. Council Directive 92/85, 1992 O.J. (L 348) 1 [hereinafter Council of Ministers Amendments].

226. *Id.* at art. 11(1).

227. *Id.* at art. 11(3).

228. Unamended Draft Pregnancy Directive, *supra* note 207, at arts. 5-6; see also *After Maastricht: An Update on EEC Developments*, 444 INDUS. REL. LEGAL INFO. BULL. 2, 6 (1992) [hereinafter *After Maastricht*].

practice and, where applicable, provided that the competent authority has given its consent."²²⁹

Although no explicit reference was made to the reversal of the burden of proof in cases of disputes, Article 10(2) stated that if a pregnant worker (not a woman who has recently given birth or one who is breastfeeding) is dismissed during her leave, "the employer must cite duly substantiated grounds for her dismissal."²³⁰ This does not appear to mean that the burden of proof would be shifted to the employer if the worker sought legal redress in the courts.

Significantly, the Council's Amendments did not oblige Member States to enact provisions in national legislation enabling a woman who believes that her rights under the Directive have been infringed to seek redress in the courts. There was an obligation on behalf of Member States to adopt measures necessary to comply with the Directive not later than two years after its adoption, or to ensure that the two sides of industry introduce the requisite provisions in collective agreements by the same deadline.²³¹ The December 1991 amendments further provided that any existing measures in national law affording protection to pregnant workers, workers who have recently given birth, or who are breastfeeding, that are more favorable than the draft Directive must be maintained.²³²

As well, the onus was no longer on national health and safety authorities to assess the impact of working conditions on pregnancy, but rather it was on the woman's employer to evaluate these risks and to decide what measures should be taken. In addition, the provisions regarding receipt of pay, in the event a worker must take a special leave where a change of post is not possible, would be governed by national law instead of entitling the woman to receive full pay.²³³

Finally, the Council of Ministers Amendments eliminated the automatic prohibition on night work. Instead, a medical certificate must be obtained stating that it is necessary for the health or safety of the worker that she not perform night work.²³⁴ Member States were to ensure that workers covered by the Directive were not required to perform night work during pregnancy, and for a period after childbirth to be determined by the national authority responsible for safety and health. Previous drafts required an alternative to night work for a period of at least sixteen weeks.

229. Council of Ministers Amendments, *supra* note 225, at art. 10(2)(a).

230. *Id.* at art. 10(2).

231. *Id.* at art. 13.

232. *Id.* at art. 1(3).

233. *Id.* at art. 11.

234. *Id.* at art. 7.

The December 1991 amendments were adopted by ten Member States with Italy and the U.K. abstaining. The U.K. abstained as it objected to the use of Article 118a of the EEC Treaty dealing with matters such as leave, pay, and other employment rights. For Italy, the Directive was inadequate.²³⁵

D. May 1992 Developments Regarding the Proposed Pregnancy Directive

The rather tortuous development of the draft Directive continued when the European Parliament gave its opinion at the second reading in May 1992. The Members of the European Parliament voted in favor of improving the provisions to include a fourteen week maternity leave "paid at a level equivalent to the latest salary but ceilinged off so that this paid leave totals 80% of former earnings."²³⁶

Although it was intended to increase the period of leave from fourteen weeks to sixteen weeks, an error occurred during proceedings which resulted in the Council's common position on this provision being passed without amendment. In addition, Parliament introduced a provision reversing the burden of proof. Thus, the employer must prove that the employee has not been discriminated against on the grounds of her pregnancy.²³⁷ At the June 24, 1992, meeting of the EC Ministers for Social Affairs, the matter was debated but no vote was taken on the Directive because an agreement could not be reached. The European Commission refused to countenance a text which failed to provide benefits equal to 80% of the previous salary. Italy took the position that it would vote against the text because it thought the protection given was inadequate.²³⁸

E. The Pregnancy Directive

The Council of Ministers adopted the Pregnancy Directive on October 19, 1992. The Directive was adopted at the eleventh hour since the proposal would have lapsed if there was no decision by that date. Passage of the Directive was made possible by the abstention of Italy and the United Kingdom during the vote. Italy agreed to abstain in ex-

235. See *EEC Draft Directive on Pregnant Workers*, EQUAL OPPORTUNITIES REV., Mar./Apr. 1992, at 35.

236. *Social Affairs: Members of European Community Parliament Want to Reinforce Social Directives*, EUR. REP., May 23, 1992, at 6.

237. *Draft Pregnancy Law Strengthened*, EQUAL OPPORTUNITIES REV., July/Aug. 1992, at 3.

238. *Social Affairs Council: Adoptions Galore, But Pregnant Women Left in the Lurch*, EUR. REP., June 27, 1992, at 15, 15-16.

change for the addition of recitals making it clear that pregnancy is not to be equated with illness.²³⁹

Significantly, the Directive includes a non-regression clause which stipulates that the level of protection afforded to workers covered may not be reduced as compared with the situation that currently exists in each Member State. Accordingly, the United Kingdom and other Member States are not to take advantage of the minimum provisions set down in the Directive to reduce the level of protection currently given to the women.²⁴⁰ The Directive also provides that the Commission will draw up guidelines on the assessment of chemical, physical, and biological agents, and industrial processes considered hazardous to the safety or health of the workers protected. The guidelines are to be brought to the attention of the employers, female workers, and/or their representatives in Member States. It is for the employer to assess the risks and decide what measures are to be taken, rather than for the national health and safety authorities to assess the risks.²⁴¹

In the event that the results of the assessment reveal a risk to the health or safety of the worker, or an effect on her pregnancy and breastfeeding, the employer must adjust the woman's working conditions and/or working hours to ensure that her exposure to the risks is avoided.²⁴² If these adjustments are "not technically and/or objectively feasible," or "cannot reasonably be required on duly substantiated grounds,"²⁴³ then the employer must move the worker to another job. If this is not feasible, the worker must be granted leave for the period necessary to protect her safety or health.²⁴⁴ This also applies to women who are pregnant or who are breastfeeding.

The Directive includes an Annex which is a non-exhaustive list of prohibited physical, chemical, and biological agents that are dangerous to pregnant workers and workers who are breastfeeding. The Directive states that these women may under no circumstances be obliged to perform duties which involve a risk of exposure to these agents. This includes work in pressurized enclosures and underwater diving, and exposure to toxoplasma and the rubella virus (unless the workers are adequately protected by immunizations), underground mining work, and exposure to lead and lead derivatives.²⁴⁵

239. *Social Policy: Pregnancy Directive Adopted at the Eleventh Hour*, EUR. REP., Oct. 21, 1992, at 9 (1992).

240. *Pregnancy Directive*, *supra* note 200, at art. 1.

241. *Id.* at art. 4.

242. *Id.* at art. 5.

243. *Id.* at art. 5(2).

244. *Id.* at art. 5(3).

245. *Id.* at Annex II.

Unlike the Unamended Draft Pregnancy Directive, which required an alternative to night work for a sixteen week period, the Directive maintains the Council of Ministers Amendments requirement that the worker provide a medical certificate stating that a transfer to daytime work is necessary for her safety or health. The period of time that this covers is to be determined "by the national authority competent for safety and health."²⁴⁶ If a transfer to daytime work is not technically and/or objectively feasible or cannot be required on duly substantiated grounds, then a leave from work or an extension of maternity leave must be granted.

The provisions with respect to maternity leave and time off for prenatal examinations are unchanged following the December 1991 Council of Ministers Amendments. The women covered by the Directive must be give fourteen weeks maternity leave, including a compulsory leave of two weeks allocated before and/or after confinement. Unfortunately, any periods of sickness would be included as part of the fourteen weeks since the provision in the Unamended Draft Pregnancy Directive, stating that periods of sickness would not form part of the leave, was eliminated from the adopted Directive.²⁴⁷ As well, there is room for variation among Member States as the timing of the leave is to be "allocated before and/or after confinement in accordance with national legislation and/or practice."²⁴⁸ Pregnant workers are entitled to time off with pay to obtain antenatal examinations, if the examinations have to take place during working hours.

Article 10, which deals with prohibition of dismissal, was widened by referring to "workers, within the meaning of Article 2." In contrast, the Council of Ministers Amendments referred to "pregnant workers, within the meaning of Article 2(a)." The reference to "workers" represents a move back to the broad protection against dismissal that was found in the Unamended Draft Pregnancy Directive. Thus, it will not only be pregnant workers who are protected against dismissal, but also workers who have recently given birth, and workers who are breastfeeding. This is an important change in the ambit of the protection against dismissal. It appears that this covers both full and part-time employees. As well, in the event that a worker is dismissed during this period, "the employer must cite duly substantiated grounds for her dismissal in writing."²⁴⁹ The previous draft did not require the reasons to be in writing.²⁵⁰ This, however, is unlikely

246. *Id.* at art. 7(1)-(2).

247. Unamended Draft Pregnancy Directive, *supra* note 207, at art. 5.

248. Pregnancy Directive, *supra* note 200, at art. 8.

249. *Id.* at art. 10(2).

250. Council of Ministers Amendments, *supra* note 225, at art. 10(2).

to be construed as shifting the onus of proof to the employer to prove that there was cause for dismissal. There is no explicit provision shifting the burden of proof to the employer if a worker alleges discriminatory treatment on grounds of pregnancy before the courts or another competent authority.

The provisions with respect to employment rights remain the same as the previous draft of the Directive. Employment rights relating to the employment contract, including maintenance of payment to and/or entitlement to an adequate allowance for the workers, must be ensured.²⁵¹ Significantly, the allowance to be received is still linked to that which the worker would receive in the event of a break in her activities on grounds connected with her state of health. Member States may set down conditions regarding eligibility; however, this cannot provide for employment prerequisites in excess of twelve months immediately prior to the anticipated due date.²⁵²

This aspect of the Directive is controversial, since an analogy between sickness or disability and pregnancy is arguably inappropriate, and because the level of benefits would be considerably lower than full pay. In response to these concerns, a Statement of the Council and the Commission was made with respect to Article 11(3) of the Pregnancy Directive. It states that in determining the level of the allowance reference is to be made "for purely technical reasons, to the allowance which a worker would receive in the event of a break in her activities on grounds connected with her state of health. Such a reference is not intended in any way to imply that pregnancy and childbirth be equated with sickness"²⁵³

This statement establishes that the link with the legislation in Member States for an allowance to be paid during absence due to sickness is intended to serve as a concrete, fixed reference amount to determine a minimum allowance payable. It states that where allowances are paid in Member States that exceed those provided for in the Directive, those allowances are retained. This is due to Article 1(3) of the Directive which prohibits reductions in the level of protection currently given to the women covered.²⁵⁴

Interestingly, a new Article 12 was inserted in the Pregnancy Directive which is similar to an Article that was inserted by the European

251. Pregnancy Directive, *supra* note 200, at art. 11.

252. *Id.*

253. *Statement of the Council and The Commission Concerning Article 11(3) of Directive 92/85/EEC*, entered in the minutes of the 1608th Meeting of the Council (Luxembourg, Oct. 19, 1992).

254. *Id.*

Parliament in 1991²⁵⁵ and later removed by the Council of Ministers. The new Article 12 requires Member States to introduce measures into their legal systems to enable workers who are wronged by failure to comply with the Directive to prove their claims by judicial process and/or recourse to other competent authorities. The provisions regarding the enactment of legislation to ensure compliance in Member States within two years of adoption of the Directive are unchanged.²⁵⁶ Member States must report to the Commission every five years with respect to practical implementation of the Directive. A clause was inserted stipulating that Member States are to report for the first time with regard to practical implementation four years after adoption.²⁵⁷ A new clause states that Council will re-examine the Directive on the basis of an assessment based on reports from Member States and, if necessary, on the basis of a proposal to be submitted by the Commission no later than five years after adoption of the Directive.²⁵⁸

F. *Comments on the Pregnancy Directive*

It is not difficult to see why the European Commission and the European Parliament object to the manner in which the draft Directive was whittled down by the Council in December 1991. If the protection is limited to the level of statutory sick pay provided in national legislation, there is great room for diversity and small benefits. Fortunately, the non-regression clause should prevent lowering the rate of maternity pay to this level for workers who already fall within the requirements for maternity pay at a higher rate in the U.K. For women who qualify at this lower rate in the United Kingdom, however, the provision in the Directive amounts to virtually no protection at all. In the U.K., the minimum statutory sick pay stands at £43.50 per week, or £52.50 if the individual earns more than £185 per week.²⁵⁹ This is hardly enough pay to encourage women workers to become pregnant and to continue working thereafter. Interestingly, Mr. Eric Forth, Parliamentary Under-Secretary of State, Department of Employment, recently raised the issue of the desirability of encouraging women to return to work after giving birth:

The other very important point that you raise and into which I hope that I will not be drawn — I am probably rather incautious even to

255. Amendment to the Proposal for a Council Directive Concerning Measures to Encourage Improvements to the Safety and Health of Pregnant Workers, Women Workers Who Have Recently Given Birth and Women Who are Breastfeeding, 1991 O.J. (C 25) 9, at art. 8.

256. Pregnancy Directive, *supra* note 200, at art. 14.

257. *Id.* at art. 14(4).

258. *Id.* at art. 14(6).

259. *After Maastricht*, *supra* note 228, at 6.

mention it, but it is relevant — is the extent to which at any time one wants to encourage or even to entice mothers back to work. I am tentative about that because it gets one into the whole area of the family and the view that one takes of the role of women and, indeed, men in the family and the role that they should be fulfilling in respect of children, child care and so on Although I generally support measures that will enable women to return to work should they choose to do so, to go to the next step of saying encourage to return to work I think gets into a different sort of area of saying that rather than leave it to their choice and that of their spouse and their family circumstances, if one then begins to get into the incentive business rather than the enabling business — and I hope that I am not playing with words, I think that there is a real difference here — I think that is a different matter altogether. I personally am not sure that the Government is wholeheartedly prepared to go down that road.²⁶⁰

These comments do not provide much comfort to working women contemplating having a baby and returning to work.

The Minister estimated that the additional cost of implementing the maternity pay provision of the draft Directive is likely to run between £400 million and £500 million a year. Furthermore, the additional cost to employers of extending the current rights of employees to return to their previous post, so that they apply to all pregnant women, would likely be between £100 million and £150 million per year.²⁶¹ This compares with £90 million to £100 million in the event that the payments are linked to the level of sick pay.²⁶²

Many organizations made submissions to the House of Lords Select Committee on the European Communities hearings on the draft Pregnancy Directive in 1991. The Committee itself was of the view that Article 118a was an inappropriate legal base for the social policy provisions in the draft Directive, and that Article 100 would be more appropriate. The Committee shared the Government's concerns about the economic implications of the proposal and agreed that the direct costs would be substantial, whether they were borne by Member States or by employers. However, the Committee was of the view

Given the importance of retaining skilled women in the national workforce, account needs to be taken of the possible savings in recruitment and training costs to employers if women return to their jobs. This saving, as well as possible savings in unemployment

260. PROTECTION OF PREGNANT WOMEN, *supra* note 28, Minutes of Evidence, at 6-7.

261. *Id.* at 35. These figures pertain to the draft prior to the December 1991 amendments.

262. *Draft Pregnancy Law Strengthened*, EQUAL OPPORTUNITIES REV., July/Aug. 1991, at 3.

benefits and social security payments, needs to be set against the assessed costs of the proposal. Moreover, while we share the Government's view about the importance of maintaining the international competitiveness of British industry, we are not convinced that this issue should be determined solely on the basis of cost, in isolation from such issues as worker morale, social justice and the labour needs of industry. So far as Europe is concerned, we also consider that, in the longer term, Britain's competitive position in the Community might be favoured by the creation and maintenance of minimum standards of benefits for women workers in all Member States.²⁶³

A recent Policy Studies Institute Report indicated that there has been substantial growth in the number of women who return to work shortly after having a baby. Almost half of working women who become pregnant return to work within nine months of giving birth. In addition, the study found that such women are more likely than they were ten years ago to return to full-time work, doing the same job for the same employer. There was a correlation between higher pay and seniority of the position, and the likelihood that women returned to work.²⁶⁴

Both the Equal Opportunities Commission and the National Association of Citizens Advice Bureaux (NACAB) report large numbers of complaints by women who allege dismissal on the basis of pregnancy. NACAB is of the view that pregnancy is not an illness, but a condition meriting distinct legislative protection and rights against dismissal.²⁶⁵ The Equal Opportunities Commission was in favor of adoption of the Pregnancy Directive, including proposals to give statutory rights to paid leave, rights to return to work, and maintenance of employment rights while on leave. In their view, the measures do not cease to be questions of health and safety simply because they have a broader social significance. This is because of the high levels of stress experienced by women who suffer dismissal while pregnant, or the loss of the right to return after childbirth.²⁶⁶

The European Commission acknowledged in October 1992 that the Directive which was ultimately adopted was an insufficient response to the Commission's proposals and the requirements presented by the European Parliament, but nevertheless was of the view that the Preg-

263. PROTECTION OF PREGNANT WOMEN, *supra* note 28, Opinion of the Committee, at 12.

264. McRAE & DANIEL, *supra* note 3, at 5.

265. *Not in Labour: CAB Evidence on Pregnancy, Dismissal and Employment*, NAT'L ASS'N OF CITIZENS ADVICE BUREAUX, E/4/92, 26 (June 1992).

266. PROTECTION OF PREGNANT WOMEN, *supra* note 28, Written Evidence, at 16-17.

nancy Directive would improve the present situation in some Member States. In particular, the ban on dismissals without conditions on the length of employment and without reference to the size of the employer is an improvement for workers in the United Kingdom.²⁶⁷ One estimate suggests that this will protect approximately 4,000 pregnant workers who are dismissed annually in Great Britain.²⁶⁸ In addition, the Commission believed the reduction of the qualifying period for maternity benefits to twelve months is an improvement in Great Britain. Before, the requirement was two years full-time employment or five years part-time employment prior to being eligible for maternity benefits at the higher rate.²⁶⁹ Also, the requirement that work rights be retained during maternity leave will be an improvement in the United Kingdom since before the work contract was suspended during maternity leave with respect to pension rights, holidays, and seniority.²⁷⁰

V. CONCLUSION

The European Court of Justice and the British Courts have rejected the contention that the uniqueness of pregnancy precludes claims of sex discrimination in employment on grounds of pregnancy. Instead, the approach of the European Court of Justice gives pregnancy a protected status and holds that dismissal of a pregnant woman on the basis of her pregnancy is direct sex discrimination. The adverse financial consequences of an employee's maternity leave to the employer, including employers in the private sector, do not justify such sex discrimination. This is the result of the decisions in *Dekker* and *Hertz*.

Arguably, the Court of Appeal in *Webb* was incorrect to adopt the reasoning of the House of Lords in *Duke* and *Finnegan* in its decision. This is because the principle of indirect effect set out by the European Court of Justice in *Marleasing* obliges national courts to interpret national legislation to give effect to the objectives of Community law, including directives, notwithstanding any contrary provisions in national law. This is the case whether the national legislation predates or postdates the effective date of the Directive. Arguably, the Court of Appeal could have applied the approach of the House of Lords in *Stockton* to the facts in *Webb* to arrive at a conclusion giving effect to the social aim of the Sex Discrimination Act 1975 to accord special protection to pregnant employees.

267. (EU) EC/Social: For the European Commission, the "Pregnant Workers" Directive Contains Improvements to the Present Situation and Guarantees the Advantages Gained Even If It Does Not Fully Meet Its Requirements, EUR., Oct. 21, 1992, at 13.

268. Julie Kirkbride, *Maternity Boost for Employees*, DAILY TELEGRAPH, Oct. 20, 1992, at 4.

269. *Id.*

270. *Id.*

The Court of Appeal's approach to pregnancy dismissals involving the hypothetical ill man as a comparator to the pregnant woman is not in accordance with the law of the European Community. Such a comparison is unnecessary. As well, the difficulties it presents were demonstrated in *Shomer* where the Court added the requirement of comparing the treatment of the hypothetical ill man, who is also guilty of misconduct, to the pregnant woman's treatment. This is an extreme, convoluted approach. Surely, it is more reasonable to give pregnancy a protected status in employment law as it is a condition which is inherent to the female sex.

In any case, it appears that the problems created by dismissal of pregnant women may be largely addressed by the prohibition on their dismissal in the Pregnancy Directive. Of course, we do not yet know what "duly substantiated grounds" for dismissal will be, nor do we know what the "exceptional cases not connected with their condition" will be. It is likely that employers will continue to allege misconduct in order to attempt to avoid the financial consequences of employing pregnant women. In any case, it is hoped that the United Kingdom will enact legislation giving effect to the spirit and aims of the Pregnancy Directive. Recognition should be given to the important role of working women in British society, rather than simply to the desire of employers to keep wage costs low and the protection of workers to a minimum. British working women would welcome protection against dismissal on grounds of pregnancy which did not require length of employment conditions to be met, such as those stipulated by the Employment Protection (Consolidation) Act 1978. Finally, it is hoped that the adoption of the Pregnancy Directive, in combination with the decisions in *Dekker* and *Hertz* will lead to recognition by the British Government and British Courts that pregnancy is a condition that merits special treatment in society, and that comparisons with sick men in the workplace demean the dual role that women play in employment and childbearing.

VI. ENDNOTE

The House of Lords recently rendered its decision in *Webb v. EMO Air Cargo (UK) Limited*.²⁷¹ Significantly, the Court held

[t]here can be no doubt that in general to dismiss a woman because she is pregnant or to refuse to obey a woman of child bearing age

271. *Webb*, 1 C.M.L.R. 259 (H.L. 1993) (U.K.). As of publication, pinpoint citations were not available for this case. Page numbers given for specific citations to *Webb* in this Endnote section refer to the case as it appears in Lexis.

because she may become pregnant is unlawful direct discrimination. Child-bearing and the capacity for childbearing are characteristics of the female sex. So to apply these characteristics as the criterion for dismissal or refusal to employ is to apply a gender-based criterion, which the majority of this House in *James v. Eastleigh Borough Council*, [1990] 2 A.C. 751 held to constitute unlawful direct discrimination²⁷²

The House of Lords held that on the facts of this case, however, there was not any direct application of a gender-based criterion. Ms. Webb's expected non-availability during the period when she was needed to cover for Mrs. Stewart was the critical factor.²⁷³ If her anticipated confinement date had not been so close to that of Mrs. Stewart, she would not have been dismissed. In the court's view, the issue was whether it was legitimate to compare the non-availability of a woman by reason of confinement to the non-availability of a man, which might or might not be for medical reasons. The court concluded the test for direct discrimination set out in *R. v. Birmingham County Council ex parte Equal Opportunities Commission*²⁷⁴ was inapplicable in this case. This test requires a finding of direct discrimination under the 1975 Act if there has been less favorable treatment on grounds of sex or, in other words, if the relevant woman or women would have received the same treatment as a man but for her/their sex. In the opinion of the House of Lords, Ms. Webb "was not dismissed simply because she was pregnant but because her pregnancy had the consequence that she would not be available for work at the critical period"²⁷⁵

The court went on to compare the treatment of a pregnant woman to a hypothetical man due to have a prostate operation:

Then it has to be considered whether there is something special about pregnancy which ought to lead to the conclusion that the case of a woman due to be unavailable for that reason is materially different from the case of a man due to be unavailable because of an expected prostate operation. In logic, there would not appear to be any valid reason for that conclusion. It is true that pregnancy may be said to be a normal condition, not an abnormal pathological condition such as to require a hysterectomy, but the consequences of both are the

272. *Id.* at 263.

273. *Id.* at 264.

274. 18 INDUS. REL. L. REP. 173 (H.L. 1989) (U.K.) (*approved in James v. Eastleigh Borough Council*, [1990] 2 App. Cas. 751 (H.L. 1990)).

275. *Webb*, 1 C.M.L.R. at 262 (1993).

same, namely unavailability of the person when particularly needed.²⁷⁶

Arguably, the answer to the question posed by the House of Lords should have been "yes" since there is something "materially different" about the case of a pregnant woman and a man due to have a prostate operation. What is materially different about the two situations is that in the situation of the pregnant woman, the European Court of Justice has accorded protected status to pregnant women. The court has stated that discrimination on grounds of pregnancy is direct sex discrimination.

The House of Lords asserted that the correct comparison is not with any man, but with a hypothetical man who would also be unavailable at the critical time.²⁷⁷ The reason for the unavailability is "not a relevant circumstance, and in particular it is not relevant that the reason is a condition which is capable of affecting only women, or for that matter, only men."²⁷⁸ The Court accordingly held that Ms. Webb's dismissal did not constitute unlawful direct or indirect discrimination. With regard to the effect of Community law, the Court was of the opinion that *Dekker* and *Hertz* did not involve a situation where a woman, on account of pregnancy would not be able to carry out, at the time when her services were required, the particular job for which she is applying or for which she has been engaged. The Court stated "[t]he two decisions do not give any clear indication whether in such a situation the Court would regard the fundamental reason for the refusal to engage the woman or for dismissing her as being her unavailability for the job and not her pregnancy."²⁷⁹

Thus, the Court referred the question of whether the facts of this case constituted discrimination on grounds of sex contrary to the Equal Treatment Directive to the European Court of Justice. The question posed included the observation that "had the employer known of the pregnancy of the appellant at the date of the appointment, she would not have been appointed," and that "the employer would similarly have dismissed a male employee engaged for this purpose who required a leave of absence at the relevant time for medical or other reasons."²⁸⁰

In this author's opinion, the decision that there was no direct discrimination contrary to the 1975 Act against Ms. Webb is incorrect.

276. *Id.*

277. *Id.*

278. *Id.* at 265.

279. *Id.* at 270.

280. *Id.*

The Court's attempt to exclude pregnant women, who are discriminated against by not being engaged for a position, from the test established by the Law Lords for direct discrimination is not convincing. The Law Lords decided in *Webb* that it was direct discrimination to dismiss a woman because she is pregnant, or to refuse to hire a woman of child bearing age because she may be pregnant. Surely then, on the facts of this case, there must have been direct discrimination even under this limited test, because it appears that Ms. Webb was dismissed because she was pregnant. Her employer terminated her employment upon discovering her pregnancy. Evidently, the House of Lords shared the Court of Appeal's reservations about imposing the costs of maternity leave for two women on the employer with respect to the same position. The problem with this approach is that focusing on her unavailability for the position at the time when her services were required emphasizes the consequences of pregnancy to her employer. The consequences of Ms. Webb's pregnancy explain why the employer acted as it did in discriminating on grounds of pregnancy, but the discriminatory treatment would not have been afforded had she not been pregnant.²⁸¹

On this view, Ms. Webb was dismissed because of the consequence of her pregnancy to her employer, which was the anticipated cost of hiring another replacement. This is unacceptable because the European Court of Justice held in *Dekker* that the fact that the refusal to engage Mrs. Dekker was due to the adverse financial consequences to the employer, caused by the absence from work due to pregnancy, was immaterial, because the refusal was essentially based on the fact of her pregnancy. As well, in *Hertz* the Court stated that the refusal to hire a pregnant woman constitutes direct sex discrimination. As argued above, these cases establish a broad principle which accords pregnant women a protected status in employment. The Court of Justice also held that the fact no man had applied for the position made no difference to the finding of direct sex discrimination.

It is the contention of the writer that the question posed in the Reference, which compares the situation of a pregnant woman to a man requiring a similar period off work, for medical or other reasons, involves taking an approach which is out of step with the principles already established in Community law. It is not necessary or appropriate to compare Ms. Webb's treatment to an ill man or any other man.

281. See Nicole Lacey, *Recent Cases: The Law Relating to Sex Discrimination*, 15 INDUS. L.J. 43, 45 (1986); *Fair Treatment of Pregnant Women*, EQUAL OPPORTUNITIES REV., Sept./Oct. 1988, at 7, 12 (discussing *Donley v. Gallagher Ltd.* (N. Ireland Indus. Trib., June 11, 1987)).

In a recent development, a bill has been introduced to partially implement the Pregnancy Directive in Great Britain.²⁸² The bill, entitled the Trade Union Reform and Employment Rights Bill (TURER), received Second Reading on November 17, 1992, and reached Committee Stage in January 1993. TURER is tremendously complex and a separate article would be necessary to do it justice. Briefly, the bill prohibits dismissal on grounds of pregnancy, regardless of the length of the woman's service, or her hours of work.²⁸³ As well, it provides a general right to fourteen weeks maternity leave and a right to leave with full pay on maternity grounds when continuing work would expose the worker to health and safety risks at work.²⁸⁴

The Equal Opportunities Commission has formally responded and expressed concerns about "crucial flaws" in the bill. The Equal Opportunities Commission is of the view that there is an inadequate definition of work that is unsuitable during pregnancy, and it argues that the bill does not comply with the Pregnancy Directive because it does not guarantee continuation of contractual rights, such as pension entitlements during maternity leave.²⁸⁵

282. Bill 78, HOUSE OF COMMONS (1992).

283. *Id.* at cl. 21.

284. *Id.* at cls. 33, 35.

285. See *Equal Opportunities and the TURER Bill: An EOR Clause-by-Clause Guide*, EQUAL OPPORTUNITIES REV., Jan./Feb. 1993, at 21; Barrie Clement, *Shephard Faces Criticism Over Womens' Rights*, THE INDEPENDENT, Jan. 11, 1993, at 2.

