

## **WOMEN, EMPLOYMENT AND THE LAW**

*Doris Littlejohn*

### **BACKGROUND**

1975 was International Women's Year, and it was the year in which in the United Kingdom three separate, but closely related, pieces of legislation came into force. The first is the Equal Pay Act, which was passed in 1970 but which did not come into effect until the end of 1975, the second was the Sex Discrimination Act 1975, and the third was the maternity provisions which were contained in the Employment Protection Act 1975. It would have been very much more convenient for employers and employees alike if these separate provisions had all been contained in one single Act of Parliament, but it is also fair to say that when taken together the provisions of the three separate Acts appeared to cover all the areas of employment in which women had been traditionally at a disadvantage, and it appeared to open the way to equal opportunities in employment.

Separate from these Acts but closely connected with them was the European legislation. Article 119 of the Treaty of Rome, to which the United Kingdom became a signatory on joining the EEC, laid down the principle that men and women should receive equal pay for equal work. In 1975, the Council of the European Communities issued the Equal Pay Directive (75/117) which states that all discrimination on the ground of sex in respect of pay should be eliminated. Then in 1976 the Council issued the Equal Treatment Directive (76/207) which states that equal treatment must be accorded to men and women as regards access to employment including promotion, and to vocational training and as regards working conditions. Both Directives place

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an obligation on the member countries to enact the necessary legislation to ensure complete compliance with the Directive. There are three exceptions provided to the Equal Treatment Directive which are occupational qualifications, provisions for protecting women as regards pregnancy and maternity, and measures to promote equal opportunities (this last measure relates to steps to encourage entry to a level of employment where the one sex or the other is under-represented).

I intend to deal with each of the United Kingdom statutes in turn, to look at their strength and their weaknesses and to what extent they have achieved their purpose and how that has been done. In doing so, I would pay tribute to the courage and determination of women who have used this legislation to seek redress for their particular disadvantages, and in so doing have brought meaning to legislation which without their intervention might well have remained sterile and relatively meaningless.

#### **EMPLOYMENT PROTECTION ACT**

Let me deal with the least successful measures first.

Without doubt, the least successful measure for providing equal opportunities must be the maternity rights provisions contained in the Employment Protection Act 1975. It seems to me that in order to provide equal opportunities in employment for women, it is necessary to provide the same opportunity for a woman to become a mother, without prejudice to her employment, as exists for a man to become a father without prejudice to his. Had that approach been adopted, the legislation would have been very different in its original form. Initially, the Employment Protection Act established that it was automatically unfair for an employer to dismiss on the ground of pregnancy a woman who had been continuously employed for two years or more. The Act made provision for such women on becoming pregnant to have the right to maternity leave, to maternity pay and to return to their job after the end of their period of maternity leave, provided they carried out to the letter the very precise procedures set out in the Act.

Subsequently, these rights were amended to give them an additional right to time off for maternity care during their pregnancy, and various other rights. It is, to say the least, unfortunate that these provisions were set out in such a way as to be difficult to understand for employers and employees alike. Indeed, Mr Justice Browne-Wilkinson, writing in 1982, said 'these statutory provisions are of inordinate complexity exceeding the worst excesses of a taxing statute. We find that especially regrettable bearing in mind that they are regulating the everyday rights of ordinary employers and employees'

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(Landry -v- Plessey 1982). It is frankly difficult to imagine that the legislation was ever really meant to work. Fortunately, most employers accepted the obligations once they were able to understand them, and the good employers took steps to acquaint their employees with the provisions, and to advise them on what was required.

No protection, however, was given to women who became pregnant with less than two years' employment. Where was the equality of treatment for them with men who could become fathers with the same length of employment without putting their employment at any risk? A few women sought redress under the Sex Discrimination Act, and I shall say more about that later, but for most there was no redress. Fortunately, as a result of the European Communities Pregnant Workers Directive, provisions have been inserted in the Trade Union Reform and Employment Rights Act 1993, which came into force on 10 June of this year, which make it automatically unfair to dismiss a woman because she is pregnant, regardless of her length of service, and which give to every woman an automatic right to fourteen weeks' maternity leave. This is undoubtedly a major step forward in the protection of pregnant women, but it has done nothing to improve the complexity of the existing provisions.

### **EQUAL PAY ACT**

I now turn to the Equal Pay Act, which has as its heading 'An Act to prevent discrimination as regards terms and conditions of employment between men and women'. In last year's 'Women in Society' lecture, Morag Alexander quoted the statistic that the average gross weekly earnings for female manual workers working full-time in Scotland is 60.8 per cent of men's earnings, and that is after almost twenty years of the legislation being in force (Alexander 1993, p.41). The reason for the lack of success of the legislation is not difficult to find. As originally enacted, the Equal Pay Act provided for equal pay for women in two sets of circumstances. The first was where the women employed in the same establishment or in a different establishment but under the common terms and conditions were engaged on work which was the same or broadly similar to work being done by men. The second was where they were doing work which had been rated as equivalent under a job evaluation scheme to the work being done by men. If this Act was to succeed in its stated purpose, it was obvious that a great deal would depend on how the words 'the same or broadly similar' would be interpreted by tribunals and courts, who were to adjudicate on claims under this legislation.

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Happily, at least in Scotland, they took a purposive approach to the legislation, and within its limits the Act worked reasonably well in the early days and it appeared that progress was being made. Section 1(3) of the Act provided an additional defence to an employer in circumstances in which otherwise equal pay would be awarded, which was if he could prove that the difference in pay was genuinely due to a material difference other than the difference of sex. There was considerable concern on the part of women and their advisers that the material difference defence might be too easily accepted and too broadly interpreted by industrial tribunals, and thereby have the effect of defeating women's claims, but, in practice, it did not so operate. It was made clear by judicial interpretation that the terms of Section 1(3) must be construed as imposing on the employer the onus of proving that a variation in pay between a man and a woman employed on equal work is, in fact, reasonably necessary in order to achieve some objective other than an objective related to the sex of the worker. It did not matter that the employer did not intend to discriminate if the effect of what he did was discriminatory. Great care was taken by industrial tribunals and courts to ensure that the material difference defence was not used as a back-door means of perpetuating past discrimination. Certain things were identified as amounting to genuine material differences, such as red-circling, which sometimes occurs when individual employees are regraded or re-employed in lower-grade work through no fault of their own and have their existing level of pay protected, service increments based on length of service, additional training where that training can be shown to be necessary to give the employer flexibility in using his workforce, or perhaps an extra qualification or responsibility such as first-aid qualifications.

Eventually, in the case of *Claycross Quarry Services Limited -v- Fletcher* (1979), it was held by the Court of Appeal that in order to constitute a material difference which would justify a difference in pay, the difference had to be in what was called the personal equation of the woman and the man, and all extrinsic matters such as market forces were to be excluded from consideration. It was also established that the difference between the woman and the man in the personal equation must justify the whole of the difference in pay, and not just part of it. If it justified only part, it failed as a defence (*NCB -v- Sherwin* 1978). And so the material difference defence proved to be a much less formidable hurdle for women than was feared.

By the early 1980s, it had become clear that a very large number of women could not seek a remedy for their unequal treatment under the Act because they could not find a male employee in the same establishment whose work could be described as the same or broadly similar to the work which they

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were doing, and they worked in an establishment where no job evaluation study had been carried out. For them the Act provided nothing. In 1982, when this gap in the United Kingdom legislation had been held by the European Court of Justice to be a failure to implement the Equal Pay Directive's principle of equal pay for work of equal value, the Equal Pay (Amendment) Regulations 1983 were passed. The amendment enacted by these Regulations allows a woman to claim equal pay with a man in the same establishment when she is employed on work which is of equal value to that of the man, in terms of the demands made on her - for instance under such headings as effort, skill and decision. No-one would describe that wording as a model of clarity. But it is sufficient to enable a woman doing what has long been regarded as women's work, and which is consequently often undervalued, to claim equal pay with a man doing work which has been traditionally regarded as men's work and as a consequence often overvalued.

The opportunity was taken at the same time to amend Section 1(3) of the Sex Discrimination Act by substituting the words 'material factor' for 'material difference' in relation to equal-value claims. There was no logical reason why this defence should be different in relation to equal-value claims from what it was in relation to the other equal-pay claims, but the amendment was made. No definition was given of the words 'material factor', but it seemed clear that it was intended to widen the scope of this defence and perhaps to permit market forces to be considered where appropriate.

At the same time, the Industrial Tribunals (Rules of Procedure) Regulations, which regulate the proceedings before Industrial Tribunals, had added to them a second Schedule setting out the procedure which had to be followed by tribunals in dealing with equal-value claims. These are a highly complex set of procedures which have operated almost entirely to defeat the object of the legislation. I know of no other piece of legislation which has been so criticised by senior members of the judiciary. Speaking in the House of Lords soon after the regulations were passed, Lord Denning observed that 'no ordinary person could understand them and that industrial tribunals would have the greatest difficulty in doing so and the Court of Appeal would probably be divided in opinion'. Mr Justice Kilner-Brown, speaking in 1986, said of the Regulations: 'But confusion is worse confounded by the procedural Regulations which purport to deal with the problem of the obvious question as to what is equal value. These require the industrial tribunal to resort to the last refuge of the bewildered and undecided, and to send it to an expert for his pseudo scientific judgment rather than leave it to the broad and realistic judgment of an industrial tribunal' (Forex Neptune -v- Miller 1987). Speaking in 1992, Mr Justice Wood said: 'The state of the law

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is such that this industrial tribunal faced a formidable task. A number of cases in recent months and years have made clear the extreme complication both in substance and procedures of this branch of the law. Such complications are the enemies of clarity, speed and simplicity of action. We would respectfully urge statutory reconsideration and clarification as soon as possible' (Lloyds Bank -v- Fox 1992). And Lord Lowry, the greatly respected former Lord Chief Justice of Northern Ireland, speaking in the Court of Appeal said: 'We would finally express our opinion that the Rules of Procedure are now very obscure and much too complicated, together with the hope that they will soon be replaced by something clearer and simpler' (Tennants Textiles Colours -v- Todd 1989). The criticisms appear to have fallen on deaf ears.

One can only speculate as to why the procedural regulations are so extraordinarily complex. The view was expressed in some quarters that enabling women doing what had been traditionally female jobs to obtain equal pay with men doing traditionally male jobs which were different but of equal value would so radically upset the traditional pay patterns in industry and commerce that it would amount to an unwarranted interference by the government in business. On the other hand unless the traditional pattern was broken women would never achieve equality. Even if Parliament was unconcerned about the inequality of women's and men's earnings, as their disregard since 1975 of the Equal Pay Directive would appear to indicate, they were by 1983 under irresistible pressure to amend the legislation as a result of the adverse decision of the European Court of Justice. The legislators would say that the regulations were drafted in their present form because it would be extremely difficult if not impossible for industrial tribunals to judge equal value without a report from an independent expert. That is not a view generally shared by industrial tribunals. A cynic might say that they were framed as they are to discourage women from bringing claims, it being more important not to upset employers than to provide equality of opportunity for women. The sad fact is that because of the unsatisfactory Regulations, as a result of which cases take several years to complete, the number of equal-value complaints has declined to a trickle, and the object of the legislation is being defeated.

It is particularly regrettable that this is so because from the mid-1980s there has been much litigation in the European Court of Justice about the meaning of 'pay'. 'Pay' is defined in Article 119 of the Treaty of Rome as meaning the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives directly or indirectly in respect of his employment from his employer. It has been established as a result of litigation in the European Court of Justice that it covers such things

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as pensions, sick pay and redundancy payments (the Danfoss case: see Handels 1989). It is somewhat ironical that the decisions of the European Court of Justice have been used with great success by men to redress the financial disadvantage from which they have suffered in relation to occupational pensions and redundancy pay, as a result of those being linked to the gender discriminatory age qualifications for United Kingdom State pensions. Also, the European Court of Justice has made it clear in a number of decisions that where a female worker establishes, by comparison with a relatively large number of employees in the establishment where she works, that the average pay of female workers is lower than that of the male workers, the burden of proof is on the employer to show that his pay practice is not discriminatory.

In the recent case of Enderby -v- The Frenchay Health Authority, the European Court of Justice considered the question of whether the fact that the difference in pay had been arrived at as a result of many years of separate collective bargaining was capable of amounting to a material factor defence. The Court held that it was not. It did explain how the difference had arisen, but the Court held that it is not sufficient for an employer to explain how the difference in pay is arrived at. The explanation must be one which justifies the difference (European Court of Justice 1993). In the same decision the European Court of Justice said that market forces were capable of justifying a difference in pay, but I have no doubt that in order to do so it will have to be shown that the higher market-value of the job is not based on the fact that the job has been traditionally regarded as a male job. Unless regard is had to that, then market forces would all too easily allow a continuation of historical discrimination.

And so the position really is that while the substance of the legislation is being interpreted in the European Union in a way which is ever more favourable to women, the Regulations imposed in the United Kingdom are such as effectively to deny women access to remedies. I understand that the Equal Opportunities Commission have already referred the matter to the European Commission. As someone who has had to endure the frustrations of trying to make the Equal Value Regulations work, I would say that unless the procedure is drastically amended, the object of the legislation will be defeated.

## **SEX DISCRIMINATION ACT**

It is in connection with the Sex Discrimination Act that, from an unpromising start, spectacular success has been achieved and has been achieved only because of women being brave enough to litigate in pursuit of their rights.

The Sex Discrimination Act has been subjected to much criticism, and most of it is well-deserved, but it is only fair to recognise the difficulties which the legislation inevitably would encounter in achieving its objective. In order to achieve its objective, it required to change ideas and attitudes which had been in existence from time immemorial. Ideas and attitudes cannot be changed by legislation alone, but the legislation is necessary as a means of enforcing the change. When attempts are made to change attitudes and restructure society, many people will not only have entrenched attitudes, but also have a self-protecting interest in trying to ensure that nothing changes. If, as was largely the case in 1975, the people with the self-protecting motives are the ones in positions of power, change is made doubly difficult. There can be no doubt that it was for that reason that one of the provisions of the Act was the setting up of the Equal Opportunities Commission, whose duties are to work towards the elimination of discrimination, to promote equality of opportunity between men and women generally, and to keep under review the working of the Sex Discrimination Act and the Equal Pay Act, and when appropriate to draw up and submit to the Secretary of State for Employment proposals for amending them. Clearly, with the Commission lay the duty of educating employers and others into the new attitudes which they were required to adopt, and they also had the right to give assistance to people for the purpose of bringing complaints under the Sex Discrimination Act and Equal Pay Act. Their assistance and support has been invaluable to the victims of discrimination. They have had spectacular successes in litigation pursued in their own name, such as the House of Lords victory in March 1994, in which they won the right to equal treatment in respect of unfair dismissal and redundancy for part-time employees. It is not the fault of the legislation that the Commission is chronically underfunded.

There are two other aspects of the Sex Discrimination Act which I would praise unreservedly. The first is the provisions of Section 74 of the Act which gives a person who believes that she has been discriminated against the right to send a questionnaire to her employer, or the person to whom she applied for employment, requiring him to answer such questions as she puts to him relating to the act which she believes was discriminatory. The answers to these questions should give her a reasonable indication of whether her suspicion of discrimination is well-founded. Section 74 also provides that the

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questions and answers may be part of the evidence in a complaint of discrimination, and that if the employer fails to answer the questionnaire within a reasonable time, or answers it evasively or equivocally, the tribunal can draw from that any inference it chooses, including an inference that an act of discrimination has been committed. The value of this provision cannot be over-emphasised.

The second aspect which I would praise is Section 41, which makes employers liable for acts of discrimination committed by their employees, whether the employers were aware of the acts of discrimination or not. The only defence which is open to an employer under that Section is for him to prove that he had taken such steps as were reasonably practicable to prevent the act of discrimination. That provision should have prevented employers from being ostriches and should have galvanised them into some kind of action if only for the purpose of self-protection.

The coming into force of the Sex Discrimination Act was hailed as the dawn of a new era for women in employment. Almost immediately a new word came into our language, namely Chairperson. Job advertisements stopped inviting applications from the one sex or the other. Advertising revenue for newspapers increased appreciably as every large employer inserted in all of his job advertisements the words 'We are an equal opportunities employer', and some employers published high sounding equal opportunity policies. Not much else happened, and if we look at the wording of the legislation I think we shall understand why.

The Sex Discrimination Act makes unlawful four separate types of discrimination - direct sex discrimination, indirect sex discrimination, discrimination against married persons and discrimination by victimisation. It applies to men as well as to women. Within the employment field, the Act makes it unlawful for an employer to discriminate against a woman or a married person in the recruitment arrangements which he makes, in the terms on which he offers her employment, or by refusing or deliberately omitting to offer her that employment. It is also made unlawful for an employer to discriminate against a woman or a married person who is in his employment, in the way in which 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 by dismissing her or by subjecting her to any other detriment. Excluded from the Act in its original form were provisions in relation to death or retirement, and so it remained lawful to retire compulsorily men and women at different ages. Also excluded were situations where being of one sex or the other was a

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genuine occupational qualification, such as in dramatic performances or where physical contact was part of the job in circumstances where one sex might reasonably object to it being carried out by the other, and also special treatment in connection with maternity and childbirth.

Discrimination is defined in the first Section of the Act. Direct discrimination occurs where, on the ground of sex or marital status, a person treats a woman less favourably than he treats or would treat a man or an unmarried woman. Indirect discrimination occurs when a person applies to a woman or a married woman a requirement or a condition which he applies or would apply equally to a man or an unmarried person, which is such that the proportion of women who can comply with it is considerably smaller than the proportion of men or married persons who can, and which the person cannot show to be justifiable and which is to the detriment of the woman because she cannot comply with it.

Direct discrimination is very easily understood. Indirect discrimination is a difficult concept to grasp, but is undoubtedly the greatest barrier toward women's progress in the employment field because even after twenty years it is still not widely understood. It has been described as being a practice which is fair in form but discriminatory in effect. It occurs when an employer advertising a job and setting out the terms on which he offers it, and the criteria which have to be met by aspiring applicants, sets out conditions and criteria which apply equally to both sexes and to married and unmarried persons but which criteria one sex would find much more difficult to meet than the other. Examples might be an obligation to work full-time, or an upper age limit of thirty-five, particularly where that is accompanied by a requirement for a prescribed number of years of experience in a particular post. These clearly are conditions with which, at the time when the Act was passed, a considerably smaller of women could comply than the proportion of men who could comply. It does not mean that those criteria cannot be used by the employer, but it does mean that before he imposes them he must be able to show that they are objectively justified, and justified in that context means amounting to a real need on the part of the employer.

It is not surprising that it was not immediately clear to employers that that is what the legislation meant. Leaving aside the bad employers determined to ignore the provisions of the Act, great progress could have been made very quickly if, in relation to direct discrimination, employers, as well as making sure that their job advertisements invited applications from both sexes, had taken the positive action of carrying out an equal-opportunities audit in their organisation, and taken steps to ensure that circumstances likely to lead to

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discrimination were altered. It would have helped if they had trained their recruitment officers to be aware of their own in-built prejudices and biases, and to assess female applicants on their merits without regard to their marital status, child-bearing propensities or perceived domestic responsibilities. This was a necessary step because, of course, in 1975 nearly all people in positions of authority in employment were men, who knew that women were likely to marry and when they married would put their domestic responsibilities first. After all, that was how life had been ordered by men for centuries. And it was not always men - sometimes it was unmarried women who had dedicated their lives to their careers and did not see why some women should have both a career and marriage and parenthood.

Equally, progress could have been made rapidly in the indirect-discrimination field if employers had examined the criteria which they normally operated in recruitment and promotion exercises. Where it appeared likely that these criteria would have a disparate impact on one sex or the other, they might have considered whether they were justifiable and, if they were not, changed them. But there was nothing in the wording of the legislation which compelled them to do so. Indeed, there was little in the wording of the legislation which compelled anyone, except the Equal Opportunities Commission, to do anything. There was a very real danger that all that would be achieved by the legislation was that discrimination which had previously been overt would become covert. In addition, well-motivated employers, believing that they were being absolutely fair to both sexes and to married and unmarried persons alike, would perpetuate recruitment and promotion selection practices which discriminated against one sex or the other. As with the equal pay legislation, much would depend on the industrial tribunals and higher courts charged with the enforcement of the legislation. Only industrial tribunals hear the evidence on complaints of sex discrimination, and it is their duty to elicit all the relevant information. The fact that industrial tribunals were given the jurisdiction of dealing with discrimination complaints is a mixed blessing for women.

I would suggest that there are more advantages in that provision than disadvantages; a complaint could be brought by an applicant free of any anxiety about the cost of the proceedings; access to tribunals is reasonably speedy; and the tribunal is tripartite, having, in addition to a legally-qualified chairman, two members from each side of industry. The tribunal hearing a complaint of discrimination is always of mixed gender and the proceedings are much less formal than in courts. The disadvantage for women is that legal aid is not available for representation before industrial tribunals, although if a woman wins at the industrial tribunal she is eligible for legal aid for

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representation at the higher tribunals and courts in the event of an appeal being taken by the respondent. Happily, industrial tribunals very rapidly realised that it would be very rare indeed for direct evidence of sex discrimination to be available to them, and that if they did not adopt a purposive attitude toward the legislation then its objective would be defeated. There has always been, and continues to be, much criticism of the fact that the onus of proof in a sex discrimination complaint rests upon the applicant. That criticism, in my view, is misplaced. The practice has always been, at least in Scotland, to listen to the evidence of the applicant, and if that evidence discloses a prima facie act of discrimination, then the employer is required to explain the action, and if he is unable to establish an acceptable explanation which is free of sex discrimination, then the inference is drawn that the act of discrimination was on the ground of sex. Tribunals always remembered that the motive and intent of the employer was irrelevant. What had to be looked at was the effect upon the complainer. It was also established that direct discrimination could never be justified.

In relation to indirect discrimination, there has been much litigation about the meaning of 'requirement' or 'condition' and the meaning of 'justified', and over the years a substantial body of case law has built up identifying a considerable number of time-honoured practices as being indirectly sexually discriminatory, and which therefore required to be objectively justified if they were to continue. For example, the practice in a redundancy situation of selecting part-time employees first for redundancy was held to be indirect discrimination (*Clarke -v- Eley* (IMI) *Kynoch* 1982), as was the practice of requiring jobs to be done on a full-time basis (*Home Office -v- Holmes* 1984)). Both of these were extremely radical changes.

Gradually the sterile words of the Statute became meaningful, and employers began to understand the type of rigorous examination which they had to conduct of their own practices if they were to be confident that they were non-discriminatory. For example, if a University were to be accused of sex discrimination by a female lecturer who had applied for, and not been appointed to, a senior lectureship, the tribunal would expect the University to produce statistical information about the numbers of male and female academic staff at the various levels throughout the organisation. They would want to know the gender balance of the appointing committee and the gender, qualifications, experience and references of the other candidates, the criteria for the selection of the short-list, and the details of the questions used at the interview; and they would expect to see produced the notes of the assessment of the various candidates. It would also want to know whether the University had an equal-opportunities policy and, if so, how it was implemented and

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what guidance was given to the selection committee on avoid discrimination at the interviews. Where the complainer has been unsuccessful in her application for a post, and the successful, but apparently less qualified, candidate is a man, all of the information I have indicated would be taken into account, and - particularly if there is evidence of gender imbalance at promoted levels, and the tribunal has not been satisfied with the explanation given for the appointment of the man - an inference is likely to be drawn that the reason for the appointment is based on sex and is therefore an act of unlawful discrimination.

It is generally believed that another obstacle to the effectiveness of the legislation is the absence from our judicial procedure of any provision for class actions. On balance, I do not think that criticism is well-founded. While class action would give the individual woman the comfort of being part of a large group, my understanding of the American experience is that identifying and defining the class can take such a long time that it causes unacceptable delay. My own experience is that where one applicant is successful, then what she has won is extended to others in a comparable position. Nowhere was that more clearly illustrated than in the case in a Scottish Regional Authority, where two careers officers who had been on maternity leave wished to return to work on a job-sharing basis. The employer refused, saying that they had no policy for job-sharing, the women brought a complaint of indirect sex discrimination, they were successful, and the employers could not justify the requirement that they work full-time. Within a matter of weeks, job-sharing had become the norm in that Authority.

There are two matters which are not mentioned in the Sex Discrimination Act, but which were extremely important in the working lives of women. The first is pregnancy and the second is sexual harassment. I pointed out earlier that the Employment Protection legislation gave no protection to women against dismissal on the ground of pregnancy when they had been employed by their employers for less than two years. A number of women over the years, finding themselves dismissed for that reason, brought complaints under the Sex Discrimination Act. Initially, they were unsuccessful, because it was held that since men could not become pregnant it was not possible to compare like with like, but it was soon established that it was an act of sex discrimination if the woman was dismissed because of pregnancy when a man employed for the same length of time would not have been dismissed because of an absence for a temporarily disabling condition. However, with typical European directness, the European Court of Justice, as a result of a case originating in Denmark, held that dismissal on the ground of pregnancy could not be other than a gender-based dismissal and therefore unlawful, because

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pregnancy was unique to one sex and therefore the dismissal was directly sexually based (*Dicker -v- VJV Centrum* 1991). Happily, this matter has been effectively taken care of by the new provisions in the Trade Union Reform and Employment Rights Act 1993.

It is perhaps surprising that it took some years for it to be understood that the Sex Discrimination Act did cover acts of sexual harassment. This was not authoritatively established until 1985, when Mrs Porcelli brought a complaint of sexual harassment against her employers, Strathclyde Regional Council, and claimed that being subjected to sexual harassment was being subjected to a detriment on the ground of her sex and was therefore covered by the Act (*Porcelli -v- Strathclyde* 1986). Her complaint was upheld, and as a result of that single case and the publicity which attended it, the whole attitude to sexual harassment has changed. There have been many other successful complaints of sexual harassment, and, as a result of judicial interpretation, it has become very clear that, in deciding what amounts to sexual harassment, it is the view of the victim which must be considered. So, as a result of that one single case, a particularly unpleasant form of treatment which women have had to endure in the workplace for too long can now be dealt with. Because of the ability of women to bring complaints of sexual harassment and obtain a remedy, the extent to which it was practised in the workplace has become widely recognised, and the European Commission has produced a Code of Practice for dealing with sexual harassment; there is now no reason why any woman should have to accept it.

In this area, above all others, the wording of Section 41, which makes employers vicariously liable for the acts of their employees, is particularly important. Sexual harassment is very frequently committed by fellow employees without the presence of the employers. It will avail an employer nothing to say that he was unaware of the sexual harassment which was being perpetrated. Most large employers, including some Universities, now recognise the need to have in place a proper policy for dealing with sexual harassment, not only for the purpose of good employment practice but also for self defence against what now might be extremely large claims for compensation.

### **REMEDIES**

The remedies provided by the Sex Discrimination Act in its original form are three-fold: the declaration of the rights of the parties in relation to the complaint; a recommendation that certain steps be taken for the purpose of obviating or reducing the adverse effect on the complainant of the act of

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discrimination; and an order for compensation which can include compensation for injury to feelings, but subject to the maximum limit in place at any time for compensation for unfair dismissal, which at the present moment is £11,000. This is the only field of employment law, apart from race discrimination, in which compensation is payable for injury to feelings, but the limit on compensation meant that if the patrimonial loss used up all the £11,000, then the wounded feelings go unassuaged. Failure adequately to compensate for injury to feelings is simply an aggravation of the wound.

Happily, the inadequacy of the compensatory provisions have been put right as a direct result of the tenacity of a splendid one-woman campaigner, Miss Helen Marshall of Southampton, supported by the Equal Opportunities Commission. I mentioned earlier that provisions for death and retirement were excluded from the Act, and so the Act did nothing to change the position of women being compulsorily retired at 60 and men at 65. Miss Marshall was compulsorily retired at 60, and felt aggrieved by the loss of her employment and the income therefrom between then and the age of 65. Finding no remedy under the United Kingdom legislation, she raised a complaint under Article 119 of the Treaty of Rome and the Equal Treatment Directive, complaining that by allowing a sex-based differential on retirement ages, the United Kingdom legislation was in conflict with the European Directive. The case went all the way to the European Court of Justice, where her complaint was upheld (*Marshall -v- Southampton and South West Hampshire Area Health Authority* 1986), and as a direct result of Miss Marshall's efforts, the Sex Discrimination Act was amended to make it unlawful to apply different compulsory retirement ages for men and women.

Miss Marshall then found that the maximum amount of compensation then payable under the United Kingdom legislation was totally insufficient to meet the loss of earnings which she had sustained. She then raised another complaint under Article 119 and the Directive, saying that by failing to provide adequate compensation the United Kingdom Government was in breach of the Directive. Again it went all the way to Europe and again she succeeded. As a direct result, the limit on compensation in sex-discrimination cases has now been removed. In addition, in the same case the European Court of Justice said that the compensation for acts of discrimination should include interest on the sum awarded from the date of the act of discrimination (*Marshall -v- Southampton and South West Hampshire Area Health Authority* 1993). As a result, very substantial amounts of money indeed can be awarded for acts of sex discrimination. That is being amply demonstrated in the Ministry of Defence cases which are presently being dealt with in tribunals throughout the UK. In my view, these very large sums of money

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will do more to assist the implementation of equal opportunities than anything which has preceded them.

### **CONCLUSIONS**

So what then does this account of legislation say about women and employment and the law, and what does it say about the position of women in society? It shows that women have done for employment law at least as much as employment law has done for women, because it is as a result of their use of the legislation that it has become meaningful and effective. As a result of women internationally using the legislation, they are now in some respects in a stronger position as far as financial remedies are concerned than are their male counterparts. But of course equal opportunities is not really about money. It is about enabling women to occupy their rightful position in the workplace. Large financial awards are simply the weapons which are sadly necessary if we live in a society which is prepared to allow women to be treated unjustly in the workplace until compelled to do otherwise. The continuing unsatisfactory state of the legislation would appear to indicate that, as far as the legislators are concerned, access to equality between men and women is not a matter of priority. Although progress has been made, and the shortcomings of the legislation have been highlighted, no real interest is being shown in making improvements. The lack of public outcry suggests the conclusion that the society in which we live regards justice for women as less important than protecting the vested interests of largely male-dominated institutions and employers.

An interesting contrast, however, is found in the attitude of judges at all levels who, with a few exceptions, have adopted the attitude that cases should be approached in such a way as to achieve the purpose of the legislation wherever possible. This reflects a considerable change from the attitude of the judiciary as described and commented on by David Pannick in the introduction to his book **Sex Discrimination Law** (1985). When such a male dominated and traditionally reactionary body as the judiciary can be persuaded, there is every reason to hope that sooner or later justice will be done.

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