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Women in the Workplace: On 'unfair discrimination', 'affirmative action', 'reasonable accommodation' and 'special measures'

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1 INTRODUCTION

Despite the fact that women are a designated group for purposes of affirmative action regulated in the Employment Equity Act, 1998 (the EEA),[1] a recent report of the Commission for Employment Equity[2] emphasised that male employees still outnumber female employees at all levels of management. This persistent reality raises questions about the success or otherwise of our legal system to provide for the effective recognition of women, their equality of opportunity and, ultimately, their effective inclusion and advancement in workplaces.

In the South African employment context, women as a group are protected in three ways. First, the EEA prohibits unfair discrimination[3] based on, among others, sex, gender, pregnancy[4] and family responsibility.[5] Secondly, against the backdrop of section 9(2) of the Constitution, the EEA states its goal to include an obligation on designated employers[6] to implement 'affirmative action measures[7]

[1] Act 55 of 1998.
[2] "Commission for Employment Equity, Annual Report" (2013-2014) South Africa: Department of Labour <http://www.gov.za/sites/www.gov.za/files/14%20CEE%20Annual%20Repport.pdf> (accessed 13-05-2014) 15, 53.
[3] In section 6(1).
[4] Section 1 of the EEA defines pregnancy as to include 'intended pregnancy, termination of pregnancy and any medical circumstances related to pregnancy'.
[5] Section 1 of the EEA defines family responsibility to mean 'the responsibility of employees in relation to their spouse or partner, their dependent children or other members of their immediate family who need their care or support'.
[6] Section 1 of the EEA defineS 'designated employer' to mean-
(a) an employer who employs 50 or more employees;
(b) an employer who employs fewer than 50 employees, but has a total annual turnover that is equal to or above the applicable annual turnover of a small business in terms of Schedule 4 to the EEA;
(c) a municipality, as referred to in Chapter 7 of the Constitution;
(d) an organ of state as defined in section 239 of the Constitution, but excluding the National Defence Force, the National Intelligence Agency and the South African Secret Service; and
(e) an employer bound by a collective agreement in terms of section 23 or 31 of the Labour Relations Act, which appoints it as a designated employer in terms of this Act, to the extent provided for in the agreement.'
[7] Described in section 15 of the EEA.

to redress the disadvantages in employment experienced by designated groups,[8] in order to ensure their equitable representation in all occupational levels in the workforce'.[9] Section 1 of the EEA expressly includes all women in its definition of designated groups. Thirdly, there are some provisions in our legislation – such as the provisions of the Basic Conditions of Employment Act, 1997[10] (the BCEA) relating to maternity[11] and family responsibility leave[12] and the new sections 198B and C of the Labour Relations Act, 1995[13] – that do provide for a measure of specific, more focused relief women may rely on. In short then, the workplace protection women in South Africa is a matrix consisting of discrimination law, affirmative action and specific rights.

In assessing the effectiveness of the law to protect and advance women, this paper will, at a first level, aim to make three points. First, protection against unfair discrimination is notoriously haphazard – the concept itself is fraught with difficulty and requires litigation to flourish.[14] Furthermore, despite important recent amendments to the EEA, many of the reservations about the effectiveness of discrimination law remain. Secondly, affirmative action has largely collapsed into a system of demographically aligned appointment and promotion, a system that serves little purpose in necessarily addressing the challenges women as a group face as they strive to combine a career with care. Thirdly, the specific rights we do have in legislation are sparse.[15] Simply put, discrimination litigation, the recruitment of female employees and a low level of specific rights are not sufficient in redressing the workplace inequalities associated with sex, gender and family responsibilities. A more focused intervention is necessary to ensure both equal opportunities, as well as advancement for women, the primary caregivers of children, to enable a successful combination of their work and family responsibilities. Underlying this, is the simple reality that true accommodation of women in the workplace – in terms of both access to employment as well as their security and advancement over time – also of necessity requires a focus on their (ongoing) family responsibilities and the flexibility of their working arrangements.

These remarks in mind, this paper will argue that a shift in focus is needed and that, to some extent, the conceptual basis for that shift already is present in our law in two familiar terms – that of 'reasonable accommodation' and 'special measures'. The EEA - implicitly in sections 5 and 6 (in the context of discrimination) and explicitly in section 15 (in the context of affirmative action) - advocates and recognises the idea of 'accommodation'. In the gender context, section 1 of the EEA also tells us that 'reasonable accommodation' means 'any modification or adjustment to a job or to the working environment that will enable [women] to have access to or participate or advance in employment'. As such, it will be argued that 'reasonable accommodation' is both the common

[8] Section 1 of the EEA defines 'designated groups' to mean 'black people, women and people with disabilities who are citizens of the Republic of South Africa by birth or descent or became citizens of the Republic of South Africa by naturalisation before 27 April 1994; or after 26 April 1994 and who would have been entitled to acquire citizenship by naturalisation prior to that date but who were precluded by apartheid policies'.

[9] See section 2(b) of the EEA. See also O Dupper "Equality in the workplace" in Walt A v d, et al. (eds) *Labour Law in Context* ed (2012) 65.

[10] Act 75 of 1997.

[11] Section 25 of the BCEA.

[12] Section 27 of the BCEA.

[13] Act 66 of 1995. The sections referred to in the text were introduced by the Labour Relations Amendment Act 6 of 2014, which came into operation on 1 January 2015.

[14] See the discussion in part II below.

[15] See the discussion in part III below.

denominator between, as well as a prerequisite for the success of, effective protection against unfair discrimination and effective implementation of affirmative action in the gender context.

Furthermore, it will be argued that the most effective way of giving content to the principle of reasonable accommodation is to focus on a regime of specific rights departing from the focus driven principle of 'special measures'. The concept 'special measures' is used in several international treaties and already forms part of our law. For example, article 5 of the International Labour Organisation's Discrimination (Employment and Occupation) Convention, 1958, permits the adoption of 'special measures of protection or assistance' to meet the particular requirements of people, who for reasons such as sex and family responsibilities, are generally recognized to require special protection or assistance'. A proper appreciation of reasonable accommodation and the need for special measures may well prove a conceptual tiebreak to provide the basis for a move away from rather haphazard (unfair discrimination) or amorphous (affirmative action) protection towards a broader and more focused legislative regime.

In addressing these issues, part 2 below will consider the continued stereotyping of women in workplaces, the notion of 'reasonable accommodation' in the context of South African equality law as well as the potential or otherwise of equality law to protect women into the future. In doing so, attention will be paid to recent legislative amendments to the EEA. This will be followed by a brief comparison of the specific rights regime protecting women across three different jurisdictions as far as time off for family responsibility and flexible working arrangements are concerned. While not comprehensive, this is for the following reasons: it illustrates how specific rights may be used to alleviate the position of women in the workplace; it already shows some of the comparative deficiencies of South African law; and it also shows how comparative work may be used to offer possible solutions. Ultimately, it will be argued that if one of the goals of the law is to see greater representation of women at all levels in the workplace, development of 'reasonable accommodation' (as developed in light of the concept of 'special measures') is not only a necessity, but preferably should be embodied in specific legislative rights such as adequate family responsibility leave and flexible working options as longer term baseline measures to accommodate female employees who provide ongoing care.

II CONTINUED STEREOTYPING AND REASONABLE ACCOMMODATION IN THE CONTEXT OF EQUALITY LAW

(1) Continued Stereotyping

Long entrenched societal practices and cultural norms reinforce assumptions about the role of women as primary caregivers and the importance of family and good parenting.[16] At the same time, society prioritises paid work over the unpaid work of carers and in doing so, prejudices employees, specifically female employees, that attempt to juggle these two social ideals.[17]

[16] T Cohen and L Dancaster "Family Responsibility Discrimination – a Non-starter?" (2009) 2 *Stell LR* 221 228.
[17] Cohen and Dancaster (2009) *Stell LR* 228.

In common with many other countries in the world, the majority of part-time workers in South Africa are women who often switch to part-time employment because of family responsibilities.[18] The problem from a gender equality perspective is that part-time work is chosen in a context in which work-family reconciliation options are limited by gender inequalities within the family and the inadequacy of public care services, and that many of the part-time jobs on offer are of poor quality.[19] Switching to part-time work means a reduction in weekly earnings.[20] It may also involve downward mobility if it entails changing jobs. [21] If stability is maintained, it is often at the cost of reduced prospects of career advancement.[22]

In South Africa, many women take breaks in their careers, work reduced hours, or otherwise contribute large amounts of time to caring for children and responding to family needs. [23] They often do this mid-career, at precisely the time when the 'ideal worker' is climbing the career ladder.[24] Such breaks can prevent women from being seen as 'ideal workers' and candidates for top positions. [25] The generally accepted norms of society – also South African society - are therefore indirectly discriminatory against women.[26]

Many employers tend to perceive an employee's request for flexibility as indicating that she is no longer able to perform her job[27] and seeking an advantage over others, rather than an entitlement to equality of treatment.[28] This approach fails to acknowledge that for many women, the decision to work is not a choice but a necessity borne out of economic circumstances, and that flexible working hours are not only of benefit to a privileged minority but to all worker-carers that would otherwise be incapable of remaining in employment.[29]

Gender stereotyping also disadvantages family caregivers at work.[30] Gender stereotyping can take three forms: prescriptive stereotyping where an employer makes assumptions about how a female

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[18] C Fagan, et al. *The influence of working time arrangements on work-life integration or "balance": A review of the international evidence* (2012) 23, D Posel and C Muller "Is there evidence of a wage penalty to female part-time employment in South Africa?" (2008) 76 (1) *South African Journal of Economics* 466 473.

[19] Fagan, et al. *The influence of working time arrangements on work-life integration or "balance": A review of the international evidence* 23.

[20] Fagan, et al. *The influence of working time arrangements on work-life integration or "balance": A review of the international evidence* 23.

[21] Fagan, et al. *The influence of working time arrangements on work-life integration or "balance": A review of the international evidence* 23.

[22] Fagan, et al. *The influence of working time arrangements on work-life integration or "balance": A review of the international evidence* 23.

[23] K April, et al. "Gender impediments to the South African Executive Boardroom" (2007) 31 *South African Journal of Labour Relations* 51 53.

[24] April, et al. (2007) *South African Journal of Labour Relations* 53.

[25] April, et al. (2007) *South African Journal of Labour Relations* 53.

[26] April, et al. (2007) *South African Journal of Labour Relations* 53.

[27] J Murray "Work and Care: New Legal Mechanisms for Adaptation" (2005) *Labour & Industry* 66 81 as quoted in Cohen and Dancaster (2009) *Stell LR* 227.

[28] B Gaze "Context and Interpretation in Anti-Discrimination Law" (2002) *Melbourne University Law Review* 347 as quoted in Cohen and Dancaster (2009) *Stell LR* 227.

[29] Cohen and Dancaster (2009) *Stell LR* 227.

[30] J Williams and N Segal "Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job" (2003) *Harvard Women's Law Journal* 77 90.

employee should behave by insisting on her adherence to traditional gender roles;[31] descriptive stereotyping or cognitive bias where an employer's perception is influenced by stereotypical assumptions regarding a female employee's needs and wants;[32] and competence assumptions in terms of which motherhood is regarded by an employer as rendering an employee less capable of performing effectively.[33] Importantly, and perhaps ironically, the notion of accommodation of women at the workplace serves to reinforce this perception of the ideal worker as normative and employees seeking flexibility as deviating from this ideal.[34]

The influence of gender assumptions and stereotyping on both employer and judicial decision-making is undeniable, but it remains extremely difficult for the aggrieved employee to identify and prove.[35] Short of 'loose lips'[36] employers that verbalise these views, employees are left grappling with nothing more than suspicion and speculation when determining the effect of stereotyping on the employer's decision-making. [37] In light of this many working women, particularly those in male-dominated working environments, are reluctant to create a situation of conflict with requests for accommodation or claims of unfair discrimination, and instead elect to remain gender neutral in a bid to fit in. [38] Until the role and effect of gender assumptions and stereotyping are identified and addressed, the potential for change through equality law is limited, as the struggle over equality at the workplace 'is as much over minds as it is over rules'.[39]

What these realities show is that the real prejudice women are exposed to in workplaces is ongoing, difficult to identify and does not stop once women are in employment. This already demands recognition of at least three threshold principles in order for the law to provide for the effective protection and advancement of women in the workplace: first, the mere appointment or promotion of women does not necessarily address this prejudice; secondly, protection must be readily available; and, thirdly, protection must be focused on the real challenges faced by women in the workplace.

(2) The EEA and 'reasonable accommodation' in the context of unfair discrimination and affirmative action

The EEA regulates equality in employment and was enacted to give effect to section 9 of the Constitution.[40] The purpose of the EEA is to eliminate unfair discrimination in the workplace and to

[31] For example, the assumption that a mother's place is at home.
[32] For example, an employer's assumption that a working mother would not want to be promoted to a position that requires travelling.
[33] Williams and Segal (2003) *Harvard Women's Law Journal* 97 as quoted in Cohen and Dancaster (2009) *Stell LR* 228.
[34] Cohen and Dancaster (2009) *Stell LR* 228.
[35] Cohen and Dancaster (2009) *Stell LR* 228.
[36] Williams and Segal (2003) *Harvard Women's Law Journal* 160 as quoted in Cohen and Dancaster (2009) *Stell LR* 228.
[37] Cohen and Dancaster (2009) *Stell LR* 229.
[38] Cohen and Dancaster (2009) *Stell LR* 229.
[39] Gaze (2002) *Melbourne University Law Review* 354.
[40] Dupper "Equality in the workplace" in Labour Law in Context 53. However, the EEA is supplemented by the Labour Relations Act 66 of 1995 (which regulates discriminatory dismissals) and the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (which addresses discrimination in spheres other than

make provision for affirmative action measures to redress disadvantages in employment experienced by designated groups in order to ensure their equitable representation in all levels in the workplace.[41] The EEA embraces both a formal approach (equality in treatment) and a substantive approach (equality in outcome) to equality.[42] Affirmative action constitutes a substantive approach to equality[43] and seeks to secure justice in the distribution of jobs and opportunities between different groups.

While protection against unfair discrimination primarily is concerned with the status and recognition of protected groups, affirmative action is based on pre-existing recognition of the status of certain marginalised groups in society and reflects a concern for achieving an improvement in the status and participation of these groups in employment and occupation. The underlying assumption of affirmative action is that talents are distributed uniformly between women and men and between dominant and minority racial groups. Put differently, it is accepted that inter-group imbalances in labour market outcomes reflect the existence of structures of discrimination that preclude or limit the opportunities of members of particular groups to fully develop their potential.[44]

Section 5 of the EEA places an obligation on all employers to take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice, followed by the express prohibition, in section 6(1), of unfair discrimination on the grounds of (among others) sex, gender, pregnancy and family responsibility. While the Act does not tell us what the constituent elements of 'unfair discrimination' are and it was left to the courts to give us guidance, precedent discussed below arguably shows that the idea of (reasonable) accommodation is part and parcel of the general duty to eliminate and the prohibition of unfair discrimination (not being limited to disability discrimination). At the same time, section 15(1) of the EEA provides for affirmative action measures to be implemented by a designated employer. The EEA provides a broad definition of affirmative action measures. In general, it means any measure aimed at ensuring equal employment opportunities and equitable representation of suitably qualified people from designated groups in all occupational levels in the workforce.[45] This goes further than mere preferential appointment of members of designated groups to vacant positions.[46] It also includes preferential promotion as well as the development and training of employees in order to increase their prospects of advancement, a duty on the employer to analyse employment policies and

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employment). S 9 of the Constitution – the equality clause - states that: (1) 'Everyone is equal before the law and has the right to equal protection and benefit of the law. (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken. (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination. (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.'

[41] Section 2. Also see sections 5 and 6.

[42] A Basson, et al. *Essential Labour Law* 5 ed (2009) 233.

[43] Basson, et al. *Essential Labour Law* 233.

[44] M Tomei *Affirmative action for racial equality: features, impact and challenges* (2005) International Labour Organization Geneva 7.

[45] Dupper 'Equality in the workplace' in Labour Law in Context 67.

[46] Basson, et al. *Essential Labour Law* 235.

practices in order to identify and remove any employment barriers, measures to further diversify the workplace and an express duty to make 'reasonable accommodation'.[47] 'Reasonable accommodation' means the modification or adjustment to a job or the working environment that will enable a person from a designated group to have access to, or participate or advance in employment.[48]

(3) Judicial guidance on reasonable accommodation

Reasonable accommodation is entrenched as part of disability discrimination law – also in South Africa.[49] However, perhaps the strongest principled statement yet about the general role of accommodation in our equality law comes from the constitutional court in *MEC for Education, Kwazulu-Natal, and others v Pillay,*[50] a case concerning (primarily) religious discrimination in the context of the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 ('PEPUDA').[51] After stating that '[t]he concept of reasonable accommodation is not new to our law'[52] and part and parcel of the Constitution, the EEA and PEPUDA, the court formulated the rationale for reasonable accommodation as follows:

> 'At its core is the notion that sometimes the community, whether it is the State, an employer or a school, must take positive measures and possibly incur additional hardship or expense in order to allow all people to participate and enjoy all their rights equally. It ensures that we do not relegate people to the margins of society because they do not or cannot conform to certain social norms.'[53]

And further:

> '[E]xclusion is inflicted on all those who are excluded by rules that fail to accommodate those who depart from the norm. Our society which values dignity, equality and freedom must therefore require people to act positively to accommodate diversity. Those steps might be as simple as granting and regulating an exemption from a general rule or they may require that the rules or practices be changed or even that buildings be altered or monetary loss incurred.'[54]

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[47] Basson, et al. *Essential Labour Law* 236.
[48] Section 1 of the EEA.
[49] See item 6 of the Code of Good Practice on the Employment of People with Disabilities GN 1345 in GG 23702 of 19/8/2002 as corrected by GN 1064 in GG 23718 dd 19/8/2002.
[50] 2008 (1) SA 474 (CC)
[51] Act 4 of 2000. PEPUDA recognises (in section 9) that 'failing to take steps to reasonably accommodate the needs' of people on the basis of race, gender or disability will amount to unfair discrimination'. The Act (in section 25) also places a duty on the State to 'develop codes of practice . . . in order to promote equality, and develop guidelines, including codes in respect of reasonable accommodation' and permits courts to order that a group or class of persons be reasonably accommodated. Section 14(3)(i)(ii) lists the question whether the applicant has taken reasonable steps to accommodate diversity as a factor for the determination of fairness of discrimination.
[52] *Pillay* par 72.
[53] *Pillay* par 73.
[54] *Pillay* par 75.

As far as the extent of accommodation is concerned, the court stated that an approach that 'more than mere negligible effort is required to satisfy the duty to accommodate….is more in line with the spirit of our constitutional project which affirms diversity', but ultimately remarked that '[r]easonable accommodation is in a sense an exercise in proportionality that will depend intimately on the facts'.[55]

Two further important remarks by the court were that reasonable accommodation 'is most appropriate where, as in this case, discrimination arises from a rule or practice that is neutral on its face and is designed to serve a valuable purpose, but which nevertheless has a marginalising effect on certain portions of society' and also that 'the principle is particularly appropriate in specific localised contexts, such as an individual workplace or school, where a reasonable balance between conflicting interests may more easily be struck'.[56] In short then, the constitutional court has told us that accommodation is part of equality and of equality law, that it requires a context-specific proportionality analysis, that it is appropriate in the workplace and that it will be particularly important in the context of allegations of indirect discrimination.

Against this background, the Labour Courts have also on occasion dealt with the idea of accommodation, but not necessarily in the context of discrimination and then not necessarily in the context of gender or family responsibility discrimination. In *Kievits Kroon Country Estate (Pty) Ltd v Mmoledi & others*[57] the Labour Appeal Court, called on to consider the review of an arbitration award based involving the fairness of dismissal, remarked that:

> '[i]t would be disingenuous of anybody to deny that our society is characterized by a diversity of cultures, traditions and beliefs. That being the case, there will always be instances where these diverse cultural and traditional beliefs and practices create challenges within our society, the workplace being no exception… What is required is reasonable accommodation of each other to ensure harmony and to achieve a united society…… A paradigm shift is necessary and one must appreciate the kind of society we live in. Accommodating one another is nothing else but 'botho' or 'Ubuntu' which is part of our heritage as a society.'[58]

At the level of the Labour Court, the issue of accommodation in the context of discrimination has arisen on at least three occasions. In *Dlamini & others v Green Four Security*[59] – in the context of a dismissal allegedly (indirectly) based on religion – the court accepted that even if an 'inherent requirement of a job' is found to exist, the dismissal may still be discriminatory if 'the impact is not ameliorated by a reasonable accommodation or modification of the rule, or an exemption from it'.[60] More to the point, in *Co-operative Workers Association & another v Petroleum Oil & Gas Co-operative of SA & others*[61] (*PetroSA*) the court stated, with reference to and reliance on both the

[55] *Pillay* par 76.
[56] *Pillay* par 78.
[57] (2012) 33 *ILJ* 2812 (LAC).
[58] *Kievits Kroon* par 26.
[59] (2006) 27 *ILJ* 2098 (LC).
[60] *Dlamini* par 13. See also par 31-32.
[61] (2007) 28 *ILJ* 627 (LC).

International Labour Organisation's Convention on Workers with Family Responsibilities[62] and the more general Convention on Discrimination (Employment and Occupation)[63] Convention:

> 'It is now trite that South African courts pursue a substantive and not a formal approach to equality……In the context of this case, the result is that special measures are applied to workers with family responsibilities to adjust for the hardships of having such responsibilities. Without affirmation of their special status, there can be no equality amongst the workforce. Responsibility for addressing the special needs of workers with family responsibilities, is not for the state to bear alone. In this case, [the employer] is sharing this responsibility by providing additional remuneration for employees with dependants. The basis for the additional remuneration is not merely endorsed, but encouraged by national and international law. '[64]

In *Standard Bank of South Africa v CCMA*[65]the Labour Court held (in the context of dismissal based on disability) that the '[r]easonable accommodation of the employee and unjustified hardship to the employer operate as countervailing forces to balance the respective rights of the parties. If the employer cannot reasonably accommodate the disabled employee without unjustifiable hardship, the employer may dismiss the employee.'[66] Unjustifiable hardship is the 'threshold at which employers are relieved of their obligation to accommodate.'[67] This involves considering, amongst other things, the effectiveness of the accommodation and the extent to which it would seriously disrupt the operation of the business.[68] Making an accommodation and proving that it is reasonable is an onus resting on the employer, as is the onus of proving that reasonable accommodation is unjustifiable.[69]

What this brief overview shows is that 'reasonable accommodation' – often associated with disability discrimination only – should be seen as part of our equality law in general, inclusive of the protection against unfair discrimination and expressly as part of affirmative action as regulated in the EEA. Applied to gender, this then means our equality law recognises – and we can expect - that in order for women to successfully combine their work and family responsibilities, proactive measures are necessary to reduce the conflict inherent in their dual roles.[70] This includes measures such as leave arrangements and flexible working arrangements, which involve a more permanent

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[62] No 156 of 1981.
[63] No 111 of 1958.
[64] *PetroSA* paras 48-52.
[65] 2008 4 BLLR 356 (LC).
[66] P 371.
[67] P 378.
[68] T Cohen and L Dancaster "Flexible Working Arrangements for Employees with Family Responsibilities – The Failings of the Employment Equity Act" in Dupper O and Garbers C (eds) *Equality in the Workplace: Reflections from South Africa and Beyond* ed (2010) 211.
[69] *Standard Bank of South Africa v CCMA* p 377.
[70] Cohen and Dancaster "Flexible Working Arrangements for Employees with Family Responsibilities – The Failings of the Employment Equity Act" in Equality in the Workplace: Reflections from South Africa and Beyond 211.

change to the working conditions of female employees.[71] The EEA, however, is silent on the actual nature and extent of accommodation required and the determination of reasonableness[72] and the courts have not yet been faced with the need to provide judicial interpretation of the meaning of 'reasonable accommodation' in the context of gender and family responsibility discrimination in the workplace. However, one important point of departure laid down on *Pillay,* is that it will require a contextual proportionality analysis. This will require consideration of the impact of the workplace rule on women (or a woman), the importance of the workplace rule (ie the goal the employer seeks to achieve), the relationship between the rule and the goal (whether they are rationally related) and whether this goal may reasonably be addressed by less invasive means – including accommodation.

Applying the above to the imperative to accommodate women with family responsibilities, employers ought to be obliged to accommodate women's family responsibilities and by extension a request for flexible working arrangements, unless they are able to justify their refusal by means of evidence of unjustified hardship to the enterprise.[73] Apart from the continued stereotyping discussed above, there is, however, one other major impediment that emerge from this imperative, namely that reasonable accommodation in the current context ultimately depends for its development and enforcement on discrimination litigation or the implementation of affirmative action.

(4) Developing and enforcing 'reasonable accommodation' through affirmative action and discrimination litigation

(a) Affirmative action

At face value, the provisions of the EEA relating to affirmative action contain powerful potential to change the situation of women in the workplace – not only in terms of access to employment (preferential promotion or appointment), but also in the sense that affirmative action expressly includes the identification of barriers to employment and reasonable accommodation in employment.[74] Furthermore, the EEA requires this to happen as part of a consultation process, the design of employment equity plans and periodical reporting to the Department of Labour about progress in the implementation of affirmative action.[75]

At the same time, however, there are practical and legal deficiencies that may continue to limit reasonable accommodation to flourish as part of affirmative action. First, there is little doubt that the main focus of affirmative action over the past two decades – understandably so – has been race

[71] Cohen and Dancaster "Flexible Working Arrangements for Employees with Family Responsibilities – The Failings of the Employment Equity Act" in Equality in the Workplace: Reflections from South Africa and Beyond 211.
[72] Cohen and Dancaster "Flexible Working Arrangements for Employees with Family Responsibilities – The Failings of the Employment Equity Act" in Equality in the Workplace: Reflections from South Africa and Beyond 211.
[73] Cohen and Dancaster "Flexible Working Arrangements for Employees with Family Responsibilities – The Failings of the Employment Equity Act" in Equality in the Workplace: Reflections from South Africa and Beyond 212.
[74] Section 15 of the EEA.
[75] See the text to nn 80-84 below.

(rather than gender). Race, unlike gender, is not so much about accommodation during employment. Rather, race is about the denial of opportunity to begin with – access to jobs or higher jobs – a fact which adds to the impression that the success of affirmative action is to be measured in quantity, not quality. As mentioned earlier, gender brings with it challenges that remain despite women finding themselves in jobs. Affirmative action, due to a focus on race, has assumed a character based more on access to employment (preferential appointment or promotion) and numbers rather than qualitative accommodation while in work. Affirmative action in this sense does not truly address the challenges women face in the workplace, especially if one takes a long view and look at the security and flexibility required for the growth of women in employment over time. In fact, it is one of the ironies of our equality law that the ILO's Discrimination Convention, which does prohibit race discrimination, does not immediately identify race as a ground that might merit 'special measures', but does so in respect of sex and family responsibilities.[76] Put yet differently, race based and sex based affirmative action may overlap, but ultimately each one brings with it its own demands. Secondly, the obligation to implement affirmative action does not apply to all employers.[77] Thirdly, affirmative action is administratively enforced.[78] This means a failure to implement affirmative action (for example, the failure of a designated employer to reasonably accommodate women as part of affirmative action) cannot be brought to court as an unfair discrimination claim. In *Dudley*,[79] the Labour Appeal Court held that the failure to implement affirmative action in itself does not constitute unfair discrimination. Affirmative action remains to be administratively enforced, which raises the question as to how effective the administrative enforcement mechanisms for affirmative action are. While the EEA provides for monitoring,[80] undertakings to comply and compliance orders,[81] a review of the employer's progress in implementing affirmative action,[82] the possible imposition of substantial fines by the Labour Court[83] and loss of State contracts,[84] section 42(4) of the Act allows employers to raise any reasonable argument to justify its failure to comply with its affirmative action obligations. This places the capacity of the Department of Labour to monitor affirmative action in a qualitative and substantive sense (as opposed to monitoring on the basis of quantity and procedure) squarely in issue - any evaluation of compliance by any individual employer will require appreciation of its individualised substantive (business) realities and the quality of its decision-making in that context. In short, while the EEA makes for easy formal policing (eg monitoring of the submission of reports), one should be under no illusion that proper substantive policing – ie policing the quality of affirmative action - is another matter entirely.

(b) Discrimination litigation

(i) **General remarks based on the position prior to 2014**

[76] See articles 1(a) and 2 of the Convention.
[77] See the definition of 'designated employer' above n 6.
[78] See Chapter V of the EEA.
[79] *Dudley v City of Cape Town & another* (2004) 25 *ILJ* 305 (LC) and on appeal [2008] 12 BLLR 1155 (LAC).
[80] Section 34 of the EEA.
[81] Sections 35-38 of the EEA.
[82] Sections 42-45 of the EEA.
[83] Section 50(1)(g) read with Schedule 1 to the EEA.
[84] Section 53 of the EEA.

Litigation as a means to enforce the right not to be discriminated against is, and has been for many years, subjected to trenchant criticism.[85] First, discrimination litigation, in essence, requires individual litigation against the employer while the employee is in employment. Employees simply may be reluctant to engage in the 'naming, blaming and claiming'[86] inherent in litigation, which requires them to identify their treatment as discriminatory rather than unjust - a difficult exercise where the discrimination is institutionalised and is not perceived as being an individual issue.[87] High unemployment rates, that make any job better than no job, discourage employees from jeopardising existing employment relationships with requests that involve a reorganisation of standardised working arrangements. [88] Thus 'the groups most disadvantaged in our society have been granted a right against discrimination, but then left to enforce it alone and not for systematic change, but for individual compensation'.[89] Furthermore, discrimination litigation may be expensive and time-consuming. This was certainly the case in South Africa prior to 2014 when jurisdiction to hear and determine discrimination cases was reserved for the Labour Court.

Secondly, experience has shown that discrimination litigation simply is difficult, for at least three reasons. First, at least in the South African context there continues to be a measure of lingering uncertainty about the meaning of unfair discrimination and its constituent elements, an uncertainty that may hamper litigation. This uncertainty raises a whole range of further and more specific legal questions.[90] These include the scope and meaning of the grounds of discrimination, the question whether an appropriate comparator is always necessary in discrimination cases, the question as to how strong the link between an employment policy or practice and the alleged ground of discrimination should be, the test for indirect discrimination, whether there is such a thing as 'fair' discrimination (as opposed to the idea of non-discrimination), whether the two listed grounds of 'justification' in the EEA – an inherent requirement of a job and affirmative action - are the only two available arguments available to employers to defeat discrimination claims or whether it is open to employers to argue fairness or justification as general concepts, and, lastly, who bears the onus of proving what. Secondly, even if there is certainty about the content of the right against unfair discrimination, there are a number of potential hurdles in getting from the conduct complained of to the point where we can say discrimination (in the legal sense) exists. At least prior to the 2014 amendments to the EEA it could safely be said it was not easy for women with family responsibilities to prove that the employer did not reasonably accommodate them and that the absence of such accommodation constitutes unfair discrimination (whether on the ground of gender or family responsibility).[91] Prior to the amendments an employee was required to discharge the burden of proof in respect of the existence of discrimination by causally linking the differentiation in treatment

[85] C Garbers "Proof and Evidence of Employment Discrimination under the Employment Equity Act 55 of 1998" (2000) *South African Mercantile Law Journal* 136 136.
[86] S Charlesworth "Managing Work and Family in the 'Shadow' of Anti-discrimination Law" in Murray J (eds) *Work, Family and the Law* ed (2005) 104 as quoted in Cohen and Dancaster (2009) *Stell LR* 230.
[87] Charlesworth "Managing Work and Family in the 'Shadow' of Anti-discrimination Law" in Work, Family and the Law 106 as quoted in Cohen and Dancaster (2009) *Stell LR* 230.
[88] Cohen and Dancaster (2009) *Stell LR* 230.
[89] B Smith "Not the Baby and the Bathwater: Regulatory reform for Equality Laws to Address Work-Family Conflict" (2006) 28 *Sydney Law Review* 689 714 as quoted in Cohen and Dancaster (2009) *Stell LR* 230.
[90] See Garbers & Le Roux 'Employment Equity into the Future' (2015) Unpublished Paper (on file with the authors) at 4ff.
[91] Cohen and Dancaster (2009) *Stell LR* 231.

arising out of an employer's policy or practice at the workplace directly or indirectly to the employee's gender or family responsibilities.[92] Specifically in the context of the accommodation of women, particular problems exist with identification of an appropriate comparator (to show differentiation) in the context of a search for, or expectation, of varied possible forms of flexible working arrangements.[93] There is no generic working arrangement that suits all employees seeking a better work-life balance and specific arrangements have to be customised to the particular family responsibility obligations of an employee.[94] As a result, the identification of differential treatment of a group of employees would often be impossible to identify and prove.[95] Furthermore, establishing this causal link was a difficult process, particularly where the employer's decision-making was based on 'mixed motives'[96] arising out of a combination of prohibited and non-prohibited grounds.[97] In circumstances where gender assumptions and stereotypes influenced the decision-making process, amongst other legitimate motivating factors, the employee faced the difficult task of linking the disparate treatment to a prohibited ground.[98] Thus, even in the absence of uncertainty about the concept of unfair discrimination, it is - and was for employees prior to 2014 - extremely difficult to prove discrimination as a legal concept.[99] A third difficulty is the evidentiary challenges associated with proof of discrimination claims. In cases of direct discrimination, the fundamental difficulty has always been that evidence to show employer conduct in comparison with other employees, as well as the reasons on which the employer relies to justify the differentiation, are not readily available to complainants. This in turn means that complainants often have to rely on circumstantial and weak evidence. Experience has shown that many direct discrimination claims never progressed beyond a mere allegation of discrimination. In case of indirect discrimination claims, there are also evidentiary problems, sometimes even more acute. The disproportionate impact on a protected group (such as women) may be readily evident and a matter of common sense. But often the evidence (or the raw statistics) about the impact of workplace policies or practices will fall in the domain of the employer, or will only be available through sophisticated statistical impact analysis.

These reservations about the effectiveness of discrimination litigation – also in the context of gender and family responsibility - are supported by the experience over the past two decades or so. The sex/ gender discrimination cases that came before the courts included an eclectic mix of harassment,[100] the dismissal of transsexuals,[101] the dismissal of male correctional officers failing to

[92] Cohen and Dancaster "Flexible Working Arrangements for Employees with Family Responsibilities – The Failings of the Employment Equity Act" in Equality in the Workplace: Reflections from South Africa and Beyond 209.
[93] Cohen and Dancaster (2009) *Stell LR* 230.
[94] Cohen and Dancaster (2009) *Stell LR* 230.
[95] Cohen and Dancaster (2009) *Stell LR* 230.
[96] Pretorius, et al. *Employment Equity Law* (2006) chapter 3.3 as quoted in Cohen and Dancaster "Flexible Working Arrangements for Employees with Family Responsibilities – The Failings of the Employment Equity Act" in Equality in the Workplace: Reflections from South Africa and Beyond 209.
[97] Cohen and Dancaster "Flexible Working Arrangements for Employees with Family Responsibilities – The Failings of the Employment Equity Act" in Equality in the Workplace: Reflections from South Africa and Beyond 209.
[98] Cohen and Dancaster "Flexible Working Arrangements for Employees with Family Responsibilities – The Failings of the Employment Equity Act" in Equality in the Workplace: Reflections from South Africa and Beyond 209.
[99] Garbers (2000) *South African Mercantile Law Journal* 136.
[100] See *Daymon Worldwide SA Inc v CCMA & Others* (2009) 30 *ILJ* 575 (LC); *Potgieter v National Commissioner of the SA Police Service & Another* (2009) 30 *ILJ* 1322 (LC); *SAMWU obo Petersen v City of Cape Town & Others*

cut their dreadlocks;[102] the dismissal of a female subordinate in the context of an affair at work[103] and isolated challenges to affirmative action based on sex discrimination.[104] This is hardly the story of systemic change to the advantage of women brought about by discrimination law. Furthermore, in spite of the constitutional and legislative commitment to prohibit family responsibility discrimination and the governmental initiative to facilitate the advancement of women in the economy, not one family responsibility discrimination matter, brought by employees with family responsibilities, has culminated in a judgment by the labour courts in the 17 years since the EEA's enactment.[105] And, bearing in mind that indirect discrimination has shown itself worldwide to be a strong catalyst for systemic change in workplaces – also on the basis of sex and gender[106] - the past two decades did not see one indirect discrimination case on the basis of sex or gender come before the Labour Court.

To all of this may be added that the managerial prerogative largely remains insofar as employers are entitled to determine the operational needs of their enterprise. The determination of working hours, shift times and workplace policies are generally left to the unfettered discretion of the employer.[107] Employees that are unable or unwilling to comply with the operational needs of a business may be retrenched, provided that the employer can prove that the dismissal is operationally justifiable and complies with sections 189 and 189A of the LRA – this despite the new section 187(1)(c) in the Labour Relations Act, 1995.[108] The prioritisation of the needs of organisations inescapably leads to

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(2009) 30 *ILJ* 1347 (LC); *Mokoena & Another v Garden Art (Pty) Ltd & Another* (2008) *ILJ* 1196 (LC); *Piliso v Old Mutual Life Assurance Co (SA) Ltd & Others Ltd* (2007) 28 *ILJ* 897 (LC); *Dial Tech CC v Hudson & Another* (2007) 28 *ILJ* 1237 (LC); *Vodacom Service Provider Co (Pty) Ltd v Phala NO & Others* (2007) 28 *ILJ* 1335 (LC); *SA Broadcasting Coprporation Ltd v Grogan NO & Another* (2006) 27 *ILJ* 1519 (LC); *Christian v Colliers Properties* (2005) 26 *ILJ* 234 (LC) *Ntsabo v Real Security CC* (2003) 24 *ILJ* 2341 (LC). As these cases bear out, harassment may come before the Labour Court on many different bases, not always as direct discrimination envisaged by s 6(3) of the Employment Equity Act, 1998 – also as automatically unfair (typically constructive) dismissal; as a review of an arbitration award dealing with the fairness of the dismissal of the perpetrator for misconduct; and as an issue of liability of the employer in terms of s 60 of the EEA. Furthermore, harassment cases will not necessarily come before the Labour Court – in respect of cases concerning the liability of the employer in common law (direct or vicarious) the High Court also has jurisdiction – see *Grobler v Naspers Bpk en 'n ander* (2004) 25 *ILJ* 439 (C) and *Media 24 Ltd & Another v Grobler* (2005) 26 *ILJ* 1007 (SCA).

[101] See *Atkins v Datacentrix (Pty) Ltd* (2010) 31 *ILJ* 1130 (LC); *Ehlers v Bohler Uddeholm Africa (Pty) Ltd* (2010) 31 *ILJ* 2383 (LC).

[102] See *Department of Correctional Services & another v POPCRU & others* [2013] ZASCA 40.

[103] See *Steynberg v Coin Security Group (Pty) Ltd* (1998) 19 *ILJ* 304 (LC).

[104] For example, *Willemse v Patelia NO & Others* (2007) 28 *ILJ* 428 (LC).

[105] Cohen and Dancaster (2009) *Stell LR* 227.

[106] The following comparative examples all show practices found to have a disproportionate impact on women: *Jenkins v Kingsgate Ltd* 2 CMLR 24(paying part-time workers a lower hourly rate than full-time workers); *Clarke v Eley (IMI) Kynoch Ltd* [1982] IRLR 482 (retrenching part-time workers before considering full-time workers); *Bilka Kaufhaus v Weber von Harz* [1986] CMLR 701 (requiring full-time employment for occupational pension benefits); *Rinner Kuhn v FWW Spezial-Gebäudedereinigung GmbH & Co KG* [1989] IRLR 493 (granting sick leave only to employees working more than 10 hours per week or 45 hours per month); *Equal Opportunities Commission and another v Secretary of State for Employment* [1994] 1 All ER 910 (requiring part-time employees to work for three years longer than full-time employees to qualify for statutory dismissal protection and for dismissal and redundancy payments).

[107] Cohen and Dancaster (2009) *Stell LR* 230.

[108] Cohen and Dancaster (2009) *Stell LR* 230. See for example *Fry's Metals Pty Ltd v NUMSA* 2003 24 *ILJ* 133 (LAC) 147, which decision has now been overtaken by the new section 187(1)(c). This section now provides that dismissal on the basis of 'a refusal by employees to accept a demand in respect of any matter of mutual interest' is automatically unfair. However, this does not eliminate the possibility that changes to working

the view that employees who are unable to fit into the organisational structure are seen as obstructions to economic efficiency.[109] Proposed changes (proposed by employees) to contractually agreed terms and conditions of employment are regarded as matters of mutual interest, which must be negotiated with the employer.[110] The perceived costs and anticipated disruption to ordinary operational systems, posed by a request for flexible working arrangements, are likely to be raised by employers to justify inflexible working arrangements.[111] And, to the extent that one seeks to rely on discrimination law to put a break on the operational needs of the employer, one should always bear in mind that our law does not prohibit discrimination, rather unfair discrimination. In this regard, it is worth noting that both the Constitutional Court[112] and the Labour Appeal Court[113] recently were prepared to factor the genuine and legitimate business needs of an employer into the question whether the conduct of an employer, even though discriminatory, ultimately was fair or otherwise. In this sense, an employee who, for example, seeks to secure flexible working arrangements to attend to family responsibilities may face an insurmountable obstacle in the form of the operational requirements of the employer and will be reliant on the question whether the employer willingly subscribes to the proposed arrangement.[114]

(ii) The 2014 Amendments to the EEA

2014 saw important amendments to the EEA, amendments which address many of the reservations expressed above about the effectiveness of discrimination litigation to also improve the plight of women in the workplace.[115] For present purposes, no more than a brief overview of these amendments is necessary as the potential impact of most of these provisions when juxtaposed with the earlier reservations about discrimination law is self – evident. First, the CCMA's jurisdiction has been expanded to include sexual harassment cases (harassment as unfair discrimination)[116] and all unfair discrimination cases where applicants earn below the threshold.[117] As such, access to speedy and relatively cheap litigation has significantly been enhanced. Secondly, the completely overhauled section 11, dealing with the onus of proof in discrimination cases, now provides in cases based on listed grounds such as sex, gender, pregnancy or family responsibility that

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conditions may be raised (and lead to dismissal) as an alternative to contemplated retrenchments in the context of sections 189 and 189A. of the Labour Relations Act, 1995..

[109] Cohen and Dancaster (2009) *Stell LR* 231.

[110] Cohen and Dancaster (2009) *Stell LR* 231.

[111] Cohen and Dancaster (2009) *Stell LR* 231.

[112] *Mbana v Shepstone & Wylie*(2015) 36 *ILJ* 1805 (CC).

[113] *SA Airways v Jansen van Vuuren & another* (2014) 35 *ILJ* 2774 (LAC).

[114] Cohen and Dancaster (2009) *Stell LR* 231.

[115] Garbers & Le Roux above n 90.

[116] Instances of harassment may give rise to different types of cases and different causes of actions – see above n 100. The CCMA's jurisdiction is limited to harassment as discrimination in terms of section 6(3) of the EEA.

[117] Section 10(6)(aA) now allows for employees referring discrimination disputes to the CCMA for arbitration (even in the absence of consent by the employer) 'if (í) the employee alleges unfair discrimination on the grounds of sexual harassment; or (b) in any other case, that employee earns less than the amount stated in the determination made by the Minister in terms of section 6(3) of the Basic Conditions of Employment Act.'

> 'the employer against whom the allegation is made must prove, on a balance of probabilities, that such discrimination-(a) did not take place as alleged; or (b) is rational and not unfair, or is otherwise justifiable'.[118]

This means that the full onus of persuasion to prove both the absence of discrimination as well as its fairness is now on the employer. As indicated earlier, most discrimination cases prior to 2014 failed because the employee could not prove the existence of discrimination (as opposed to its fairness or justification) to begin with. In addition, section 48 of the EEA read with section 50(2), gives commissioners the power to not only grant compensation and damages should unfair discrimination be found to exist, but also to grant an order directing the employer to take steps to prevent the same discrimination in respect of other employees.[119] The EEA amendments have thus removed two of the most serious barriers to discrimination litigation (the jurisdiction of the Labour Court and an onus on the employee) and, at the same time, created room for awards to be a force for transformation based on systemic change and accommodation, rather than being limited to individual relief in the form of compensation and/ or damages.

Yet, these amendments do not address all the reservations expressed earlier – notably the factors militating against identification of gender and family responsibility discrimination (stereotyping) and the use of litigation to begin.[120] It also does not address the potential impact the approach of commissioners to the fairness of discrimination may have on the outcome of litigation.[121] At least one can say that the amendments have created the potential that protection against unfair discrimination may prove much more of a factor in the protection and advancement of women in the workplace in future.

In this regard, mention may be made of developments in the UK. As discussed below,[122] family responsibility discrimination is addressed in the UK primarily through the specific statutory 'right to request' flexible working. Apart from this direct right, indirect discrimination litigation alleging that certain groups of employees, such as mothers, are disproportionately disadvantaged by lack of flexibility has provided an alternative route to alternative work arrangements.[123] Given the amendments to the EEA discussed above, South Africa may well follow suit and we may see, for example, successful discrimination challenges to employers' blanket refusals to consider alternative work arrangements or seriously to consider the feasibility of a request for such arrangements. However, in the UK the legal principles established through indirect sex discrimination case law have mainly supported use of the specific right to request flexible working by creating awareness of the prevailing interpretation of the law.[124]

III **SPECIAL MEASURES**

[118] Section 11(1) of the EEA.
[119] Section 48 of the EEA read with section 50(2)(c).
[120] See the discussion in part II (1) above.
[121] See the discussion in part II (4)(b)(i) above.
[122] See part III (2) below.
[123] A Hegewisch, *Flexible working policies: a comparative review* Institute for Women's Policy Research (2009) 4.
[124] A Hegewisch, *Flexible working policies: a comparative review* Vi.

The concept of 'special measures' is used in several treaties – also ratified by South Africa – and is part and parcel of international human rights discourse and our law. It includes those measures commonly referred to as 'affirmative action'. Article 5 of the ILO Discrimination (Employment and Occupation) Convention[125] was one of the first articles in an international treaty to permit the adoption of 'special measures of protection or assistance to meet the particular requirements of people, who for reasons such as sex, disablement, family responsibilities or social or cultural status, are generally recognized to require special protection or assistance'. The Convention states explicitly that these measures shall not be deemed to be discrimination.[126]

More recently - in 2004 - the Committee on the Elimination of Discrimination against Women provided a general recommendation on art 4(1) of the Convention on the Elimination of All Forms of Discrimination against Women.[127] Its purpose was to clarify the meaning of 'temporary special measures' in article 4(1) to facilitate its use by State members when implementing the Convention.[128] The recommendation states that the term 'special' needs to be carefully explained because its use sometimes casts women and other groups who are subject to discrimination as weak, vulnerable and in need of extra or 'special' measures in order to participate or compete in society. According to the recommendation the real meaning of 'special' in the formulation of article 4(1) is that the measures are designed to serve a specific goal. Furthermore, the term 'measures' encompasses a wide variety of legislative, executive, administrative and other regulatory instruments, policies and practices, such as outreach or support programmes; allocation and/or reallocation of resources; preferential treatment; targeted recruitment, hiring and promotion; numerical goals connected with time frames; and quota systems. The recommendation continues to state that the choice of a particular 'measure' will depend on the context in which article 4(1) is applied and on the specific goal it aims to achieve.[129] The Recommendation also uses the expression 'special temporary measures' instead of 'affirmative action measures' as the former is considered to be less ambiguous and more accurate than the latter.[130]

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[125] No 111 of 1958. South Africa ratified this Convention on the 5th of March 1997.

[126] Tomei *Affirmative action for racial equality: features, impact and challenges* 2.

[127] South Africa ratified this Convention on the 15th of December 1995.

[128] See General recommendation No. 25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures, thirtieth session, 12-30 January 2004 <http://www.un.org/womenwatch/daw/cedaw/recommendations/General%20recommendation%2025%20(English).pdf> and Tomei *Affirmative action for racial equality: features, impact and challenges* 5. Article 4, paragraph 1 states: '[A]doption by States parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.'

[129] See General recommendation No. 25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures, thirtieth session, 12-30 January 2004.

[130] The Experts, who met in Maastricht in October 2002 to assist the CEDAW-Committee in its efforts to draft a General recommendation on art. 4(1), used the term "special temporary measures" instead of "affirmative action" as they contended that terms, such as "formal "and "substantive" equality, had ambiguous meanings or terms, such as "affirmative action" or "special rights", had different meanings in different legal contexts. See: Holtmaat, R. (Rapporteur): Report of the Expert Meeting in Maastricht (Valkenburg) 10-12 October 2002:

The term 'special measures', then, is suggestive of a more focused intervention than either protection against discrimination or a broad obligation to implement affirmative action on the basis of gender. The deficiencies of both discrimination law and affirmative action were described above. In what follows below, a brief comparative overview will be provided of the specific rights regime as it exists in South Africa, the UK and Sweden. The focus will be on the accommodation of family responsibility through time off and flexibility. While by no means comprehensive, this is done for three reasons: it already shows deficiencies in the South African approach, it shows possible solutions and it shows that there is room for expanded use of specific rights in the South African context.

(1) Specific rights related to family responsibility and flexibility in South Africa

Adequate family responsibility leave and flexible working options as longer term measures to accommodate female employees who provide ongoing care, are not sufficient in South Africa and do not provide employees with family responsibilities choices to ensure that they are able to care for their children in a manner that best suits their circumstances. Section 27 of the BCEA provides that an employee who has been in employment for more than four months and who works for an employer for at least four days per week[131], is entitled to three days'[132] paid family responsibility leave during every twelve months of continuous service for the following events: the birth of the employee's child, if the employee's child is sick, or in the event of death of the employee's child, spouse, life partner, parent, grandparent or grandchild.[133]

Section 27 of the BCEA is extremely limited in terms of duration and access.[134] Three days per year may not be enough during a given year to cover the wide range of circumstances, including the birth or sickness of a child and/or the death of a family member that the section seeks to provide for.[135] Employees who work for more than one employer during a week, which is often the case, may not

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Building Blocks for a General Recommendation on Article 4(1) of the CEDAW Convention and Tomei *Affirmative action for racial equality: features, impact and challenges* 5.

[131] No such qualification exists for other leave provisions, such as sick leave or annual leave. For other leave provisions in the BCEA, such as sick leave or annual leave, the qualification for utilization is far less restrictive. For employees to qualify for those two types of leave they must be working more than 24 hours a month. This is far less than the four-day restriction for family responsibility leave. Furthermore, sick leave and annual leave are not prohibited during an initial period of employment although there are restrictions on the amount of sick leave that can be utilized by an employee during the first six months of employment. A blanket exclusion on the use of family responsibility leave during the first four months is not consistent with the utilization of other leave provisions in the BCEA. See L Dancaster and M Baird "Workers with Care Responsibilities: Is Work-family Integration Adequately Addressed in South African Labour Law" (2008) 29 *Industrial Law Journal* 22 32.

[132] Five days in the case of domestic workers. See Sectoral Determination 7: Domestic Worker Sector, 2002. The different duration of this leave for domestic workers and 'other' employees appears to have arisen from a concern that live-in domestic workers spend more time on travel to and from work and accordingly require a greater period of leave. The provision in any event does not distinguish between live-in domestic workers and other domestic workers' so the logic becomes dubious. See Dancaster and Baird (2008) *Industrial Law Journal* 32.

[133] S 27 of the BCEA.

[134] See L Dancaster and T Cohen "Workers with Family Responsibilities: a Comparative Analysis for the Legal Right to Request Flexible Working Arrangements in South Africa" (2010) 34 (1) *South African Journal of Labour Relations* 31 33.

[135] Dancaster and Cohen (2010) *South African Journal of Labour Relations* 33.

have access to this protection.[136] There is furthermore no provision for parental leave for mothers after the period of maternity leave. Female employees who wish to take additional leave (once family responsibility leave and maternity leave have been exhausted) are dependent on the goodwill of the employer and will often have to take unpaid leave.[137]

Another limitation of section 27 is the restrictive qualification that only employees who work at least four days per week and who have been employed for more than four months are permitted to use this leave; this precludes a large number of employees, particularly part-time workers, from making use of family responsibility leave.[138] The scope of circumstances and persons for whom family responsibility leave may be utilised is also too narrow.[139] Section 27 fails to address leave for employees to attend to unexpected emergency situations such as an injury sustained by the employee's child (or a dependant in his/her care) at school or during sport practice or, for example, if the au pair does not show up for work.

Apart from inadequate provision for family responsibility leave, there is no separate legislative right for employees to request flexible working arrangements in South Africa.[140] Section 7(d) of the BCEA does require every employer to regulate the working time of each employee with due regard to the family responsibilities of that employee.[141] Furthermore, the Code of Good Practice on the Integration of Employment Equity into Human Resource Policies and Practices[142] requires employers to attempt to provide employees with family responsibilities 'an accessible, supportive and flexible environment' which includes 'considering flexible working hours'. This at least recognises the imperative to address the need for flexible working arrangements, but requires further exploration and determination.[143] This provision does not provide any guidance to employers on how these working arrangements should be made or implemented. Given the fact that employers are not obliged, and only required to 'endeavour', to 'consider' flexible working hours, it will be easy for employers to argue that despite consideration it was impractical or not in line with the operational requirements of the undertaking. In the final analysis, Codes of Good Practices are guidelines for employers and do not have the status of legislation.[144] The indeterminate content and weak enforceability of the Code means that it does not provide any significant additional rights for employees with family responsibilities.[145]

The limited provision for family responsibility leave and weak provision for broader flexibility in working arrangements make it clear that accommodation of family responsibilities largely is perceived as an exception to the rule (as opposed to the integration of work and care).[146] It means

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[136] K Miller *An evaluation of "work-life" legislation in South Africa* M.Phil. University of Cape Town (2012) 33.
[137] Unless the goodwill of such an employer extends to an ex gratia payment. The employee has no entitlement to payment under labour legislation. The employee can probably take paid annual leave as well but the BCEA only provides for 15 working days paid annual leave.
[138] Dancaster and Cohen (2010) *South African Journal of Labour Relations* 33.
[139] Dancaster and Cohen (2010) *South African Journal of Labour Relations* 34.
[140] Dancaster and Baird (2008) *Industrial Law Journal* 40.
[141] Cohen and Dancaster (2009) *Stell LR* 232.
[142] GN 1358 in GG 27866 of 04-08-2005 .
[143] Miller *An evaluation of "work-life" legislation in South Africa* 22.
[144] The Code may well play a role in discrimination litigation as discussed earlier.
[145] Cohen and Dancaster (2009) *Stell LR* 237.
[146] Dancaster and Baird 2008 *Industrial Law Journal* 42. Also see Smith (2006) *Sydney Law Review* 692.

that female employees in South Africa are and will continue to be forced to rely on the willingness of employers to implement work-family reconciliation measures or to use their own resources to pursue claims of unfair discrimination based on family responsibilities.[147] It is therefore critical to review family responsibility leave in South Africa. Adequate provision for flexible working arrangements and part-time work is also required to ensure that employees who are caregivers are not forced, through lack of choice, to give up their employment in order to attend to their care demands.[148] The experience in other countries may provide some guidance on how to improve the current situation in South Africa.

One final note on the South African position relates to the new sections 198B[149] and C[150] of the Labour Relations Act, 1995. Experience has shown that temporary and part-time employees are often predominantly female. To the extent that these provisions now provide for equality of treatment between temporary or part-time employees and permanent employees, it is envisaged that these provisions will provide relief to women in workplaces – at least in the sense that these sections now directly (as opposed, for example, to use of an indirect discrimination argument) may be relied on to provide for security of employment and of terms and conditions of employment. However, these sections are of limited application,[151] contain any number of exceptions[152] and, in any event, do not address the fundamental concern of women in the workplace, namely that true equality does not require sameness, but recognition of difference and accommodation of that difference.

(2) Specific rights related to family responsibility and flexibility in the UK

The Employment Rights Act[153] (ERA) provides employees in the UK with an unpaid entitlement to 'reasonable time off'[154] during working hours in order to attend as is necessary to family/care obligations. This includes, for example, the provision of assistance when a dependant[155] falls ill, gives birth or is injured or assaulted, or where an unexpected disruption or termination of arrangements for the care of a dependant takes place, or where it is necessary to deal with an incident, which involves a child of the employee and which occurs unexpectedly in a period during which an

[147] Cohen and Dancaster (2009) *Stell LR* 239.
[148] Dancaster and Baird 2008 *Industrial Law Journal* 42. Also see Smith (2006) *Sydney Law Review* 692.
[149] Section 198B regulates temporary employment and provides – generally speaking -for indefinite employment and equal treatment to permanent employees doing the same or similar work.
[150] Section 198C regulates part-time employment and provides – generally speaking – for equality of treatment with permanent employees who do the same or similar work, taking into account the part-time employee's actual working hours.
[151] Both section 198B and C, for example, do not apply to employers who employ less than 10 employees or to employees earning above the threshold determined in terms of the BCEA.
[152] Sections 198B(3) and (4) provides for a whole range of exceptions to the limitations on the appointment of employees on a fixed –term basis, while section 198B(8) allows for a 'justifiable reason' for differential treatment of permanent and temporary employees doing the same or similar work. Section 198C(3) similarly provides that differential treatment between part-time and permanent employees may have a 'justifiable reason'. Section 198D(2) provides examples of such justifiable reasons.
[153] 1996 c.18.
[154] 'Reasonable time off' is not defined in the EU Parental Leave Directive.
[155] 'Dependant' is defined in the as the worker's spouse, child, partner "or a person who lives in the same household" (other than tenants, boarders or lodgers).

educational establishment, which the child attends, is responsible for that child.[156] There is no qualifying period of continuous employment for this right.[157]

Apart from the ERA[158] and against the background of the EU Parental Leave Directive,[159] the Maternity and Parental Leave Regulations 1999, SI No 3312,[160] provide that an employee who has been continuously employed for a period of not less than a year, and who has, or expects to have, parental responsibility for a child is entitled to take unpaid parental leave for the purpose of caring for that child.[161] The extent of entitlement has recently been extended by the UK government from thirteen to eighteen weeks in respect of any individual child.[162] The leave may be taken up any time up to the child's fifth birthday or, if the child is disabled and entitled to disability living allowance, up to the child's eighteenth birthday.[163] The leave may be taken in blocks of no less than one week at a time, except in the case of a child in receipt of disability living allowance. No more than four weeks may be taken in respect of any individual child during a particular year.[164] The leave is a non-transferable right available to each parent: the mother and the father.[165]

With regards to flexible working options, part 9 of the Children and Families Act 2014 amended part VIII of the Employment Rights Act 1996.[166] Since 30 June 2014, all employees with 26 weeks continuous employment have the statutory right to request flexible working. The procedural requirements for employers' responses to flexible working requests have now been replaced with a requirement for the employer to 'deal with the application in a reasonable manner'. It also requires employers to notify employees of the decision on the application within a three month period, or such longer period as is agreed by the parties.[167]

Not only are the reasons for time off in the UK provisions wider than those in section 27 of the BCEA, but the recipients of care are defined more broadly in the UK. UK employees are also entitled to take time off immediately on starting employment whereas family responsibility leave in South Africa is only available to employees who work at least four days a week and who have worked for their employer for four months. Although leave for time off to attend family obligations as well as parental leave are unpaid in the UK, provision is at least made for these types of leave and they are available to parents, specifically female employees, who are in a financial position to take time off

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[156] Section 57A of the Employment Rights Act.
[157] O Ajibade, et al. *Reconciling Work and Family Life within Labour Law* (2014) United Kingdom University of Leicester 16.
[158] See section 76-80 of the ERA.
[159] Directive 96/34/EC extended to the UK by Directive 97/75/EC and amended by Directive 2010/18/EU.
[160] These Regulations came into force on 15 December 1999 and were amended in 2002 by The Maternity and Parental Leave (Amendment) Regulations 2002, SI No 2789.
[161] Ajibade, et al. *Reconciling Work and Family Life within Labour Law* 14.
[162] Ajibade, et al. *Reconciling Work and Family Life within Labour Law* 14.
[163] Ajibade, et al. *Reconciling Work and Family Life within Labour Law* 14.
[164] Ajibade, et al. *Reconciling Work and Family Life within Labour Law* 14.
[165] Ajibade, et al. *Reconciling Work and Family Life within Labour Law* 14.
[166] See sections 80F-I of the ERA.
[167] D Pyper "Flexible working" (2014) *Commons Library Standard Note* <http://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=2&ved=0CCUQFjAB&url=http%3A%2F%2Fwww.parliament.uk%2Fbriefing-papers%2Fsn01086.pdf&ei=SFgNVIKNLOSR7AaB84Ao&usg=AFQjCNGPyPdD558dGSyupFe2GAiYSWTDdw&sig2=ewUFCaUix-J9R6jQY7_iuQ> (accessed 08-09-2014) 5.

from work to care for their children. This, together with the statutory right to request flexible working and the obligation on employers to 'deal with the application in a reasonable manner', provide an example of a step in the right direction regarding the integration of work and care.

(3) Specific rights related to family responsibility and flexibility in Sweden

In Sweden the Parental Leave Act[168] provides that temporary parental leave is available at 120 days per child per year for children under the age of 12 and for children between 12 and 15 with a doctor's certificate. It is a family entitlement and it can be used to care for sick children.[169] This type of leave is paid at 80 per cent of earnings, up to an earnings ceiling.[170] Sixty of these days may also be used to stay home with young children if the regular caregiver is sick. Since 2001, it may be offered to someone outside the family if they are an eligible person in the social insurance system.[171]

Each parent is also entitled to take leave from work (full time) until their child is 18 months old.[172] In addition, there are 480 days of paid leave per family. Sixty days are reserved for each parent and cannot be transferred (often called 'mother's quota" and 'father's quota,'). Out of the remaining 360 days, half are reserved for each parent and may be transferred from one parent to another.[173] Parents have the right to decrease their working time by up to 25% without using parental benefit days, until the child is eight years old or finishes the first year of school.[174] If the child is born on the 1st of January 2014 or later, paid leave may be used until the child turns 12 years old (but only 96 days may be used after the child turns four).[175] Eligible parents[176] receive payment for 390 days at 80% of earnings up to an earnings ceiling. Payment for the remaining 90 days is received at a flat rate payment. Non-eligible parents receive a flat rate payment for 480 days.[177]

Sweden's highly developed and flexible parental leave scheme allows and encourages both parents to spend time with their children.[178] The right(s) to parental leave may be utilised in various ways to enable working parents to extend the length of the leave period to suit their own preferences and/or responsibilities. In addition, this also enables both parents to care for their child at the same time, which would not otherwise be possible if only one person is entitled to claim parental benefit

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[168] 1995:584.

[169] A Duvander and L Haas "Sweden" (2013) *International Review of Leave Policies and Research* <http://www.leavenetwork.org/fileadmin/Leavenetwork/Annual_reviews/2013_complete.6june.pdf> (accessed 15-06-2014) 4.

[170] Duvander and Haas "Sweden" *International Review of Leave Policies and Research* 4.

[171] Duvander and Haas "Sweden" *International Review of Leave Policies and Research* 4.

[172] Until a child is one year old, both parents can receive parental benefit for the same days. These days are called double days. You can take up to 30 double days. After a child's first birthday, only one of the parents may receive parental benefit at a time.

[173] Duvander and Haas "Sweden" *International Review of Leave Policies and Research*2.

[174] Anonymous "Sweden: Successful reconciliation of work and family life" (2014) *European Union* <http://europa.eu/epic/countries/sweden/index_en.htm> (accessed 27-11-2014).

[175] Duvander and Haas "Sweden" *International Review of Leave Policies and Research* 3.

[176] All parents are entitled to paid parental leave, but paid leave at 80% of earnings requires parents to have had an income of over SEK225 (€26) a day for 240 days before the expected date of delivery or adoption. See Duvander and Haas "Sweden" *International Review of Leave Policies and Research* 3.

[177] Duvander and Haas "Sweden" *International Review of Leave Policies and Research* 2.

[178] Anonymous "Sweden: Successful reconciliation of work and family life" *European Union*.

at a time.[179] However, if both use their rights flexibly, they can care for their child at different times of the day/week enabling them to share the responsibility. Flexibility is further underscored with the option to change the type of leave a maximum of three times per year, enabling parents to adapt their circumstances if necessary. [180]

Sweden's generous and flexible parental leave policy may ultimately only make one convincing point – that the extent of family responsibility leave, parental leave and other types of flexibility to accommodate family responsibility is as much a function of what is fair (also in the context of equality) as it is of affordability. The level of accommodation has to be seen in the context of societal levels of development as well as the operational realities of the employer. At the same time, the regime of specific rights in Sweden is aimed at both parents and designed to promote equal sharing of breadwinning and childcare responsibilities.[181] This policy has specifically supported female employees, as primary caregivers, since the 1970's and has been continuously reformed to strengthen the gender equality dimension.[182]

IV CONCLUSION

This paper argued that the appointment of female employees (as part of affirmative action) and discrimination litigation are not sufficient to redress the inequalities associated with sex, gender and family responsibility in the work place. This is so despite the amendments to the EEA. While these amendments are to be welcomed, reservations remain about addressing the challenges women face through equality law. In this respect, the paper also argued that perhaps the real value of equality law is that it does provide us with both concepts – reasonable accommodation and special measures – we need as basis for a move in the direction of a regime of specific legislative rights to address the challenges women face in the workplace. A focused intervention is necessary to ensure equal opportunities for women, the primary caregivers of children, to enable a successful combination of their work and family responsibility. In this regard, a brief comparative analysis shows that different jurisdictions have vastly different levels of specific rights to accommodate women, work and care-giving. This is to be expected and does not mean that the 'best' is necessarily appropriate for South Africa. At the very least, labour legislation should view work-family reconciliation as an objective important enough to provide broader access to time off in times of crises in care-giving and also to provide for broader workplace flexibility. The basis for this already exists. Aspects of the Code of Good Practice on the Integration of Employment Equity into Human Resource Policies and Practices could be incorporated into legislation to oblige employers to provide employees with family responsibilities an accessible, supportive and flexible environment. This could include the duty of employers to consider a request for flexible working hours in a reasonable manner. Employers could

[179] M Weldon-Johns "Comparative lessons on the work-family conflict - Swedish parental leave versus American family leave" in Busby N and James G (eds) *Families, Care-giving and Paid Work: Challenging Labour Law in the 21st Century* (2011) 126.

[180] Weldon-Johns "Comparative lessons on the work-family conflict - Swedish parental leave versus American family leave" in Families, Care-giving and Paid Work: Challenging Labour Law in the 21st Century 127.

[181] L Haas "Parental Leave and Gender Equality: Lessons from the European Union" (2003) 20 *Review of Policy Research* 89 90.

[182] A Duvander *Family policy in Sweden: An overview* (2008) Sweden Swedish Social Insurance Agency 1.

be required to provide (written) reasons to the employee if the request is denied. In conjunction with this duty to reasonably and carefully consider flexible working options, family responsibility leave should be reviewed. Specific consideration should be given to the prerequisites to take this leave up, the circumstances for which it may be used, the duration thereof and the definition of dependants. However, to the extent that protection of women will in future primarily remain in the bailiwick of equality law, it is to be hoped that systemic relief to women in workplaces will be provided through the principle of reasonable accommodation – either as part of our discrimination law, or as part of the obligation on employers to implement affirmative action.